



 Shenkman

PRACTICAL PLANNER[®]

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MANY ESTATES PLANS FAIL. WILL YOURS?

Summary: Too many estate plans fail. Many fail miserably. Why does this happen? What can be done about it? Good news it is easily fixed. You just have to want to do it. Does it matter? You decide, but in too many cases people bet (and lose!) the most important goals of their lives as a result of planning failure: having to reduce your lifestyle in your later years because of poor financial planning; making lawyers or the IRS your heirs; leaving people you claim to love embroiled in intractable conflict; or losing dignity and control over your life because of illness or old age. Don't you want a better result? Everyone will say yes, but many of you will not take the requisite steps.

■ **What is Failure:** ■ An obvious failure is when an estate ends up in litigation and much of the estate is dissipated in legal and other fees and family relationships are destroyed. Many Star-types seem to make this a routine. No reason for that. ■ But failure can occur without winding up in court. Example: Evil heir steals much of the estate and the family relationships are destroyed. An elderly parent or other relative is intentionally alienated from family so one heir can steal or inherit most of the money. ■ But a couple that doesn't plan properly (investments, budgeting, insurance) and runs out of money is also a failure. ■ While estate taxes are a non-issue for most folks, no one knows what tax law changes tomorrow will bring, and income tax savings can have a huge impact. ■ For wealthier folks, tax issues remain taxing! Complex planning is vital to minimize that blow, but too few wealthy take the time to administer their plans.

■ Failure to use proper trusts (and it ain't only the super wealthy that need trusts) can expose an inheritance to divorce, IRS or other creditor claims and quickly decimate a lifetime of savings. ■ A growing threat is aging. If you don't have the proper safety net in place you may become a target for elder financial abuse. But even absent abuse, failure to realistically deal with the challenges of aging, and few people do (and having a power of attorney is barely a start), will almost assure a tragedy. ■ Many estate plans fail – but most should not. What can you do to avoid your estate, financial, retirement, insurance and other planning being a failure? Read on!

■ **Who Causes Estate Plan Failure:** ■ You and anyone and everyone. No exceptions to possible culprits. But don't despair all of this is easily fixed if you the client will demand success, permit success, and work towards success. ■ Refusal of clients to address critical issues, often because they are unpleasant (no one likes addressing the challenges of aging or health), hard (facing the reality that you saved too little and spend too much is tough, especially when you thought estate planning was to be a fun process of dividing up your zillions), really difficult

(you have an heir who is fiscally irresponsible, a drug addict or worse), and so on. ■ Many people just prefer to do the ostrich (that is not a new dance step but rather the act of putting your head in the estate planning sand instead of dealing with real issues. ■ Another big problem is sycophant advisers who will tell you whatever you want to hear to keep your business, rather than telling you what they know you need to hear fearing you might be unhappy with them. You the client must take charge and direct every adviser on your team (you do have a team don't you?) to Dr. Phil you! That means tell it like it is, not

blow smoke in your ear. Here's a common ploy of the sycophant adviser. "You should consult your attorney." You complain "But she'll bill me!" Dude you think your wealth adviser is meeting you because you're so handsome? They bill too. A good and honest wealth adviser might explain why regular meetings with your attorney and CPA, even if they do bill you, is critical. The sycophant adviser will play into your annoyance about being billed and try to inappropriately control the process. ■ Golf buddies and mahjong partners mean well but ruin too

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CHECKLIST: 2017 TAX ACT

Summary: The 2017 Tax Cut and Jobs Act has changed almost every aspect of planning. Consider the following.

✓ **Sec. 199A:** The 20% QBI deduction applies for 2018 – 2025. Consider the sunset of this tax bennie when evaluating the cost of planning to enhance whatever benefits you can get. Example: Before restructuring a business, will the payback over the years remaining be worth the cost?

✓ **Charity:** The new doubled standard deduction may eliminate any tax benefit from donations. Consider setting up a non-grantor trust to salvage that deduction. Example: You create an irrevocable trust naming a family member as

trustee. Beneficiaries are a list of charities you donate to and all descendants. You gift \$250,000 to the trust and it earns 4% or \$10,000. The trustee donates it to the charities listed and the trust realizes a \$10,000 charitable deduction that offsets the income. That's because trusts don't have a standard deduction. Meanwhile you still get the \$24,000 standard deduction. ✓ **Trust Goals:** The three goals many will need for irrevocable trusts are: (1) completed gift to use some of your temporary exemption, (2) preserve access to funds given, and (3) non-grantor trust status to capture income tax benefits like the charitable

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many plans. Just because Joey takes the purple pill doesn't mean it's right for you. Talk to your CPA not the gals around the poker table. ■ Yes, we all know that everything on the internet is true. While there is a lot of really valuable information on the internet, much of the estate planning advice you find on line barely qualifies as dribble. Good to read and bone up but please talk to real advisers for real advice.

■ What Causes Estate Plan Failure:

■ Not planning. Things rarely work out just 'cause you want them to. You must proactively plan. ■ Not addressing real issues. Successful planning can be costly, complex, and unpleasant. Unless you have the access to the fountain of youth, an assurance of no health issues (130 million Americans live with chronic illness), more money than you could ever spend (do you have financial forecasts by your wealth adviser showing at least say 80% likelihood of not running out of money by age 100?), one of the only non-dysfunctional families on the planet,

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and so on, real planning is not likely going to be a feel good romp! ■ Not taking a holistic view of planning. Planning is never about a particular magic bullet. It is never sufficient to "have a will." You need to address financial, tax, asset protection, legal, family, insurance and an array of issues. A narrow approach will never work. Marsh Private Client services published a report with lots of eye-popping stats including: 78% of families employ domestic workers but only 58% carry Employment Practice Liability Insurance. Only 13% of families carry individual directors and officers (D&O) liability coverage though many family members serve as directors or officers of for-profit and not-for-profit enterprises. Having a will is pretty useless if you get sued, have coverage gaps, and lose.

■ Not having a collaborative team of advisers. Yep, that must cost some more money, will require a bit of coordination, and seemingly make the process longer and more complex. But planning will never succeed without it. Assuming your lawyer, wealth adviser, CPA, is the sole person you need to consult with, or that your estate planner and wealth adviser don't need to communicate will doom your plan. Guaranteed.

■ Planning fatigue can derail your plan. If you start with expectations that are too narrow or simplistic, then if complications arise, or extra steps are necessary to address your circumstances, or personal decisions become more difficult than you initially anticipated, you might grow weary from the process and not complete the planning.

■ Snake in the Planning Room: OK this will upset a lot of folks but remember we're Dr. Phil'ing this discussion. Many services are getting commoditized. You can get an online broker for peanuts, do your will online for less than your attorney would charge for an email, and use tax prep software for a fraction of what your CPA charges. Properly used that's all good stuff. But the reality is that many professionals, in every discipline are hurting as a result of this. That exacerbates the adviser-sycophant we discussed above. That will have some advisers try to

control the planning process, convince you they have all the right answers, and much worse. Any adviser who minimizes the need for your involving your other advisers, anyone who won't let the sun shine into the planning room, is likely a bad apple. Good advisers welcome diverse thoughts from others on the

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planning team. They are not threatened because the common goal is doing the best possible job for you the client. Isn't that the goal you want your advisers to have? There are outstanding advisers that complement and supplement other advisers to best help their clients. Top advisers foster communications with you and all advisers, not control communications to the exclusion of other advisers. Wealthy investors need to identify the right advisers.

■ Cheap: Hey sorry but we are calling 'em like we see 'em. Many plans are ruined because clients get penny wise and pound foolish. You can get all your stuff for cheap online, or from discount providers. You can always find a CPA to do a tax return cheaper than your current CPA, but is that really a benefit? You can get a will done cheaper by a different lawyer, but it should be the value of what you receive and the goals you achieve, not just the cost that you consider. Cheap doesn't assure adequacy. Focus instead on strong professionals who will help you appropriately control costs. Demand collaboration even if it costs a few bucks (it will save far more in the short run). Don't dismiss full service institutions or firms. If they can fill gaps in your team and backstop your other advisers on matters they may not have expertise in, they may be worth more than their additional costs. PP

...CHECKLIST: 2017 TAX ACT PLANNING TIPS

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contribution deduction illustrated above. How can you have both access to trust property, and nongrantor status? If you create a trust and name your spouse a beneficiary that will characterize the trust as a grantor trust undermining a key planning goal for many. How can you have both access and nongrantor status? Condition any distributions to your spouse on the approval of an adverse party. This might be a child who is a remainder beneficiary. An adverse party must have a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power. There is, unfortunately, little clarity on the delineation of what is “substantial.” Thus, there may be more risk in the use of the adverse party mechanism to preserve or achieve non-grantor trust status than many realize. Perhaps a better option is to give a person in a non-fiduciary capacity a special or limited power to appoint to the spouse a better option?

✓ **Update Old Docs:** The last issue of the *Practical Planner* stated: “Many (perhaps most) old wills and trusts might not be optimal in the new tax environment, they might even be costly!” Most estate planning attorneys are still waiting for the lineup outside their doors of clients returning to update old documents that won’t work. Folks you might not love updating documents for the roller-coaster of tax law changes, but the consequences of not doing so could be costly or a mess or both!

✓ **Split-Dollar:** A recent case on intergenerational split-dollar life insurance settled very favorably to the IRS. Lesson? Economic benefit split-dollar with huge estate valuation discounts and bad facts is not a viable. The bigger question, which might be settled by the Levine or Morrisette cases is what might be left of economic benefit split-dollar with better facts? While some suggest that loan split-dollar might be treated differently there are no authorities to confirm that either way. Wealthy taxpayers planning aggressively out of concern how the 2020 or 2024 elections might impact estate taxes, should proceed with caution.

✓ **S Corporations:** With the rush to use non-grantor trusts be careful if you have S corporation stock. If a trust owns S corporation stock, forming a non-grantor trust (or the conversion from a grantor trust to a non-grantor trust) will require conforming to the qualified Subchapter S trust (“QSST”) or electing small business trust (“ESBT”) requirements. It may be preferable for the donee trust to be characterized as a grantor trust rather than meeting QSST or ESBT requirements.

✓ **Life Insurance Trusts:** Life insurance is commonly held in trust. It still should be even if there is no estate tax benefit to protect the potentially large death benefit (and perhaps growing cash value). Be careful in the post-2017 Tax Act rush to non-grantor trusts. A trust holding life insurance may be character-

ized as a grantor trust if trust income can be used to pay life insurance premiums on insurance on the grantor’s life. The IRS has held that if the trust income was applied toward the purchase of life insurance, even in contradiction of the terms of the trust, the trust would nonetheless be characterized as a grantor trust.

✓ The definition of “health” means the provision of medical services by physicians, pharmacists, nurses, dentists, veterinarians, physical therapists, psychologists, and other similar healthcare professionals who provide medical services directly to a patient. If you don’t provide services “directly” to the patient, e.g. a radiologist reading an MRI and issuing a report to another physician, do you qualify for the new 199A 20% deduction and avoid the health care exclusion? **PP**

RECENT DEVELOPMENTS

■ Proposed Regs under Sec. 199A and 643 include anti-abuse rules under Sec. 643(f) to prevent taxpayers from establishing multiple non-grantor trusts to avoid Federal income tax. That sounds like creating a single non-grantor trust (a trust that pays its own tax rather than passing tax costs through to the settlor) works! But multiple trusts may be zapped whether you’re trying to maximize property tax deductions, 199A deductions, or other tax benefits.

■ Do the multiple trust restrictions really work? Are they valid? Code Sec. 643(f) grants the Secretary (IRS) authority to treat two or more trusts as a single trust (meaning you would lose the ability to get business interest into trusts that are below the taxable income threshold in Sec. 199A and then not qualify for the 20% deduction if: (1) the trusts have substantially the same grantors, and (2) substantially the same primary beneficiaries, and (3) a principal purpose of which is the avoidance of the tax. The law seems to require all 3 conditions being met but the Proposed Regs suggest that if there is a tax avoidance purpose you lose (the IRS can aggregate trusts) no matter what. That seems to exceed the statutory mandate.

■ The Proposed Regs define “A principal purpose” for establishing or funding a trust as a significant income tax benefit unless there is a significant non-tax (or non-income tax) purpose that could not have been achieved without the creation of these separate trusts. Well, if you can shift passive non-source income (e.g. securities) out of a high tax state and get asset protection benefits from the trust sounds like those might suffice to negate the principal purpose test.

■ Does rental income from triple net leased real estate qualify for the 20% deduction? Maybe. The Proposed Regs apply a Sec. 162 “trade or business test” which might negate net leased real estate from qualifying. But they have an example of net leased land to an airport with insignificant expenses that suggests net leased realty qualifies. But they suggest that the landlord “manages” the property which is unclear. So, the conclusion is still fuzzy. **PP**

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■ 5 million seniors are subject to financial scams every year. While most perpetrators are family, friends or home health aides, scammers include fake lotteries, home improvement scams and more. FINRA Rules 2165 and 4512 became effective in 2018 for brokers to in their policies and procedures. The Feds passed “The Senior Safe Act.” The theory is that financial advisers can spot signs of elder financial abuse. Advisers need protection from liability and violations of privacy if they alert authorities about potential fraud. The better answer to protect yourself if you struggle with cognitive or other health issues is to forge a collaborative team. Your CPA may see things your wealth adviser may not. Common elder abuse scams fake IRS collection calls. Who better for you to call than your CPA when that occurs? Your attorney may identify risks that the CPA may not.

■ A recent article estimated that the typical or traditional 60/40 portfolio may return a mere half-point of real

return per year over the next decade, according to Research Affiliates. For retirees and those heading into retirement budgeting (yeah, that 4-letter word!) and forecasting your finances are critical to financial security and estate planning. What types of trusts might you make transfers to, in order to lock-in the large temporary exemption? More clients than realized will need access to the funds given away. That means using trusts, like non-reciprocal spousal lifetime access trusts (grantor or not), not traditional dynasty trusts that exclude the donors as beneficiaries. Planning large gifts with your attorney, without consulting your CPA/wealth adviser, ain’t wise.

■ Reality check to be in the top 1% you need annual income of \$480,930. The top 10% requires \$138,031.

■ Charitable giving declining? Wealthmanagement.com reports a decrease in the number of Americans giving to charity. A Philanthropy Panel Study at the Indiana University shows the percentage of Americans

who give to charity has fallen by nearly 12 percentage points over the past 12 years—from 68 percent of households in 2003 to just 56 percent in 2015. At the same time, median annual giving by individuals has fallen from \$1,024 in 2005 to \$872 in 2015. While recent market run-ups might offset this data, what might it portend for future charitable giving?

■ Consider creating a special purpose LLC to house the trust protector, investment advisor and other persons involved in your irrevocable trust. That might provide a barrier to a home state court arguing jurisdiction over your trust because of a trust protector residing in that state.

PP



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