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# STRATEGIES FOR ESTATE PLANNING

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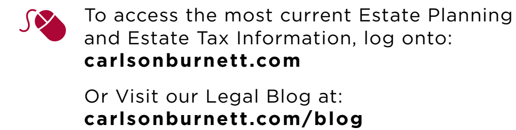


When we think of estate planning the first thought that comes to mind may be taxes. Actually, estate planning is an ongoing process to organize and provide for the administration of your affairs (both medical and financial) during your lifetime as well as the distribution of your property upon your death. Yes, tax planning is an integral part of a good estate plan, but many other factors are equally important to the proper design and implementation of your estate plan.

Whether you realize it or not—everyone has an estate plan. If you have never executed a will or living trust, you have an "intestate" plan. The intestate plan is more commonly referred to as the "do nothing" method of estate planning. When a person dies intestate, state law will control the distribution of his or her estate. The intestate plan typically does not reflect your actual wishes.

If a person has a formal written estate plan, they may have a "simple will." A simple will allows you to alter the intestate plan so that you can provide in writing for the distribution of your property at the time of your death in a manner that you specify. If a will provides for the outright distribution of assets, it is characterized as a "simple" will. If the will establishes a trust after the probate process is complete, it is typically called a "will with a testamentary trust." Alternatively, the will may leave probate assets to a pre-existing living trust (created during your lifetime), in which case the will is called a "pour over will."

The next type of estate plan that has become increasingly popular involves the use of a trust. The term trust describes the holding of property by a trustee (which typically is you) in accordance with the provisions of a written instrument for the benefit of the beneficiaries. A person may be both a trustee and a beneficiary of the same trust. If you create a trust during your lifetime, the trust is typically called a living trust. The written language of the trust document (rather than your will or state law defaults) will determine what happens to your property that is held or titled in the name of the living trust upon your death. Living trusts are designed to assist you in the event of physical or mental incapacity and to dispose of your property after your death.

A living trust is a written document that provides direction on how assets are to be distributed upon death. As the name implies, a living trust is established and assets transferred by the "settlor" during his or her lifetime. The assets of the trust are held, administered and controlled by the trustee who almost always is the settlor.

In recent years the "living trust" has replaced the "will" as the preferred estate planning document for distributing assets to heirs.

A living trust is a written document that provides direction on how assets are to be distributed upon death. As the name implies, a living trust is established and assets transferred by the "settlor" during his or her lifetime.The assets of the trust are held, administered and controlled by the trustee who is usually the settlor.

Why have many estate plans moved from the simple will to the living trust? The main reason that living trusts have become the primary document to control distribution of assets is because living trusts avoid probate.

A will can only transfer assets from a deceased person after the will is filed with the probate court and the probate process is complete. In contrast, the assets can be distributed from a living trust to the designated beneficiaries by the trustee almost immediately following settlor's death without going through the probate process. Probate involves court proceedings to rule on the validity of the will and confirm that the assets are distributed in accordance with the will after the payment of all debts and taxes. Probate is a series of court procedures that requires attorneys. Therefore, the cost of probate is considered by many as an expensive option.

The cost of the probate can be avoided by establishing a living trust that will distribute the assets. The second benefit in establishing a living trust estate plan is to avoid the lengthy time constraints associated with probate.

Although the time required to complete probate varies widely, probate generally takes nearly one year to complete. For some, the privacy that is afforded by establishing a living trust and avoiding the publicity of probate is an additional benefit from establishing the trust. As an additional benefit, a living trust with appropriate tax language can offer significant state and federal death tax savings.

If you haven't considered the use of a living trust, it may be time to do so. You need to contact our firm to see if the living trust is right for you.

Estate planning is more than just planning for the transfer of assets on death. Estate planning must also address what happens if you become disabled or incapacitated during your lifetime.

If you become incapacitated, who can help you with your financial and medical decisions? For many, this basic "Power of Attorney" can be the most important document in an estate plan.

The Durable Power of Attorney is a document used while you are alive to designate and appoint an "agent" to act on your behalf. The power is usually general in its application, empowering your agent to act on your behalf to pay your bills, file your tax returns, and generally assist with all of your financial and legal matters.

The Durable Power of Attorney may take effect immediately when signed or it may take effect upon your doctor's written determination that you have become incapacitated and are unable to adequately handle your own financial matters.

Lifetime planning in the event you become disabled or incapacitated also necessitates that every estate plan includes a Medical Power of Attorney and a Living Will. Unfortunately, we may find ourselves in a position where decisions need to be made as to how we wish to be treated in a variety of medical situations.

Further, sometimes we find ourselves in a condition where we can no longer express our preferences. Living Wills and Medical Power of Attorneys allow us to deal with these situations. Without such directives, your family may find it necessary to obtain court orders to deal with your medical situation.

The Medical Power of Attorney is a document whereby you appoint an agent to make all of your medical decisions in the event that you are not capable of expressing or communicating your medical preferences.

The Medical Power of Attorney is essential to avoid family conflict and dictate which family member will handle all of your medical decisions.

If you do not have a Power of Attorney and become unable to manage your financial affairs or medical decisions, the court may have to appoint someone to act for you in a guardianship or conservatorship proceeding.With a Power of Attorney, you are able to avoid court intervention.

A recently enacted federal law known as "HIPAA" necessitates the addition of specific consent language in a Power of Attorney so that healthcare providers and financial institutions may release your personal information to your designated agent or family member. Old and outdated estate plans typically do not satisfy these new HIPAA requirements.

The Medical Power of Attorney was once viewed as a less significant estate planning document. However, because of the impact of HIPAA and need to avoid expensive court intervention, the necessity of having a current Medical Power of Attorney has become essential.

The Living Will permits you to express your wishes as to medical treatment in the event of a "terminal illness." The Living Will does not appoint anyone to act for you. Rather, the Living Will is your written expression of how you want to be treated in certain severe medical conditions where you are defined to be terminally ill. A Living Will applies in situations where the decision to use such treatments may prolong your life for a limited period of time and not obtaining such treatment would result in your death. It does not mean that medical professionals would deny you pain medications and other treatments that would relieve pain or otherwise make you more comfortable.

## MISTAKE #1

*Failure to Periodically Review and Update Estate Plan.*

Estate planning is an ongoing process that must be reviewed and updated periodically. A common mistake is failing to review your old will, trust or estate plan documents to ensure that they still meet your needs. An outdated estate plan may cause assets to be distributed in a manner that you would not have chosen, will increase administrative expenses, and potentially create difficulties for your family. Here are some guidelines to follow when you should contact your estate planning attorney to update your estate plan.

A good rule of thumb - review your estate plan with your advisor every four to six years to assure that the estate plan still meets your goals.

The most obvious need for an update occurs whenever we have a change in the family, such as: marriage, divorce or death of a family member or beneficiary listed in the estate plan. Similarly, a change in the mental or physical condition of a family member or beneficiary requires that the plan be reviewed. Because family members are typically named as fiduciaries, any change of the mental or physical condition of such a family member should be reviewed to determine if they are able to carry out their responsibilities in the estate plan. Likewise, if one of the spouses is no longer capable of handling the financial or medical decisions because of dementia, stroke or other incapacity, this may also require naming someone who is not the spouse.

A change in the law can also require a review of your old estate plan. Estate plans that were signed in the 1980s and 1990s were implemented with an estate tax deduction of approximately $600,000. However, the federal estate tax deduction is two million dollars in 2008. Because of the significant increase in the estate tax deduction, many estate plans that were appropriately designed to avoid or reduce the federal estate taxes are now obsolete. In short, many estate plans designed to reduce federal estate taxes now are unnecessarily complex and should be simplified.

Significant changes in your income or net worth may also necessitate a review and update to your estate plan. What may have been an appropriate estate plan at the time can change when your income or net worth change. Not only will an increase in net worth require changes to your estate plan, but also a substantial decrease in net worth may as well.

The final guideline to updating and reviewing your old estate plan is simply to periodically sit down with an attorney to have it reviewed. A good rule of thumb: review your estate plan with your advisor every four to six years to assure that the estate plan still meets your goals. The review every four to six years is a good way to rest assured that your estate plan is in compliance with any new developments or changes.

## MISTAKE #2
***Improper Use of Joint Tenancy.***

A form of co-ownership known as "joint tenancy with rights of survivorship" between husband and wife is permissible as a method of co-ownership of assets and as a way to pass assets between spouses upon the first spouse's death. However, joint tenancy with rights of survivorship is almost never appropriate between non-spousal owners. For example, joint tenancy between parents and children can lead to many unexpected problems:

When a parent adds a child's name to property as joint tenants with rights of survivorship the parent may have made a taxable gift. For example, when a parent adds a child's name to the title of a parent's home, the parent has made a gift of one-half of the value of the home. If the value of the gift (i.e. one-half the value of the home) exceeds $12,000, federal gift tax return is required to be filed. In addition, the child now becomes the legal owner of one-half of the asset to which his/her name has been added.

When a parent adds a child's name to the parent's asset as joint tenants with rights of survivorship, the parent has just risked losing half of that asset to the child's creditors. Whenever you add an additional owner onto any of your assets (i.e. home, certificate of deposit, bank accounts, investment accounts) you are exposing your assets to the claims of the other joint tenant's creditors. Whether those creditors result from the divorce of a joint owner, alimony or child support claims of the joint owner, bankruptcy of the joint owner or court judgment against the joint owner, the use of joint tenancy with rights of survivorship (with non-spousal joint owners) adds considerable risk and exposes your assets to additional creditors.

When property is titled in joint tenancy with rights of survivorship the property passes upon death instantly to the surviving joint tenant. So, if a parent adds one of his/her child's name to the parent's bank account as joint tenants with rights of survivorship, the child named on the account as joint tenant will receive the entire account upon the death of the parent. The provisions of the parent's Will or Trust are ineffective in controlling the distribution of the joint tenancy asset. It also means that the surviving joint owner is not obligated to divide the joint account as may be anticipated and expected pursuant to the terms of the Will or Trust. In addition, the asset passes directly to the surviving joint tenant without the benefit of safeguards such as age restrictions and survivorship protection which are typically provided for in a Trust or Will.

## MISTAKE #3
***Improperly Designated Beneficiaries on IRA Accounts.***

Typically, spouses list each other as the primary beneficiary on all income tax qualified accounts (i.e. IRA, 401(k) and 403(b)). Thus, the surviving spouse can "rollover" the qualified account and continue to defer the income taxes which have not yet been paid on the account. However, because the tax laws now permit "stretch" provisions for IRA accounts, the contingent or second beneficiary on IRA's should be updated and confirmed. Typically the heirs are listed directly as the contingent or secondary beneficiary so that they can elect to roll over the IRA as a survivor beneficiary IRA and defer the income taxes. Thus, an IRA can be left from a parent directly to the children without the children being required to declare and pay income taxes on the entire IRA at the time of the parent's death. This can result in a significant income tax savings to the heirs and make more funds available to them. Typically the beneficiary of an IRA should not be a Trust nor the estate of the deceased. It is much safer under the current tax laws to make the spouse the first beneficiary and the children the second beneficiary.

## MISTAKE #4
***Failure To Re-Title Assets in the Name of Living Trust.***

The living trust has become the preferred estate planning method to pass assets to heirs without the time and expense of probate. However, for a living trust to effectively avoid probate, the assets must be "titled" in the name of the revocable trust. For example, John Doe must change the title on his Certificates of Deposit, Nonqualified Investment Accounts, real estate, bonds and mutual funds to "John Doe as trustee of the John Doe Trust." Failure to properly re-title assets into the trust will result in the nontrust assets having to go through probate and thus, reduce the effectiveness of the living trust. There are several exceptions, however, for assets that do not need to be titled in the name of the living trust. For example, IRAs, 401ks, annuities and life insurance all have beneficiary designations that provide for the transfer directly to a designated beneficiary upon the death of the owner. Thus, these assets do not need to be re-titled in the name of the trust because they do not go through probate. Rather, these assets pass by virtue of the beneficiary designation on the account or asset.

When we hear of a "Charitable Trust" we think of a trust used only by the super wealthy. However, the Charitable Remainder Trusts are used primarily as a vehicle to avoid Income and Estate Taxes. Charitable Trusts are available to individuals at any level of wealth.

The Charitable Remainder Trust is a trust that pays the "donors" (individual or couple) income annually over their lifetimes at a set rate.

Following the donors receipt of the annual income over their lifetimes, the remaining trust balance is distributed to a qualified charity selected by the donors. Thus, term charitable remainder trust.

Because charities ultimately receive what is left in the trust, the donors receive a substantial income tax deduction when the charitable trust is established. As a further benefit, after the donors contribute assets to the charitable trust, the assets can be sold or reinvested without paying income tax on the sale of highly appreciated assets.

For example, assume donors have highly appreciated stock or real estate. The donors desire to sell the assets to increase their income or to diversify their portfolio. If the donors sold the stock or real estate, they would pay income tax on the gains from the sale. However, if the donors establish a charitable remainder trust and transfer the assets to the charitable trust prior to the sale, the charitable trust can sell the assets and avoid all the income taxes on the sale.

An additional benefit is that the appreciated property transferred to the charitable trust will not be included in donors' gross estates for federal estate tax purposes. Typically, life insurance is funded in part by the tax savings so that the life insurance proceeds will be received by donors' heirs free of both income tax and estate tax. In effect, the life insurance replaces to the donor's heirs the value of what is given to the charity so that the donor's heirs do not receive less inheritance.

While it is clear that the donation to charity is one nice component of the cahritable trust, the income and estate tax savings are usually the primary motivation for establlishing a charitable trust.

There are two different "death" taxes that can be imposed when a person dies. Those taxes are the federal estate tax and the state inheritance tax. There is an unlimited marital deduction between spouses so each of these taxes only apply to individuals that inherit from a non-spouse.

### *Death Taxes - Where Do We Stand?*

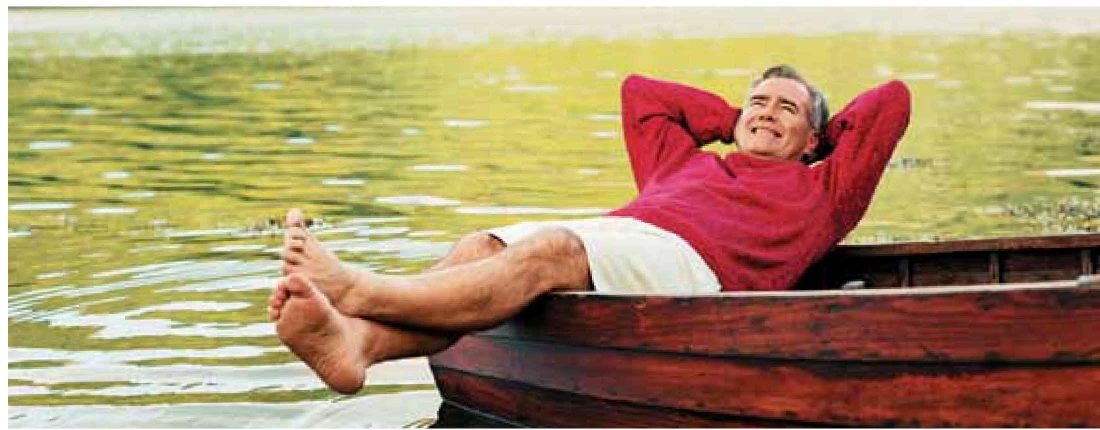
Congress passed and President Obama signed a new Federal Estate Tax Law on December 17, 2010. The new Estate Tax law, which applies for 2011 & 2012, gives taxpayers a two year reprieve by increasing the amount of the Estate Tax exemption (i.e. deduction) to $5.0 million dollars. However, this two year reduction in taxes is short-lived. Congress included a "sunset" provision in the new law so that the exemption amount would be reset on January 1, 2013 to $1.0 million dollars with a significantly increased maximum estate tax rate of 55%. With an election looming on the horizon in 2012, few try to predict whether Congress and the President will change the estate tax rates and exemption prior to the elections of 2012. So, we need to be prepared for the $1.0 million dollar exemption and 55% estate tax rate that is currently enacted and set to take effect on January 1, 2013.

With continual changes in the exemptions and tax rates, it is important to keep on top of the current Federal Estate Tax so that you can insure that your estate plan is properly designed to minimize death taxes.

With the current Federal Estate Tax exemption set for 2011 and 2012 at $5.0 million, many people feel that they will completely avoid all death taxes. However, this may not be accurate when the estate tax exemption is reduced to $1.0 million dollars in 2013.

The Nebraska Inheritance Tax is assessed on inheritance received by a parent, child or grandchild who receive more than $40,000. The good news, however, is the Nebraska Inheritance Tax rate for these beneficiaries is only one percent of the inheritance above the $40,000 exemption amount. For nieces, nephews and first cousins the Inheritance Tax is assessed on bequests above $15,000 with a rate of 13 percent. For more distant relatives or non relatives the Inheritance Tax is assessed on bequests above $10,000 with a rate tax of 18 percent.

Although the Federal Estate Tax was increased through 2012, the Nebraska Inheritance Tax continues to impact nearly all smaller estates. Because of the potential for the various death taxes, periodic review of your estate plan is essential.



Our Estate Planning, Trust and Estates practice focuses on comprehensive estate and business planning to accomplish our clients' unique goals through tax-effective methods. We recognize that effective planning must be proactive and responsive, and we strive to coordinate both the business and personal aspects of our clients' affairs. We represent a broad range of clients from modest estates up to individuals with substantial net worths. In many situations, we provide guidance for the next generation of the same family and address the needs of each generation. Our clients rely on us for vital and effective charitable planning for individuals and business entities. Our clients' trust and confidence comes from our understanding of the law and their objectives.

***Estate planning, trust and estate services we provide include:***

- Wills and/or Revocable Trusts for the transfer of assets at death
- Irrevocable Trusts for life insurance policies and for other planning purposes
- Advice and documentation for making lifetime gifts
- Transfer of business interests from one generation to the next (and/or to key employees or outside purchasers)
- Planning with Family Limited Partnerships and Limited Liability Companies
- Establishing and maintaining family-owned corporations and other family business entities
- Retirement plan and IRA beneficiary designations and related tax guidance
- Administration of Estates and Trusts, including effective post-mortem planning
- Representation of Trust Departments, Trustees, Executors and other fiduciaries
- Estate Tax Returns and negotiations with the Internal Revenue Service
- Planned Giving to benefit charitable organizations and purposes, including the creation and administration of Charitable Remainder Trusts, Charitable Lead Trusts and Private Foundations
- Guidance for not-for-profit organizations regarding qualification and compliance
- Serving as legal counsel, advisors and/or board members for various charitable organizations
- Premarital agreements and arrangements to assist with asset protection and preservation
- Our litigation attorneys work together to represent entities, individuals and corporations, ensuring that any court proceedings match our clients' financial and tax planning goals
- Representation of clients regarding Medicaid and Veterans benefit planning

***Our expertise in the real estate arena includes:***

- Acquisitions and dispositions
- Real estate financing
- Commercial leasing
- Real estate development
- Zoning, land use and permitting
- Design and construction
- Section 1031 Like-Kind Exchanges
- Real estate taxation
- Real estate litigation and dispute resolution

In representing the Business Owner of closely held businesses we focus on the day-to-day guidance in business-related areas involving third-party relationships, contract negotiations and proactive business planning. Our legal practice often focuses on ownership transition, buy-sell agreements and other issues unique to closely held businesses. This practice also includes some business and commercial litigation where we have won verdicts and negotiated settlements for our clients in business disputes.

*Services we provide to closely held businesses include:*

- Selecting and forming business entities such as corporations, S corporations, general partnerships, or limited liability companies, as the needs of the business and its owners dictate
- Assisting in acquisition of real estate and lease of property
- Assisting in locating and negotiating loans from traditional and non traditional sources
- Analyzing and structuring transactions in order to minimize federal and state income and transfer taxes
- Providing practical advice and representation in all employment-related matters
- Recognizing the high toll of litigation in today's business environment, offering creative solutions to resolve disputes, short of litigation, including mediation
- Coordinating the business planning with the owners' estate planning





## FEDERAL ESTATE TAX TABLE

| YEAR | ESTATE TAX EXEMPTION | HIGHEST ESTATE TAX RATE |
|---|---|---|
| 2011 | $5.0 Million | 35% |
| 2012 | $5.0 Million | 35% |
| 2013 | $1.0 Million | 55% |

## NEBRASKA INHERITANCE TAX TABLE

| CLASS OF BENEFICIARY | EXEMPTION AMOUNT *(per beneficiary)* | INHERITANCE TAX RATE |
|---|---|---|
| CLASS 1: parent, child, grandchild, brother, sister | $40,000.00 | 1% on all inheritance above exemption amount |
| CLASS 2: uncle, aunt, niece, nephew, first cousin | $15,000.00 | 13% on all inheritance above exemption amount; |
| CLASS 3: second cousins, all non-relatives | $10,000.00 | 18% on all inheritance above exemption amount |
| Charities | Unlimited | None |

## IOWA INHERITANCE TAX TABLE

*For deaths on or after July 1, 1997, no tax is due on the following shares: Parents, grandparents, great-grandparents, children, stepchildren, grandchildren, great grandchildren, and other lineal ascendants and lineal descendants.*

| CLASS OF BENEFICIARY | AT LEAST | BUT LESS THAN | TAX RATE |
|---|---|---|---|
| brother, sister | $0 | $12,500 | 5% |
| son-in-law, daughter-in-law | $12,501 | $25,000 | 6% |
| | $25,001 | $75,000 | 7% |
| | $75,001 | $100,000 | 8% |
| | $100,001 | $150,000 | 9% |
| | $150,001 | all amounts over | 10% |
| Any person not exempt or Included in class 1 | $0 | $50,000 | 10% |
| | $50,001 | $100,000 | 12% |
| | $100,001 | all amounts over | 15% |
| Charitable, Educational or Religous | | | 10% |
| Other Business Entities or Societies | | | 15% |

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