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Legal Matters®

Estate Planning
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Guidance on grandparent gifting

Grandparents are regularly generous with grandchildren, sometimes giving significant amounts of money.

Often they want to share their resources to leave a legacy. In some cases, their children or grandchildren are dealing with financial hardship. Grandparents might also believe that their kin shouldn't have to wait for their inheritance.

Grandparents commonly provided assistance paying for summer camp, college tuition, weddings or down payments for homes.

They should keep the following factors in mind when giving to grandchildren, however, and they should be sure to contact an attorney who can advise them on the tax implications of their kindness.

If you're not giving a gift, state it clearly. If you expect anything, such as repayment, in return, or if the gift is an advance on the recipient's inheritance, put it in writing. Indicate it in a note along with the check, or in a promissory note if it's intended to be a loan.

Think about all grandchildren and how they are treated. One grandchild might have greater financial need than another, or you might be closer with one than another. Before giving unequal gifts to grandchildren, think about the implications. In some situations, grandparents choose to do what they want for each grandchild while they are alive, and then treat children equally in their estate plan.

Evaluate whether a gift is taxable. Under current tax law, a taxpayer need not pay any gift tax for the first $5.25 million that an individual gives away in his or her lifetime. However, any gift of more than $15,000 per year to a single recipient (in 2019) must be reported on a gift tax return. Two grandparents together can give up to $30,000 per recipient per year. There is no limit, and no reporting is required, for payments made directly to educational institutions for tuition or to medical institutions for health care.

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Contribute to a 529 plan for each grandchild. Open a 529 plan for each grandchild, which allows for tax-deferred growth, assuming the accounts are used entirely to pay for higher education.

Consider trusts in particular cases. Make sure you know your grandchildren well. Some cannot be trusted to use money wisely, or for its intended purpose. One option is to give the money in a trust that's associated with an incentive. For example, the benefits of the trust could go to the grandchild after he or she graduates from college.

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Benefits of mediation in estate planning

A recent case in Illinois highlights the value of mediation in resolving estate-planning disputes.

The case involved a successful family business created by Daniel and Mary O'Brien. The business, valued at $125 million as of 2013, included interests in hotels, a nursing home, a golf course, gas stations, fast-food franchises and warehouses.

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Most of the business assets were operated through limited partnerships, and the rest were held in revocable trusts, in S corporations or in the founders' names.

The O'Briens had six children (four daughters and two sons) and 15 grandchildren.

When the oldest son passed away in 1989, the O'Briens transferred control of the family assets to their only surviving son, Peter, their youngest child. Five years later, Peter acquired a majority interest in the S corporations that owned the nursing home operations and control of the limited partnerships as a general partner. He was also appointed the controlling trustee of the revocable trusts.

When one of the daughters died in 2004, her interests were passed to two of the grandchildren.

The family then went through almost a decade of litigation, which splintered the children and grandchildren into two opposing factions.

Thanks to mediation, a number of pending suits in the case seemed to be resolved, however, the family members still couldn't determine how to implement the planned settlement, resulting in a second mediation and arbitration.

In the case that landed before the Illinois court, the plaintiff was one of the grandchildren, who was part of a "faction" called the MMMD Group.

After arbitration, the group was not able to agree on dividing the assets, so the plaintiff filed suit against the rest of the group, seeking control of his pro rata share of the total assets that had been allocated to the group.

The suit eventually settled. He then tried to sue his lawyers for malpractice and fraud, but the suit was dismissed.

The years of litigation and turmoil were a major financial drain for the family, not only because of the astronomical legal fees, but because of the loss of time that could have been spent building the business while everyone focused on fighting and lawsuits. The experience ruined family relationships.

The story underscores the value of early mediation.

The issues eventually were largely solved via mediation and arbitration. If the family had entered mediation when they made the decision to transfer their business assets to their children and grandchildren, a lot of problems could have been avoided.

For a family business, mediation can help with dividing business interests and avoiding acrimonious disagreements among family members.

In another case, a couple, Richard and Judy, had a large estate that they wanted to divide among their adult children.

With the help of attorneys, accountants and financial advisors, each family member was able to propose a recommended plan. Unfortunately, the conversation wasn't open enough for everyone to properly share their interests, and there was no way to look at the totality of the situation.

When the conversations became so heated that family members were nearing battle, they engaged a mediator.

The mediator spoke with each family member individually, in small groups and as a whole group. This fact-finding mission allowed him to see the full picture.

After three months, the mediator reached a memo of understanding that all family members signed. The result was an estate plan developed by the parents' attorney that satisfied the entire family.

The resolution was significantly better than the results of the O'Brien litigation, and demonstrates the value of early mediation in dividing estates, especially for family businesses.

Updating estate-planning documents at divorce

The story of a divorcing couple in Arizona demonstrates why you need to update your estate plan at divorce.

The couple, who were in their early 40s and had been married for several years, had created a multimillion dollar business together. When they filed for divorce, the process became bitter and full of disagreements about small issues. They were thinking in the moment about the immediate dollars and cents, but didn't consider what would happen with assets at death.

One night the wife had dinner with friends. Sadly, she died in a tragic car accident on her way home.

Neither she nor her husband had changed their wills. As a result, everything she had, including the half of the business that belonged to her, went to the husband. Her family was left with nothing.

In this case, an interim will could have stated that her share of the marital estate would go to her parents.

The lesson: during divorce, update your will to ensure your assets go where you want them to go, such as to your parents or to a child from the current marriage or a previous one.

In addition to changing your will, you must also change the following:

Power of attorney documents. It's essential that you change your powers of attorney during divorce. You need a medical power of attorney to ensure that your estranged spouse can't make medical decisions on your behalf. Remove any financial powers of attorney as well.

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Guardian for your minor children. If you have chosen a guardian for minor children in your will, any change will have to be agreed to by your estranged spouse. You cannot create an interim will that excludes the other parent as a guardian, unless your spouse's parental rights have already been removed.

Accounts with named beneficiaries. While you're in the process of divorcing, you typically cannot change the named beneficiaries on 401(k) plans or life insurance policies, though if needed, you might be able to obtain an interim order to authorize a change. Once your divorce agreement is in place, it might state which beneficiary designations can and cannot be changed.

Once your divorce is final, remember to review interim documents and other documents again. Any trust you have with your former spouse will have to be revoked or amended. The assets will have to be moved to a new trust.

An estate-planning attorney can help make sure all documents are properly changed along the way.

Avoiding Medicaid penalty period for a house transfer

Under the laws of most states, when you transfer your house to a child or anyone else, you enter into a Medicaid penalty period, barring your eligibility for Medicaid for a period of time.

A way to avoid the penalty period is for the Medicaid applicant to transfer the house to a child considered to be his or her "caretaker."

A caretaker child is defined as a child who lived in the applicant's house for at least two years before the applicant moved to a nursing home and who cared for the applicant during that time in such a way that he or she could avoid moving to a nursing home. The rule applies only to a child, not to another support person.

What you need to do to prove the child has lived with the parent and cared for the parent in the manner required varies from state to state. For that reason, it's important to contact an attorney before making any sort of transfer.

You may transfer your home to the following entities and avoid the penalty period:

- A child under age 21 who is disabled or blind.
- Your spouse.
- A trust for the benefit of a disabled person under age 65. Under certain circumstances, it's OK if the applicant is the beneficiary of the trust.
- A sibling who, during the prior year, had lived in the house and has an equity interest in it.

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

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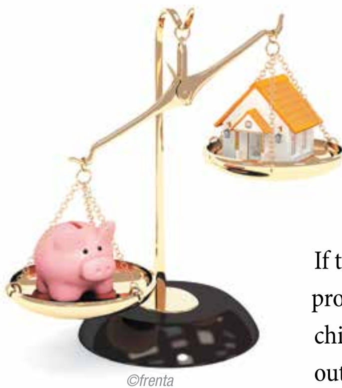
Should you leave siblings unequal shares of your estate?

When you're reviewing your estate plan, it's important to think about how to divide your estate among your children.

While you don't need to leave siblings equal shares, be aware that inheriting unequal amounts can cause arguments among children after you pass.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To avoid disagreements from the get-go, you may want to leave your children equal shares.

If that is your goal, remember to consider any property or accounts you hold jointly with each child. Jointly held property or money passes outside of your estate. That means if you have listed a child as a caregiver on a bank account, or you jointly hold property with one child, it will pass to that child alone at your death. The same rule applies for a "pay on death" account.

If you don't want one of your children to get a bigger share of your estate, be sure to add a provision in your estate plan indicating that property passing to one child through joint tenancy is an advancement of that child's share.

You can also choose to leave each child a different share. Perhaps one child has a disability and requires more for the future, or maybe you want to give a bigger share to a child who serves as your caregiver.

If you choose to give different amounts, include a provision in your estate plan explaining the reason for your choice. Make it clear that the choice was yours, not the decision of the child receiving the larger share. The more clearly you can explain yourself in advance and in your documents, the better. Otherwise, one of your children could attempt to challenge your will.

Work with an estate-planning attorney to decide how to handle dividing an estate and to determine any needed provisions.