

## Indicators an Estate Plan Needs to Be Updated

<b>Identifying Areas For Improvement In Your Clients' Estate Plans</b>	
<b>Potential Issue</b>	<b>Revision/Action</b>
<b>Big Picture Issues</b>	
1. Does the estate plan distribute the property you want, to whom you want, and when you want?	Think about what you want and create your plan accordingly.
2. Is your estate large enough to trigger federal or state transfer taxes?	Develop strategies accordingly to take advantage of the unified credit exemption.
3. Does the plan avoid probate? Will only? Trusts set up through a will?	Consider a living trust for probate avoidance and privacy.
4. Is the plan out of date?	Older plans are not bad if they accomplish the client's goals, but new and improved techniques are being developed every day.
<b>Incapacity Issues</b>	
5. Determination of incapacity requires written certifications of two licensed physicians.	May be difficult to get. Consider the signatures of a loved one and attending physician.
6. The plan predates 2003. HIPAA authorizations, allowing the release of health care information to decision makers, were not required until 2003.	Execute a HIPAA authorization allowing named fiduciaries access to medical records to they can handle affairs appropriately.
7. Clients and/or family members do not have Powers of Attorney for Health Care and Living Wills (or Advance Health Care Directives).	Have clients, as well as family members, execute documents, and place information cards in their wallets.
8. No provisions for estate planning and gifting during incapacity.	Add language to the durable power of attorney for property management and/or living trust to grant these powers.
<b>Decision Makers</b>	
9. Individuals named as successor trustees, personal representatives, guardians, and agents for financial and health care decisions have moved, died, become ill, or grown distant.	Execute new documents, updating names. Consider naming an institution as a final back up fiduciary.
10. Does the instrument address compensation and expense reimbursement?	Decision makers will not want to serve if they are not adequately paid and reimbursed for expenses.
11. Are the decision makers relieved of liability?	Decision makers may not want to serve if they can be second guessed or held liable for decisions.
12. Is there a financial institution listed as an investment adviser and successor trustee?	One of the main reasons individuals do not want to serve is they do not feel qualified. Insufficient investment and business acumen is one of the main reasons.
13. Are the beneficiaries protected from wrong doing by the decision makers? Is a bond required?	Sometimes decision makers self deal from the trust assets. What does the agreement provide with regard to removal of decision makers? Most documents waive the bond requirement, but having a bond can be good if property is taken.

14. Does the relationship among beneficiaries cause a conflict in the decision maker designation?	Conflicts often happen with co-trustees. Putting one child in charge of others or naming a step-parent as a decision maker can cause issues. Documents hopefully will address questions and promote harmony.
15. Are provisions in place allowing beneficiaries to replace a poorly-performing decision maker?	If a decision maker is ill, slow to act, derelict in their duties, or making poor management decisions, it should be possible to remove them and have a new decision maker step in by operation of the agreement without going to court.
16. If a grantor, spouse, or beneficiary is named as decision maker, have income and estate tax issues been addressed?	Having a related party making decisions can trigger the grantor trust income tax rules and cause inclusion of property in the decision maker's estate.
<b>Beneficiaries</b>	
17. Is the spouse a non-citizen?	Special rules apply to non-citizen spouses with regard to the marital deduction and the property that will be included in the estate.
18. Will the surviving spouse be disinherited?	Post-nuptial or pre-nuptial separate property agreements need to be executed. Full disclosure of assets must occur for the plan to be valid.
19. Will the surviving spouse's access to property be restricted?	Does the couple want to use a Survivor's Trust that is amendable or an irrevocable QTIP trust that leads to the distribution of property to the first-to-die's beneficiaries?
20. Surviving spouse lacks sufficient access to Bypass and QTIP trust assets.	Consider adding HEMS (health, education, maintenance, and support) invasion powers to the Bypass and QTIP trusts.
21. Surviving spouse lacks testamentary limited power of appointment over Bypass and QTIP trust assets.	Consider giving the spouse a testamentary limited power of appointment (e.g., among descendants) in case of changed circumstances.
22. Are all children (including children from previous relationships) named and either provided for or disinherited?	Most contested estate plan cases come from shunned or ignored heirs. Anticipate who might make a claim and make clear your intentions with regard to that heir.
23. Is a guardian provided for minor children? Is the guardian also a trustee?	One of the most difficult decisions for a couple to agree on. Depending on the family dynamics, it may be good for the guardian to have control of the purse strings and the children, but many families divide this responsibility to make sure the children are the beneficiaries of distributions.
24. Is there appropriate survivorship language for children who predecease?	The state provides a survivorship plan, such as per stirpes and per capita if there is no will, but the survivorship language also needs to be used when distributions are made in the documents or grandchildren and branches of the family tree may be disinherited unintentionally.
25. Property is distributed to children outright	Consider using lifetime beneficiary-controlled trusts

or in stages.	for asset and divorce protection.
26. Pecuniary funding of subtrusts.	Consider revising the funding language to use fractional shares. Pecuniary transfers trigger income tax at distribution.
27. Is there a spendthrift provision to prevent beneficiaries from assigning their interests in trusts and property to creditors?	Often a good idea with surviving spouses and children who do not have financial discipline.
28. Are there conduit provisions to accommodate assets being transferred from a retirement plan and is the plan's beneficiary designation consistent with the trust language?	Conduit features allow distributions from the retirement plan to be distributed based on the beneficiary's age rather than the oldest beneficiary's age.
29. Is there an in terrorem (no-contest) provision?	Any person challenging the will forfeits his or her interest.
30. Are the client's charitable intentions reflected in the plan?	Many want to donate a portion of their estate to a charity, such as a church or university, at their death.
31. Are remote contingent beneficiaries named?	If the client's immediate heirs die first, who gets the property? This is a safety net. Most name remote descendants or charities, but some choose a favorite sibling or friend.
<b>Other Important Issues</b>	
32. Is there a clause that directs the payment of debts, taxes, and expenses?	If not, they could be borne by the residuary entirely reducing usually the surviving spouse's share. Normally they are paid first, reducing everybody's share.
33. Estate plan provides no asset protection.	Consider establishing entities such as LLCs and/or domestic asset protection trusts in jurisdictions favoring such trusts, such as Delaware or Alaska.
34. Trusts are not funded.	Execute deeds transferring real estate to the trust and re-title other assets, as appropriate.
35. Titling of assets is not consistent with the plan.	Titling trumps the estate plan documents. It takes time, but retitling assets in the name of the trust or to pay into the trust is essential.
36. Is there a trust protector named in the document?	Trust protectors are usually named in irrevocable trusts. They can alter the terms and possibly the decision makers to carry out the grantor's intentions.
37. Is there a perpetuities savings clause?	The Rule Against Perpetuities is a complex principle of law that causes a trust to terminate after a period of time and can create unforeseen problems. A savings clause typically provides that, if the trust terminates because of the rule against perpetuities, the trust shall distribute the property to the primary beneficiaries at the time.