

Top 5 reasons Why Adult Children Should Assist Elderly Parents With Their Estate Planning

By Attorney Mark Gullotta, Esq.



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What is estate planning?

“Estate Planning” is the process of legally structuring a person’s property in such a way so as to create the most benefit for that person from applicable laws, while also taking into account that person’s individual wishes for the transfer of their property. The “Estate Plan” is the actual arrangement created in the estate planning process, which maximizes the conservation, investment, use, management, and transfer of a person’s property, both during the person’s lifetime and after the person’s death.

Depending on a person’s needs, estate planning includes planning for incapacity, reducing the uncertainties when one dies or becomes incapacitated, and maximizing the value of a person’s estate that is transferred to his or her beneficiaries. The ultimate goal of estate planning is determined by the specific goals for each client, and may be as simple or complex as the client’s needs dictate.

Who can do estate planning

Any person over the age of 18 can start Estate Planning. Persons who will see the greatest benefit are people who have property or a family they want to protect.

Top 5 reasons Why Adult Children Should Assist Elderly Parents

With Their Estate Planning

While there are multiple reason to have an Estate Plan, here are what we believe are the top five:

1. Planning for Incapacity

People often assume, incorrectly, that family members have automatic legal authority to make medical decisions for their loved ones, for example the authority to end life support. However, unless you have an advance directive (also known as an “advance health directive”), this is not true. Without an advance directive, the family of an incapacitated person, such as an elderly mother or father, must look to the Court to make those decisions for them.

People put off making an advance directive because they think they are not old enough to need one or they think because they are healthy. However, people do not consider the possibility of acts beyond their control, such as an automobile accidents, biking or skiing accident, or a natural disaster.

Timing is especially important for the elderly. Once a person loses legal capacity, they can no longer make an advance directive. Once that happens, the only alternative left to care for an incapacitated elder is a court supervised conservatorship, which is expensive and very impersonal.

Do not underestimate the effect of a disability on an elder's family or friend. Being forced to make significant health decisions for an incapacitated parent is very difficult in most situations. However making those decisions with no guidance from their parents regarding their wishes, makes those decisions even harder. When an elderly parent makes an advance directive they state what their intentions are regarding such as organ donation, funeral arrangements, and their desires regarding life sustaining procedures.

2. Avoid Probate Court

Administering a person's estate in Probate Court is expensive, open to the public, and can take up to a year or more to complete. Avoiding Probate Court should be a part of all estate plans.

People are often shocked at the cost of Probate Court. In California, for example, Court filing fees just to start and finish Probate are \$930.00. But that is just the beginning. The personal representative and their attorney also receive a percentage of the value of the decedent's estate as compensation.

For example, a probate estate of property with a market value of \$500,000 will pay both the personal representative and their attorney \$26,000. For estates with market value of \$1,000,000, the estate will pay the personal representative and their attorney \$46,000. There can also be additional fees paid for what is called "extraordinary" work, such as selling the decedent's home.

Since Probate Court is open to the public, your Probate administration will be open to the public. In other words, your personal financial information and your decisions regarding your family, will be open for public consumption, meaning a loss of privacy to you and your beneficiaries.

Lastly, Administering an estate in Probate Court takes much of the control out of your loved ones' hands, and gives it to the Court. Since an estate administration in Probate Court can take up to a year or more to finish, your loved ones can be put in a vulnerable position while they are forced to wait.

3. Creates a Complete Financial Picture for the Family

Often parents fail to share with their family specific information about their assets. Once the elderly parents lose capacity it is very difficult for their family, who is expected to care for them, to then locate their assets. Even if the family knows what assets their parents have, it may be impossible to get in control of that property without the parent's approval. Without access to the elderly parents' property caring for them can be extremely difficult.

A good Estate Plan documents the elderly parents financial assets and their retirement planning. The Estate Planning process creates a comfortable space for parents and their families to openly talk about and discuss finances, retirement planning, and what the elderly parents want for their future.

4. Mixed Marriages

Mixed marriages, where one or both parents have children from a previous marriage, makes Estate Planning difficult. However this planning is essential for the family that is left behind. Without an Estate Plan the uncertainty as to the ownership of assets can lead to conflicts, or worse, between the families of the mixed marriage. Uncertain creates even more problems for jointly owned or community property.

Often conflicts can be reduced or eliminated if the parents document in an Estate Plan what each wants. Estate Planning tackles difficult issues up front, creates an dialog between the parents and their families about how property should be divided.

5. Sibling Conflicts

Parents often act as mediators between children who do not get along. When the parents lose the ability to mediate their children, conflicts can bubble up to the surface with disastrous consequences. Sibling conflicts that occur during a time of extreme emotions can tear a family apart. A well designed Estate Plan can reduce or eliminate conflicts between children.

An Estate Plan has the ability to “speak” for the parents well beyond the point where the parents can no longer communicate directly. The more children feel they know what their parents have planned for them, the less likely there will be conflicts. Again, avoiding uncertainty is the key to avoiding conflicts. If sibling conflicts are expected, parents should consult with an attorney about Estate Planning techniques to avoid conflicts after they lose capacity or after they die.

5 Tips When Preparing an Estate Plan

1. **Nominate alternate beneficiaries.** The future is impossible to know, which is why you should name an alternate beneficiary if primary beneficiary dies before you. If your primary beneficiary does die before you, and you fail to state who should receive that gift, state law will control where that gift goes and that might not be the person you intend. If it is important to you who should receive a gift if your primary beneficiary dies before you, expressly state so in your Estate Plan.
 2. **Nominate at least one, preferably two successor Trustees.** If you name someone as your successor Trustee, they have the option to decline. For many different reasons the named successor Trustee might not be able to act. I recommend you nominate more than one successor Trustee to act if the first one you name cannot. If possible, I recommend nominating two fiduciaries in any Estate Plan.
 3. **When using a No-Contest clause consider giving the disinherited person a small gift.** A No-Contest clause states that if a person contests your trust in Court, that person will receive no property from the trust. This can be added if you are concerned that a person may contest trust. However if trust includes no gift to that person, there is nothing for that person to lose if they “contest” the trust. I recommend in this situation to give a potential contestant a small monetary gift. This may seem counterintuitive, but the gift will discourage that person from contesting the trust because they now risk losing the small gift if they contest the trust as a whole.
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4. **Make sure each document is properly executed.** Estate Planning documents require different methods of execution. Some documents, such as Wills require witnesses, other documents require notarizations. If a document is not properly executed it may not be enforceable. Be sure you know the execution requirements for each document create.
 5. **Avoid Powers of Attorney that require incapacity.** Many times your Powers of Attorney (i.e. a Durable Power of Attorney for financial decisions, or an Advance Health Care Directive) is needed in an emergency. Requiring that you be “incapacitated” means to use it you must find a doctor who will make that determination. If there is an emergency situation, this extra step might detrimentally delay your agent from acting on your behalf.
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How to choose an Estate Attorney

Make sure any attorney you use is a member of the State Bar and licensed to practice law in the state you live in. In California, be sure to check any attorneys disciplinary records at the state bar's website at www.calbar.org.

Estate Planning is a specialized area of the law. Ask your attorney how many years he or she has been drafting Estate Plans or if they have experience defending their Estate Plans in Court.

About the author

Mark Gullotta earned his law degree and his Masters in Business Administration degree from Santa Clara University. He is licensed to practice law in the State of California and is a member of the California State Bar and the San Mateo County Bar Association.

Mr. Gullotta serves clients in San Francisco and San Mateo Counties. Mr. Gullotta is a former chair of the Trust and Estates Section of the San Mateo County Bar Association. He has been practicing law for 15 years, and has represented individuals and families of all sizes. Mark Gullotta is a Who's Who 2018 Top Attorney of North American Diamond Member.

Prior to his legal career, Mark Gullotta worked as a CPA in Silicon Valley for a big four accounting firm, which now brings a strong financial perspective to his Estate Plans.

Mark Gullotta lives in San Bruno along with his wife and three young children.
