

# Top 5 Reasons Families Need an Estate Plan

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 Reason Why Spouses Need an Estate Plan**

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 spouses have automatic legal authority to make all medical decisions for each other, for example the authority to terminate 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 spouse of an incapacitated who cannot make his or her own medical decisions 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.

Once you are incapacitated, you no longer have the ability to make an advance directive. In a real sense, there is no better time than the present to create an advance directive.

People do not consider the effect of a disability on their families or friends. An advance directive gives individuals the ability to state what their intentions are regarding such as organ donation, funeral arrangements, and their desires regarding life sustaining procedures. Putting your wishes in an advance directive not only helps ensure your intentions are honored and your desires are followed, but relieves the pressure on your family and friends about what they should do and how they should care for you, if you need serious medical treatment.

## 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. Sharing Financial Information or Retirement Planning

In some marriages, one spouse may take on more of the responsibility of the family finances or retirement planning. In some marriages, one spouse may be managing the family business while the other is responsible for other aspects of the family. The point is information is not always equally shared. Problems can arise if the spouse handling the family's finances gets sick or dies, and other spouse is not equipped to start making unfamiliar decisions. A good Estate Plan brings clarity to a couples' financial position and retirement plan. The Estate Planning process itself can create a comfortable space for couples to openly talk about and discuss their finances, retirement planning, and what they want for the future.

For a spouse who is managing a couples finances or following a retirement plan, it is their responsibility to make sure all that information is explained or at least available to the other spouse. If death or disability happens, financial information and retirement planning information must be accessible to the other spouse, or at least be documented for a financial adviser or family member.

For spouses who do not spend their days handling family finances or a family business, it is their responsibility to insist all of the family's finances, retirement planning, and business information be documented so it can be accessed when needed.

### 4. Mixed Marriages

Mixed marriages, where one or both spouses have children from a previous marriage, can be difficult for both the spouses and their children. However, most parents of mixed marriages do not realize the best way to avoid conflict is communicate with their children what their wishes really are. Even if a child is upset about a marriage to a second spouse or is mad about how that parent plans to distribute his or her property, often that child will still accept the wishes of their parent if they know that is what the parent wants. Estate Planning tackles the difficult issues up front, creates an dialog about how property should be divided, and can reduce or eliminate conflicts with the children.

Parents in a mixed marriage can cause harm if they say nothing to their children about how they want their property distributed. Leaving it up to the non-parent spouse (i.e. a child's stepmother or stepfather) to explain their mother's or father's wishes, can make the children hurt or angry.

A well written Estate Plan clearly memorializes a parent's intentions to all who will be affected by their death or incapacity. Parents who clearly document and describe what their intentions are will prevent distrust and suspicion among their children.

## 5. Controlling How or When an Inheritance is Distributed

When both parents die, a minor children will be given a guardian to manage his or her inheritances. When the minor becomes an "adult" at age 18, they must receive all of the property from their inheritance. The child may be an adult at age 18, but receiving large sums of money or property at a young age can actually do them harm. Adult children may not have the maturity or experience to deal with the responsibility of inherited wealth.

A good Estate Plan can push back the age which an adult child will inherit property. During that extra time, a family member or a trusted friend can be given the power to pay for that adult child's college education or medical needs.

This way the child is protected from himself or herself until they become older and are more mature, while at the same time they can receive the benefits of their inheritance as needed.

## 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.
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.

### **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](http://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.