PROTECTING HISPANIC & LATINO FINANCIAL LEGACIES

How to Avoid 9 Estate Planning Risks and Increase Upward Mobility

AMERICAN ACADEMY | OF ESTATE PLANNING ATTORNEYS

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For over fifty years, the attorneys at Morris Hall, PLLC (MH) have provided quality estate planning documents for our clients. Helping our clients protect their assets for those they love has been our goal from the very beginning. We are recognized throughout the Southwest for our expertise in educating individuals about the importance of proper estate planning. We do this through various speaking engagements and seminars; and further, we keep our clients up-to-date through frequent communication, complimentary reviews and phone calls, and more advanced seminars.

At Morris Hall, we focus on protecting families from the expense and delay of probate and minimizing tax consequences. We also implement basic and advanced estate planning strategies for clients, and assist in the administration of our clients' estates upon death or disability. Since we practice estate planning exclusively, we are able to answer the complex questions and concerns consumers have about estate planning.

Morris Hall is staffed with experienced attorneys and paralegals who are trained in the complex areas of trust, trust administration, probate, elder law and tax law. Our firm's aim is to help you, our client, understand the basic principles of estate planning and why each individual needs a plan. We have helped thousands of individuals secure their assets. We are confident that our experience will help ease your mind and the minds of the family you leave behind. By taking advantage of the services that we have to offer, you can be assured that your legacy and your family will be protected.

CONTACT US

www.morristrust.com *info@morristrust.com*

toll free 888.222.1328

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PROTECTING HISPANIC AND LATINO LEGACIES IN THE U.S.

What is Estate Planning?

Estate planning involves protecting yourself, your family and loved ones, and the assets which you have worked to acquire during your lifetime. However, planning is not just focused on what happens after your death, but also on protecting your assets and addressing problems that can arise during incapacity and the end of your life. Having a plan in place is essential to protecting yourself and the people you love; it's important to be proactive when thinking about your future.

A Will or Trust involves deciding who will receive your money, valuables, and possessions when you are gone. A comprehensive estate plan will also include protection in the event you are no longer able to handle your own affairs or make decisions for yourself. Statistics show that we are 3-5x more likely to become disabled before we pass away[1]. Legal documents like Powers of Attorney ensure that you get to decide who will handle your assets and make healthcare decisions for you if you can no longer do so yourself because you are temporarily or permanently incapacitated. This is also critically important if you need to qualify for long-term care benefits, such as Medicaid, to cover some or all of the cost of your care.

As you can see, regardless of wealth accumulation, every adult needs an estate plan, even if it's a simple one. Unfortunately, Hispanic Americans are less inclined to have any estate planning documents in place. According to a 2021 survey by Caring.com, only 31.6% of Hispanics have a plan[2] in place despite 50% owning a home. There are several reasons, including a lack of understanding about the need for a plan, a general distrust of the government and financial institutions, and cultural norms that call for decisions to be made within the family instead of through the legal system.

Many Hispanic and Latino families are first- or second-generation Americans. Those who have made the sacrifice to provide their family with comfort and stability, know how important it is to set their family up for success with any available opportunity. However, many families are making some big unintentional mistakes in their planning or lack

[1] https://www.affordableinsuranceprotection.com/disability_facts
[2] https://www.caring.com/caregivers/estate-planning/wills-survey/

thereof, costing their families and future generations the ability to accumulate wealth and effectively support them during incapacity.

9 Planning Risks Impacting Hispanic Wealth Accumulation and Upward Mobility

As a result of cultural norms and values, very often Hispanic and Latino families make decisions that don't align with the U.S. legal system. A lack of understanding about the disparities between culture and the legal system has caused a lot of heartache and loss of assets. Here are 9 common planning risks that impact Hispanic and Latino families:

1. NO PLAN FOR AGING AND CARETAKING NEEDS

Caregiving among Hispanic families is often a natural progression in life and is embraced by many as an opportunity to give back to elders. This unpaid task, responsibility, and privilege often falls on the eldest child. In fact, Hispanics have the highest reported rates of caregiving compared to other race or ethnic groups. They are also more likely to be a primary caregiver and more reluctant to send their older family members to nursing homes or assisted living.

Caregiving can take a significant toll on a person economically, physically, emotionally and mentally. One of the biggest challenges caregivers face, is how to find balance between meeting the family member's caregiving needs and the caregiver's financial situation. Keeping up with a job, taking care of kids, a spouse and their own family/household needs plus the caregiving can be physically exhausting. Caregivers are also more likely to experience emotional distress, depression, anxiety, and social isolation. There's good news though.

Creating an estate plan before the need for caregiving arises, ensures families and caregivers will have more tools and information to care for their loved ones and themselves.

Estate planning can also provide a much-needed support structure. For example, aging parents can compensate the family member doing the caregiving to provide some financial relief, which could greatly improve the caregiver's quality of life if they're able to work fewer hours outside of the home. Fair is not always equal in estate planning and the parent can also choose to compensate their caregiver by leaving him or her a larger inheritance. Creating a plan to qualify for Medicaid to help pay for long-term care costs is also critical.

2. NO MEDICAID PLANNING

Hispanic families are less likely to take advantage of government programs and formal caregiving because of costs and a lack of awareness of available resources. One of these

resources is Medicaid, which is a federal and state program that provides money and benefits to cover expenses for people with limited income and resources. Medicaid will cover the healthcare costs for some, as well as provides benefits not normally covered by Medicare, including nursing home care and personal care services. Setting yourself up to qualify for these benefits needs to be started years before the need arises. Not starting this planning early enough typically causes one of two issues:

- Not qualifying for benefits to help support the family financially and physically with caregiving; this puts 100% of the burden on the family caregivers; or
- They qualify for Medicaid benefits; however, the family's assets are subject to Medicaid Recovery. This means that the state can attempt to recover the long-term care benefits they paid out from the recipient's estate after they are gone. Very often the state will take possession of the decedent's home and other assets to reimburse themselves.

Both of these scenarios are possible to avoid with the right Medicaid plan.

3. PROBATE

When you pass away with a Will or without an estate plan, the surviving family must go through a court-supervised process, called Probate, to distribute your estate. There are several concerns with Probate, including:

1. **It Can Be Expensive:** You may have to pay court fees, lawyers, and executors. The costs can quickly add up to ___%. Some states are more expensive than others.

2. **It May Be Time Consuming:** Probate can be very time consuming, with the average case taking _____ months in [STATE]. This can cause a lot of problems when surviving family members don't have access to the assets or funds of the deceased to pay for legal and funeral expenses. Not to mention, they'll have to continue to pay the mortgage and property tax on any homes out-of-pocket, if they want to keep that home.

If you pass away without any estate plan, matters are even more complicated. This is called dying intestate. This means that the court and the state's intestacy laws will determine who will inherit your property and assets – it's not always who you think it would be either!

4. JOINT TENANCY & CO-OWNERSHIP

Many Hispanic families falsely believe that adding a family member (typically the eldest child) to title on their assets will solve their estate planning problems, including Probate and Medicaid Recovery.

Multi-generational home ownership is also common. In fact, Hispanic home buyers are 3.5 times more likely to be part of a multi-generational household than the rest of the population. Not surprisingly, 53% of Hispanic homebuyers in 2020-21 preferred a multi-generational home[3]. This accommodates aging parents, adult children and grandchildren.

Owning a property like this creates multiple challenges in estate planning. Co-ownership on titles may include owning property as Joint Tenants with Rights of Survivorship or Tenants in Common.

Under Joint Tenancy, after the death of one of the owners, full ownership of an asset immediately passes onto the surviving Joint Tenant(s) by operation of law. While it does circumvent probate and avoid the need for a Will, it also brings with it a slew of problems.

With Tenants in Common, the co-owners of property may own unequal shares and have different ownership interests. While this option has advantages over Joint Tenancy, many of the same challenges exist.

1. **Disinheriting Other Children:** As implied by the title, Joint Tenancy with Rights of Survivorship, means that the surviving joint tenant(s) automatically inherit the full property upon the death of the other joint tenant. If a parent has only added one child to the title, then that child would own 100% of the property upon the death of the parent. If that child has two other siblings, they would have no claim to that property, despite what the deceased parent may have wanted.

2. **Exposure to Creditor Risks:** Joint Tenancy exposes one joint tenant to the financial risks, liabilities, and other potential problems created by the other joint tenant(s). For example, half of your asset held in Joint Tenancy could be lost as a result of your co-owner's:

   - Bad debts, back taxes or bankruptcy
   - Divorce
   - Lawsuits or damage awards filed against a joint tenant

   Therefore, co-ownership in this fashion could cause loss or forced sale of assets due to an unforeseen life event like a car accident or legal issues that happens in either the parents' or adult children's lives.

   Imagine parents adding a child to title and that child divorcing their spouse. The former daughter-in-law or son-in-law might be able to claim 50% of the child's

[3] https://www.realtor.com/news/trends/hispanics-bought-more-homes-during-pandemic/

share of that asset and cause the family to buy the in-law out or force the sale of an asset, such as a home, in order to compensate the in-law.

3. **Property Taxes:** Some jurisdictions offer property tax exemptions for seniors and older adults. Adding an adult child to the title of property could prevent the parent from qualifying for these exemptions.

4. **Incapacity:** If a joint tenant becomes incapacitated, a world of other problems may present themselves. Let's say that the parent becomes incapacitated due to a health issue or an accident. Before you sell, pledge as collateral or engage in any other transaction involving your property, all joint tenants must provide consent. This is not possible if one joint tenant is incapacitated.

   Let's say this incapacitated parent lives alone and still pays a mortgage on their home. The parent has added their eldest adult child to title but that child doesn't pay any of the expenses associated with the home. They are "owners" in name only. When the parent becomes incapacitated, the adult child is now responsible for paying the mortgage and bills out-of-pocket if they don't have access to the parent's bank account. If they need to sell the home to help pay for care costs, the child cannot engage in any transaction without the consent of the incapacitated parent, unless they have the proper Powers of Attorney. This would force the child to go to court for living probate. During this process, the court pronounces the parent as incapacitated and names someone, hopefully the child, as the guardian or conservator for the parent. This is a costly and time-consuming process that could easily end up costing the family more than they bargained for.

As you can see, there are many ways Joint Tenancy could end up costing you and your loved ones, many times the expense and headaches you thought you were avoiding.

5. RELIGIOUS ONLY MARRIAGES

Another accepted cultural norm with older Hispanic couples is having a religious marriage ceremony through the church, and failing to formalize it legally with a marriage license through the state. Many of these couples assume that their surviving "spouse" will automatically have the right to make decisions if they are incapacitated and will be the rightful owner of property left behind. However, this is not the case. The government does not honor religious marriages as legally valid. Here are some of the challenges the surviving "spouse" may experience at death and incapacity:

- **Incapacity:** Will be forced to go through a "Living Probate" process for the court to appoint someone (hopefully them) to make financial and health decisions. The court may or may not appoint the "spouse."
- **Probate:** The estate must go through the full probate process. Without an estate plan or legal marriage, any assets not jointly owned with the deceased "spouse" will be subject to intestacy laws which commonly pass belongings to the surviving

family of origin, which means the surviving "spouse," could lose control of their assets if they weren't on the title.

6. MARRIAGES WITH ONLY ONE SPOUSE ON ASSET TITLES

Culturally, it is also common in long-term marriages for the husband or only one spouse to have their name on the title to assets. In cases where a couple shares a home but only one spouse's name is on it, the home will not automatically pass to the surviving spouse, if his or her name is not on the title.

Let's take the example of a husband being the sole owner on title to the home the couple shares. Even though both individuals live in the home and share expenses during the marriage, the home will not automatically pass to the wife should the husband pass away first. Instead, the home will become part of the husband's Probate estate.

State laws will determine who is entitled to the home. Many states have rules that would provide only a portion of the estate to the surviving spouse. If the deceased person has children, even if children of the current marriage, local laws might grant a portion of the estate to those children. If this is a second marriage, children from the prior marriage may be entitled to more of the estate. If this happened, the surviving spouse may be forced to leave the home, even if she had contributed to home expenses during the course of the marriage.

7. LENDING CREDIT TO FAMILY MEMBERS

The Hispanic community faces several financial barriers in the U.S to accumulating and building wealth. There are many obstacles preventing them from building a secure financial future. These financial disparities begin with high-interest lending services, insufficient credit history and higher than average student loan debt, among other factors. Many younger Hispanics and Latinos find that their path to homeownership and financial security are hindered by monthly student loan repayments, which in turn prevent many of them from being able to build up their savings. Meanwhile, other more vulnerable members of the Hispanic community, such as immigrants and non-native English speakers, face challenges with predatory lending practices and unfavorable financing options.

As a result, it's become a common practice to lend credit to family members. It's not unusual for an individual with well-established credit, to allow their family to "borrow" their credit by purchasing the home in their name for the family member's benefit with the latter paying the down payment and mortgage.

Many of the estate planning issues we've discussed earlier are real possibilities. These include:

- **Creditor Issues** – If the "owner in name only" faces any creditor issues, bankruptcy or lawsuits, there could be some dire consequences, including the loss of the home.
- **Probate –** If the parent, who is "owner in name only," passes away, the home is now part of the parent's probate estate and subject to the state's inheritance and intestacy laws. The family member who lives in and pays for all the home and property expenses may find out that they now have to split the equity in their home with their siblings or may lose it altogether.

However, one of the biggest unintended consequences is when the parent who is "owner in name only," needs to qualify for Medicaid benefits to pay for their long-term care needs. In this situation, one of two things may happen:

- **Don't Disclose Ownership:** As part of the Medicaid application process, an applicant must disclose all their assets to be evaluated for qualification purposes. Often, the parent doesn't consider their child's home as their own, despite being the legal owner on title. This is considered fraud and may result in costly penalties or disqualification from Medicaid, not to mention the potential for criminal fraud penalties.
- **Disqualification:** If the parent does disclose ownership of the child's home and the parent also owns their own home or other real estate, this could disqualify the parent from receiving benefits due to having too many assets or income above the maximum level.

8. LACK OF COORDINATION WITH ASSETS OWNED IN A FOREIGN COUNTRY

Hispanic families who own property outside of the U.S. need to have a carefully coordinated estate plan in both the U.S. and the foreign country where the property is located. Each country has its own set of laws related to inheritance, succession, residency and taxes and it's rare that they match the rules in the U.S.

Failing to plan for events such as death and/or conflicts between laws can result in very costly consequences. It's essential to understand how different jurisdictions will enable assets to pass at death and work with qualified attorneys in both countries to make sure wishes are fulfilled.

Your estate planning attorney should be knowledgeable in international estate planning to help coordinate and work with an equivalent professional in the foreign country. It's critical that the attorney understand the implications of the plan language and account for the laws in the other country. For example, your U.S. Will has language that states: "This invalidates all prior Wills," – this could invalidate a Will from another country, which could create a costly and time-consuming problem in that foreign country. As you can see, failing to consider these multi-jurisdictional estate planning implications may

create dramatic consequences, including assets passing to the wrong beneficiaries and excessive taxes. Fortunately, many of these unwanted financial and emotional ramifications can be avoided with the proper international estate planning strategy.

9. FAILING TO PLAN FOR THE FUNERAL

Many foreign-born and first-generation Americans may want their body sent back to their home country after death to be buried with their family. Without a plan to pay for and navigate the challenges of repatriating remains, the surviving family may face many complications to honor those wishes, or find it impossible to do so, especially within a limited time.

Other Benefits

In addition to helping families avoid Probate, protect their assets from long-term care expenses, plan for disability and end of life, and protect from creditors, divorce and lawsuits, here are some other benefits of estate planning:

1. **Protect children from a prior relationship.** If you want assets to be passed down to children from a previous relationship you must make those wishes clear and ensure it's outlined accordingly in your estate plan.
2. **Make sure your wishes are honored when you are gone.** Since you cannot rely on simply telling your family members how you want your assets distributed when you are gone, an estate plan can ensure that your wishes are honored and followed, as well as keep the peace in your family.
3. **Protect assets you leave behind if your surviving spouse remarries.** Another type of special trust can be used to protect assets earmarked for your spouse if you pass away first and your spouse remarries in the future.
4. **Cater to the unique needs of your children and grandchildren.** If you have several children, it's a safe bet that no two are exactly alike. Customized estate planning can assure that each child's personal needs are addressed instead of treating them all as though they are the same.
5. **Gift money to the church and other charities**. If church and religion are a central part of your life, you can earmark money to go to the church or your favorite charity.

CREATING AN ESTATE PLAN

As you can see there are numerous reasons why most people can benefit from an estate plan that have little to do with the value of one's assets. Most estate plans might include the following:

- **Last Will and Testament**: A Will is oftentimes one of the most basic and widely used estate planning tools. Simply put, a Will is a legal document that describes how you want your assets distributed at your death. It also names the guardians of your children. It only goes into effect at your death. Upon your passing, an executor, whom you name in your Will, oversees the distribution of your estate to any heirs named, however, the actual distribution of your assets is controlled by the probate court.
- **Revocable Living Trust:** One of the most comprehensive and well-designed estate plans is the Revocable Living Trust. A Living Trust is set up in such a way that the Trust owns the assets to be left to the heirs, thereby avoiding probate. It also helps protect inheritances from remarriage, divorce, creditors, taxes and more.
- **Advance Health Care Directive:** This legal document expresses your wishes regarding end-of-life decisions. For instance, you can express your wishes concerning life support or medical treatments that could prolong your life but not cure you if you are terminally ill. Second, it allows you to appoint someone you trust, called your agent, to make certain medical decisions for you if you are unable to make those decisions yourself.
- **Property Power of Attorney:** Allows you to select someone you trust to look after your financial needs and act in your best interest if you're unable to. You will give this individual the authority to act on your behalf to cover financial and legal transactions. In most states and situations, upon incapacity, the agent simply provides proof (such as a physician's letter) to the bank or other institutions, and then they can write checks from your account and take other actions necessary to keep your financial life in order.
- **Medicaid Trust:** An irrevocable trust, that is put in place before you need Medicaid, to transfer assets and help you qualify for benefits. This type of planning is best done at least 5 years in advance of needing to qualify for benefits, but you should see a qualified attorney if the need arises sooner.

Be sure that you work with an estate planning and elder law attorney who focuses their practice exclusively in these practice areas. This is a complex legal topic and it is important that you have someone experienced to help you navigate the rules. Just as importantly, be sure that you work with an attorney you trust. Be open and share about your cultural beliefs and values to ensure that your estate plan takes these into account. The best estate plan is the one that reflects your wishes rather than a cookie-cutter plan provided to the masses.

ABOUT THE ACADEMY

This report reflects the opinion of the American Academy of Estate Planning Attorneys. It is based on our understanding of national trends and procedures, and is intended only as a simple overview of the basic estate planning issues. We recommend you do not base your own estate planning on the contents of this Academy Report alone. Review your estate planning goals with a qualified estate planning attorney.

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