Five Estate Planning Mistakes by the Unwary

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Estate Planning Really Is For Everyone

Many assume that "estate planning" is only for the wealthy. However, nothing could be further from the truth. In reality, everyone has an estate, whether it is a modest $100,000 condo and a bank account – or millions of dollars in stock and real estate. Therefore, a "plan" is needed to designate who shall control and inherit the estate.

And it is critical that the estate plan be valid so that one's wishes are implemented at death. Unfortunately, it is common that one's objectives, at least in part, are thwarted by improper estate planning.

Although a variety of estate planning "mistakes" occur, experience shows that five mistakes are the most common.

Mistake No. 1 – Void Executor Appointments

The Executor (or technically the "Personal Representative") is the party designated in the Will that has responsibility for handling all aspects of the estate at death.

Unbeknownst to many, Florida law limits the individuals who may serve as one's Executor to either (i) a Florida resident, or (ii) a close relative. Stated another way, a close friend or advisor that does not live in Florida cannot be one's Executor.

Also, a convicted felon (including one's spouse or child) cannot be the Executor – even if the crime was a "youthful," non-dangerous type committed decades ago.

What does the Court do you if one's Will nominates a "non-qualified" person as Executor? Stated simply, that nomination is unlawful and it will not be honored by the Court. Instead, an alternate Executor will be installed by the Court and who is either a back-up Executor nominated in the Will or the person or persons identified by Florida statute.

Mistake No. 2 – Accidental "Bequest" of the Home to the Children Before Husband and Wife Are Both Deceased

Florida law is very protective of the homestead. For example, under Florida's Constitution a married person's homestead can only be bequeathed outright to the spouse (if it is not jointly owned by them). Any other bequest of the home (i.e. in trust) is invalid.

Moreover, if the Will does not bequeath the home outright to the surviving spouse, then the Florida Constitution provides that the spouse and the children automatically become co-owners of the home.

Many estate plans, particularly those not updated for Florida law compliance, do not address this potential "split ownership" arrangement. Thus, upon the first spouse's death the children automatically become co-owners of the home with the surviving spouse and are entitled to a share of the sales proceeds upon a future sale.

Fortunately, this surviving spouse/children split ownership situation can be eliminated with proper advance planning.

Mistake No. 3 – Jointly Owned Property

One's Will or Revocable Trust generally is relied upon to transfer all property at death. However, jointly-owned property (such as real estate or an investment account) is one glaring exception to this rule.

A jointly-owned asset, instead of passing to one's heirs named in the Will or Revocable Trust, passes directly to the surviving joint owner by reason of joint property law. Unfortunately, in such a case the asset may pass to an unintended recipient.

Also, if an asset is jointly-owned with just one child, at death this can result in that child receiving a larger share of the overall estate than his or her siblings. This is because that child inherits both the joint asset AND an equal share of the assets which pass under the Will or Trust.

Mistake No. 4 – Improper Tax Planning by Dual State Residents

Florida provides many tax breaks for its residents, including (i) no state income tax, and (ii) no state death tax. However, to obtain these tax benefits it is critical that the person who has a residence in Florida and also in another state to establish the Florida residence as the primary tax residence.

Failure to establish a Florida primary tax residence will give the "northern" state grounds to tax the person's entire income or estate, including retroactively. Interestingly, as noted in the Wall Street Journal, there is a net annual migration of 400,000 people to "no tax" states such as Florida, and thus some states (including Massachusetts) are establishing special units and protocol to audit persons who claim Florida tax residency but still maintain an abode in the northern state.

Thus, it is crucial that the seasonal person obtain legal and tax advice to establish a secure Florida tax residency.

Mistake No. 5 – Improper Beneficiary Designations for IRAs and Life Insurance

Of surprise to many, one's Will or Revocable Trust does not control the transfer of an IRA or life insurance at death. Instead, upon the owner's death the IRA administrator or insurance company reviews the current beneficiary form signed by the owner and pays the funds to the person identified on the beneficiary form.

The issue then is that the "wrong person" may receive IRA or insurance money.

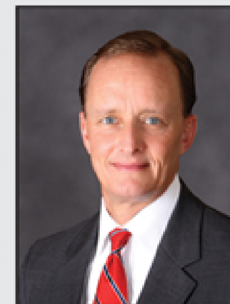
For example, Mrs. Smith designates her 4 sons, by name, as heirs of her $1 million IRA using the standard beneficiary form for XYZ investment company. Unfortunately, Mrs. Smith's oldest son, John, predeceases her but Mrs. Smith fails to update her beneficiary designation before her death.

Who inherits John's $250,000 share of the IRA? It may be John's children, or his brothers, or his wife – or even Mrs. Smith's probate estate. There is no uniform answer. Instead, it is necessary to read the "boiler-plate" provisions of the beneficiary form to determine who receives the money.

Also, if the IRA or life insurance is made payable to one's "Estate," two problems are created. First, the funds become general assets of the Estate and thus subject to the deceased's creditors. Second, in the case of an IRA, the annual minimum withdrawal amount may greatly increase.

Summary

Significant estate planning mistakes are all too easy to make. Therefore, it is only prudent to retain qualified legal counsel to implement a valid and comprehensive estate plan.



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