Top 10 Estate Planning Mistakes & How to Avoid Making Them

Written By **Virginia S. Carter** (vscarter@wardandsmith.com) and
Eldridge D. Dodson (edd@wardandsmith.com)
June 12, 2019

As estate planners, we have seen it all over the years. What we have learned is that people make some common mistakes.

Whether due to procrastination, lack of follow through, or ignoring their own mortality! This article discusses a few of the major pitfalls we frequently see. Trust us: the best way to avoid these mistakes, and save your family and loved ones the stress, cost, and heartache of dealing with these problems, is to sit down with an estate planning attorney.

1. Not having an estate plan

Many people do not have a Will at all. If you die without a Will, you relinquish to the state the right to decide who will receive your property and who will serve as your executor. Many married couples incorrectly believe that all property passes automatically to a surviving spouse under the intestacy laws. That is not the case. North Carolina law provides that property owned solely by the deceased spouse is divided among the surviving spouse and children – which can be an unpleasant surprise.

2. Not planning for the unexpected.

What if, god forbid, something happened, and you became incapacitated? Every estate plan should include a financial power of attorney naming someone to act on your behalf if you become unable to manage your financial affairs, and a health care power of attorney granting someone authority to act on your behalf in making medical decisions. In addition, if you desire that your life not be prolonged by extraordinary measures should your medical condition become hopeless, it is important to state that desire in a "living will." If you become incapacitated and have not executed basic powers of attorney, your loved ones will have to petition the court to appoint a guardian for you – an expensive and burdensome procedure which most clients want to avoid.

3. Not having a contingency plan

Every estate plan should name alternates to serve as agent under powers of attorney or as executor or trustee under a Will or trust. If only one person is named to serve in a power of attorney, for example, and that person is unable or unwilling to serve, a guardianship proceeding may have to be initiated. Failure to name a successor executor or trustee might result in North Carolina law and the clerk of court determining

the successor.

4. Not updating beneficiary designations.

Often we find that despite making specific provisions for beneficiaries in a Will or Revocable Trust, an individual forgets to update the beneficiary designation under his or her insurance policies and retirement plans. Many people incorrectly assume that these assets are controlled by the Will or trust, but they are not. You must update a beneficiary designation to make it consistent with your distribution goals. Failure to do so may result in those beneficiary-designated assets passing in a way that you did not intend.

5. Not updating planning after major life events.

Moving to a new state. The laws of the state in which you reside will determine whether your powers of attorney, Will, and other estate planning documents meet the requirements for valid execution. Documents executed in another state may not be recognized in North Carolina or might cause delay and additional expense to have them recognized in North Carolina.

Separation or divorce. Provisions under your Will or revocable trust benefitting your former spouse are revoked by law upon divorce (but not upon separation). It still is a good idea to review your estate plan during this time to determine who will inherit at your death and who will serve as your Executor, Trustee of any trusts for children or other beneficiaries, as guardian of any minor children, or as your agent under powers of attorney. Gifts made to an ex-spouse under an IRA or life insurance beneficiary designation are not automatically invalidated by divorce; you must actually change these designations. Failure to update your beneficiary designations can result in these assets passing to an ex-spouse instead of your intended beneficiaries.

Remarriage. If you remarry but have children from a prior marriage, your planning should take into consideration of your dual goals of benefitting your new spouse and your family. Leaving assets outright to a surviving spouse gives that spouse control over the disposition of your assets, and there is no guarantee that your spouse ultimately will leave those assets to your children.

Birth, death, or marriage of a beneficiary. Any time there is a major change in a potential beneficiary's life, you should review your estate planning documents. For example, if you are predeceased by a child, you should review how that child's share is going to be distributed. If a beneficiary is married, you might consider a trust instead of outright distribution if keeping family assets separate is a goal.

6. Naming a minor as a direct beneficiary.

A child under age 18 is not permitted to receive property directly from an estate. Instead, a guardian must be appointed to hold the property for the minor. The time, trouble, and expense of a guardianship can be avoided by designating in a Will a trustee or custodian for any minor beneficiaries.

7. Not funding a revocable trust

To avoid the red tape, time, and expense of probate at your death, and to ensure that information about your assets and beneficiaries is not in the public record, many people choose to include a Revocable Trust, or living trust, in their estate plan. In order to get the probate avoidance benefits, a revocable trust must actually be funded during your lifetime. It is important to review your assets and determine which assets need to be re-titled in the name of the revocable trust. Then, you must complete the steps to transfer these assets to the revocable trust during your lifetime. Skipping this step can cost your family and loved ones.

8. Adding a child as a co-owner of an account

Often individuals put a child's name on an account as a way to avoid probate. For example, assume you had a $100,000 brokerage account and decided to add one of your three children as a joint owner so that at your death, the account would not be subject to probate. Sometimes this works, but there are risks: First, when an account is titled in joint names, at your death the joint account will pass to your child who is the joint owner as opposed to being divided equally among all your children.   Second, if your child experiences financial difficulties or legal problems, your child's creditors may be able to recover from your account. Third, if your child does not survive you, the account still will be subject to probate. Finally, when an account is titled in a joint name with someone else, you actually are making a gift of half the value of the account, which may require a gift tax return.

9. Not considering income tax

With the recent changes in the federal estate tax laws, the focus of tax planning for most individuals has shifted from estate tax to income tax. An individual's tax basis in inherited property generally is reset to the value of the property on the date of the decedent's death; unrealized gains or losses existing at the decedent's death are effectively wiped out. Accordingly, a beneficiary can sell property immediately after inheriting it without income tax consequences. Effective estate planning should seek to maximize your and your heirs' basis in an asset. Many people gift assets to children before death without considering income tax, inadvertently doing their family a disservice. For example, if you gift low basis stock to a child, then that child will have to pay capital gains upon selling that stock. If you held that same stock until death, your child then could sell it without paying tax. It is equally important to recognize that a "stepped down basis" could result if the asset has depreciated in value– those assets are ripe for lifetime gifts.

10. Not updating planning for new estate tax laws.

Under the current estate tax laws, most people will not owe estate tax at death. The estate tax exemption amount in 2019 is $11.4 million per person. Contrast that to five years ago, when the exemption amount was $5 million; ten years ago, when it was $3.5 million; and twenty years ago, when it was just $650,000! Anyone who has planning that was completed more than a few years ago (or anyone who is a beneficiary of a family trust established under prior law) will be well served by reevaluating whether those plans and trusts are still tax efficient. Many older plans include automatic estate tax reduction planning that was appropriate at the time but which now is unnecessarily complex, and can actually be detrimental from an income tax perspective. Fixing these issues now can save your family time, headache, and money in the future.

--
© 2024 Ward and Smith, P.A. For further information regarding the issues described above, please contact Virginia S. Carter or Eldridge D. Dodson.

This article is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.

We are your established legal network with offices in Asheville, Greenville, New Bern, Raleigh, and Wilmington, NC.