

Common Estate Planning Misconceptions and Mistakes

This month we are writing the first in a series on the common ways that people unintentionally mess up their estate plans. As we talk to clients we see the same misconceptions arising over and over again. When we teach other professionals around the state we find that they also struggle with these issues, so we thought it would be a good topic for discussion.

Mistake No. 1 – Failure to Understand How Your Assets Will Pass at the Time of your Death.

Most people think their Wills control how their assets are distributed when they die. However, a will only controls property that is subject to probate administration at the owner's death. Therefore, many assets, such as assets held in joint tenancy, or assets for which you have named a beneficiary, are considered non-probate transfers and the distribution of these assets are not going to be controlled by a Will.

For example, let's assume Mark has a Will leaving all of his property to his three grown children. His oldest son lives in town and helps Mark with his bills, so Mark, as a convenience, adds the son as a joint tenant on his home. Mark dies. His oldest son ends up owning the home, with the other two children receiving no part of it. This is because if you own your home in joint tenancy with someone and you die, that asset passes to the surviving joint tenant. The asset will not pass according to the terms of your Will. Additionally, if there is any property passing under the Will, Mark's oldest son will also be entitled to a third of those proceeds. Mark's intention that each child receive a third of his total assets has been lost.

We also see this lopsided result when one adult child is named as a beneficiary under an insurance policy or a retirement plan. It is often assumed that the named beneficiary will share with the other children, but there is no legal obligation for them to do so.

Mistake No. 2 – Attempting to Plan Your Estate Around Specific Assets

Unless there is a strong reason to leave a certain asset to a particular person, it is usually not a good idea to plan around a specific asset. Let's look again at Mark and his three children. Mark wants to treat them all equally and his Will confirms that. Noting that his home, life insurance policy, and savings account are all worth approximately the same amount, Mark decides to leave one asset to each child. He makes his oldest son a joint tenant on his home. He makes his youngest son a beneficiary under his life insurance policy, and he adds his daughter on his savings account. A few years later, Mark decides he needs additional money so he sold his home, cashed out his insurance policy, and placed the proceeds from both in his savings account. When he died, his daughter received the only asset, the savings account, since she was the joint owner.

There were no assets to pass under the Will. By attempting to plan with specific assets, Mark unintentionally disinherited his two sons!

We sometimes see a similar problem even when all the assets are flowing through a Will. When a particular item of property is left to someone, but that item of property is sold before the maker of the Will dies, that specific bequest lapses or becomes void. For example, Mark leaves his home to his oldest son as his full share under his Will. Prior to Mark's death, he sells the home. The specific asset that was to pass to his oldest son is no longer available and the bequest lapses. The son is unintentionally disinherited. Such is the stuff that litigation is made of.

These kinds of problems can be avoided by using a Revocable Living Trust as the centerpiece of your estate plan. Let's look at how this works.

All of Mark's assets would be titled in the name of the trust, or the trust would be named as beneficiary. With all of the assets inside the trust, Mark's instructions to the trustee control how the property is to be distributed. Each child receives the share that Mark intended. If Mark needs to change the distribution plan, he simply has one place he has to go in order to take care of it, rather than having to deal with each piece of property separately.

We hope you find this information helpful. As you know, every situation is unique. Please get advice from a knowledgeable estate-planning attorney to ensure the best outcome for you personally.

Tim J. Larson, JD, PA, has its offices in Wichita, Kansas. Tim J. Larson and Logan M. Brown are members of Wealth Counsel, the Wichita Estate Planning Council, and *e.Planners*, a select group of nationally known and recognized Estate-planning Attorneys.