7 Common Estate Planning Mistakes

Over the last 20 years, I have helped hundreds of families draft their wills, trusts, and other estate planning documents. In the process, I have seen many of them make the same mistakes. Here are seven of the most common ones:

1 I'll do it next month

(also known as procrastination). Many people put off drafting their will or trust. Most of the time, there is a triggering event that makes people come into my office – a cancer diagnosis, the death of a parent, or Alzheimer's/dementia issues confronting a family member. Whatever it is, these triggering events force people into action in order to protect their families. When it comes down to it, none of us know how much time we really have, and I have seen way too many families put off doing the proper planning now only to have a tragedy hit them later (either a death or incapacity) before they have had a chance to get their documents done.

2 A will avoids a probate.

False. A will does not avoid a probate. A will does clarify your wishes for the distribution in your estate, name your personal representative (Arizona's legal term for executor), and appoint the legal guardian for your minor children, but it does not avoid a probate. In Arizona, with some exceptions, if you pass away with assets in your name only worth more than $75,000 ($100,000 for the equity in any real estate), then your estate will have to go through a probate. You may ask – "Then how can I avoid a probate?" Although there are other ways to avoid a probate, establishing a revocable living trust is probably the best way to do so.

3 You don't need a trust unless you are a multi-millionaire.

There are lots of reasons why a trust may make sense for you and your family. Although a revocable living trust can help families with larger estates avoid estate taxes, there are several other reasons why a trust may make sense for your family. First, a properly funded trust (more on this topic below) can help you and your family avoid a probate. Second, a trust avoids a conservatorship (a court proceeding to appoint someone to manage the assets of an incapacitated person) and generally works better than a financial power of attorney in the event of an incapacity. Third, a trust gives you more flexibility in determining how distributions will be paid out to your children or other beneficiaries. Fourth, a trust helps to ensure that there is someone managing your beneficiaries' inheritance if they are minors,

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have capacity issues, or have drug, alcohol, or mental health issues. Fifth, a properly drafted trust can provide creditor protection for your beneficiaries. Finally, a trust can provide a framework to manage your business or other assets over time in the event of your death or incapacity.

4 Holding assets as joint tenants avoids probate and saves taxes.

For a husband and wife, it may make sense to own property in a way that allows your assets to pass to the surviving spouse by operation of law. In general, if you title assets as joint tenants with right of survivorship, these assets will pass to your spouse by operation of law when you pass away. However, for married couples, it is better to title assets as "community property with right of survivorship" rather than as "joint tenants with right of survivorship". In this way, married couples will not only avoid probate at the first spouse's death, but they will also get a "step-up in basis" for the surviving spouse's half of that interest in addition to the deceased spouse's half, thereby saving on future capital gains taxes. However, I do not recommend that a parent name his or her child as a joint tenant on any asset in order to avoid probate. Although naming the child does avoid a probate for this asset, there are significant problems with this approach. First, naming a child as a joint tenant means that these assets could be subject to collection by your child's creditors if your child ever has financial difficulties (such as a divorce, lawsuit, or bankruptcy). Second, if you are counting on your child to divide up the funds in that bank account or to sell the home and divide up the proceeds among his or her siblings, think again. After your death, the surviving joint tenant is the legal owner of these assets, and you are relying on him or her to do the "right thing" in dividing them up according to your wishes. I have personally seen this type of planning go awry several times over the course of my career. As a result, I do not recommend it.

5 If I'm incapacitated, a power of attorney is all I need.

Not all powers of attorney are the same. Some powers of attorney have a financial power of attorney, a medical power of attorney, and a mental health care power of attorney included in them. I generally recommend that clients separate these three powers of attorney into different documents in order to avoid confusion. Generally, a durable general power of attorney gives your agent the right to make financial decisions for you if you are incapacitated. A medical power of attorney gives your agent the right to make medical decisions for you if you cannot make them on your own. Finally, a mental health care power of attorney gives your agent the right to make mental health care decisions for you in similar situations. You would be amazed, however, at the number of clients who think that their financial power of attorney covers health decision making and mental health care decision making. As a result, I recommend that clients have all three documents prepared in order to make sure that their financial needs, their health care needs, and their mental health care needs can be taken care of if they ever become incapacitated. Finally, in most cases, a trust will work better than a financial power of attorney if you become incapacitated.

6 Once my trust is signed, no other work is required.

I often see clients pay good money to have a revocable living trust drafted and then never "fund" their trust. By "fund" it, I mean re-titling their assets into their trust by a deed, assignment, or other title-changing document. This is critical for making sure that your revocable living trust will work properly. You see, the trust only governs the assets that are titled in it. Thus, after you have signed your trust, it is important that you title all of your real estate, bank accounts, business interests, certain investment accounts, vehicles, and personal property into your trust. Generally speaking, I also recommend that you name the trust as the primary beneficiary of any life insurance. Although each family is different, in most cases, I recommend naming your spouse (rather than the revocable living trust) as the primary beneficiary of any 401(k), IRA, and other retirement assets, and your adult children as the contingent beneficiaries.

7 Beneficiary designations are no big deal.

For most clients, their 401(k) and IRA assets make up a significant portion of their estate. Yet, many times the same clients who spend hours reviewing their trust and other estate planning documents hardly think at all about the beneficiary designations for these assets. Because the beneficiary designations for these assets govern how a significant portion of their estate will be transferred after they die and because there are income tax issues related to these assets in addition to simply avoiding a probate, it is extremely important that these assets are discussed and that the proper beneficiary designations are included on these forms, so that your wishes can be carried out. I have personally seen several cases where there is no beneficiary or where the estate of the deceased person was inadvertently named as the beneficiary. In these situations, this non-probate asset suddenly becomes a probate asset if it is over $75,000. Especially if the clients have established a revocable living trust and transferred assets into that trust, this is exactly what they are trying to avoid.

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I have helped hundreds of families just like yours handle a wide variety of estate planning, business planning, probate, trust administration, and guardianship/conservatorship issues. When families are not getting along, we can also help you handle any disputes and litigation related to wills, trusts, businesses, guardianships, and conservatorships as well.

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