



Friday, February 15, 2019

Top Five Estate Planning Mistakes

David M. Byrne, Attorney at Law

David Byrne is an attorney based in Fremont specializing in estate planning, small business, probate and trust administration, and Medicaid nursing home planning. He also serves on Fremont Area Community Foundation's Professional Advisory Board.

The following are the top 5 estate planning mistakes that I see in my practice.

1. No prepared estate plan. It is very important for you to have a will or a will and a trust prepared for you. Your estate plan should name a guardian for minor children, name who will manage your assets and money for your child(ren), state the age that your child(ren) will receive their share of the assets, designate who receives your property, and instruct how and when your assets are to be distributed. If you do not have a last will and testament or a living trust, your estate will be distributed pursuant to the Michigan Compiled Laws passed by our state legislature, which is unlikely to be the same as you would have chosen.

If, upon your death, you have minor children and do not have a valid will, the probate court will need to appoint a guardian for the care of the minor child. If you do not have a valid will and/or trust, the probate court will also need to appoint a conservator to manage the assets for each of your minor children. The court may not pick the person you would have chosen, your child will be in limbo until the court makes this appointment, the guardian and conservator will need to file annual reports with the court, and the conservator will need to obtain approval from the court to spend money for the child. The balance of the child's share will be distributed to him or her upon the child's 18th birthday, regardless of whether the child is financially responsible or not.

An estate plan should include the preparation of a durable power of attorney and designation of patient advocate, which names someone to act for you should you become unable to make your own business or medical decisions. Properly granting those powers to someone will avoid the need to petition the probate court for the appointment of a conservator or guardian. The attorney fees and court costs for conservatorship proceedings are much more expensive than the attorney fees for the drafting and preparation of a durable power of attorney and designation of patient advocate. A conservator, even if it is the spouse, is required to file annual accountings

with the probate court and typically will be required to obtain permission from the court before using your money to meet your needs.

2. Estate plan was not drafted by an experienced estate planning attorney. The best way to insure your desires regarding your minor children and property are met is to work with an attorney who is experienced, trained, and specialized in estate planning. Many forms/kits are confusing and not completed properly. If the provisions in your will or trust are not clear, your desires may not be effectuated. Additionally, your estate may incur extra attorney fees, delays, and may require a court hearing to interpret the document. An experienced attorney specializing in estate planning will assure that the documents are executed properly so that the will or trust will be honored as your set of instructions.

3. Improper use of joint tenants and/or owners. There are many reasons NOT to name a child as a joint tenant on your accounts or real estate. If a child is listed on an account and the child gets in a car accident, is sued, divorced, or owes money, then the creditors and/or former spouse of that child may be entitled to all of your money in that account. If not done properly, adding a child as a joint owner on real estate could make it difficult to sell that real property. If a child who is a joint tenant predeceases you, you may inadvertently disinherit his or her children. A child named as a joint account owner could misuse, misappropriate, or “borrow” your money either during your life or after.

If you want a child to be able to help you with your financial affairs, a properly drafted estate plan can allow him or her to do so without the negative aspects of adding the child to your accounts.

4. Beneficiary designations are not coordinated with estate plan. It is important for the beneficiary designations on your life insurance, retirement accounts, transfer on death (TOD), or payable on death (POD) accounts to be coordinated with your estate plan. If not properly coordinated, your assets may not be distributed as you desire and/or your personal representative/trustee may experience difficulties in administering your estate/trust after your death. For example, if you have a last will and testament, it is important for your accounts to be distributed to your probate estate after your death (or after the second of you and any spouse to die). If you have a living trust, your non-retirement assets should be owned by or transferred to your trust upon your death.

5. Failure to review and update estate plan. Your circumstances and family continue to change and so should your estate plan. Children may have been born or adopted. You may have gotten married, divorced, or remarried. Your new spouse may have his or her own children. The people you desire to act as the guardians for your children may have

changed as your children grow and relationships change. Your children may now be adults or have moved away. Those you have named in your estate planning documents may no longer be able to so act. You may now desire others to act on your behalf or desire for someone else to receive your assets upon your death. To avoid this mistake, please pull out your estate plan documents and read them again to determine if changes are necessary. If changes are necessary, call your attorney and get your documents changed right away to make sure your current desires will be known and put into effect.

The good news is that you can correct each of the above mistakes while you are alive and competent by contacting an attorney specializing in estate planning.