Seven Estate Planning Mistakes

Once upon a time (particularly before the dramatic changes in the federal estate tax law enacted in the 2001 Tax Act) most people thought of estate planning solely in terms of avoiding the estate tax. Now that the estate tax has a $2.0 million threshold, with it changing to $3.5 million on January 1, 2009, for most people the real action in estate planning involves non-tax issues. Since every person's situation depends upon individual facts it is difficult to write a column telling you what to do. It's much easier to write about you should *not* do when planning for the passage of property in the event of death. Here are seven common estate planning mistakes.

Mistake 1: Not having a will. A last will and testament is a set of instructions. Just as important, it empowers certain people to carry out designated tasks: the executor, guardian for minor children and (if applicable) trustee. It is usually reported that 70% of American adults do not have wills. In Georgia a simple will can make it easier for the executor to wind up the affairs of a decedent because certain probate court filings (especially those which give probate a bad name) can be waived and "statutory powers" can be granted to the executor by inclusion of the necessary language in the document. An executor with statutory powers can conduct what is generically called "independent administration" with very few filings made with the Probate Court after the initial petition to probate the will. Instead the executor accounts for his or her actions in annual reports to the estate's beneficiaries.

Mistake 2: Assuming you don't need an estate plan. Your economic affairs can be much more complicated than you think — even after your death. Coordinating them with your will and other legal documents is the process of estate planning. Your real estate, financial assets, life insurance, retirement accounts and tangible personal property all need to be addressed. Some assets, like personal property, should pass through your will. Some require beneficiary designations to minimize estate taxes. Some beneficiary designations may also minimize income taxes.

Mistake 3: Not understanding the estate tax system. Each person has a lifetime credit against estate and gift taxes. As of January 1, 2006 it protects $2 million and $3.5 million in 2009. Gifts over $12,000 per recipient per year trigger the requirement to file a gift tax return and use some of that lifetime credit. If a family's wealth (including 401k's, IRA's and life insurance) is somewhere between $2 million to $4 million, then some estate tax planning may be appropriate because when the estate tax hits, it's big. The initial estate tax rate is 46%.

Mistake 4: Ignoring the issues present in a blended family. The term "blended family" has been coined to describe the family unit where the husband and wife have children who might be from as many as three marriages: his previous marriage, her previous marriage and their marriage. If the will of the first spouse to die leaves everything to the surviving spouse, then there is a strong possibility of children from an earlier marriage being disinherited. The surviving spouse can re-marry and have a new spouse and even more children who replace the step-children as the object of his or her affection and beneficence.

Mistake 5: Jointly titling all or most assets. Joint assets almost always have a right of survivorship that transfers ownership at death to the joint owner "by operation of law." This bypasses the will. Since probate of a will in Georgia is usually "pain-free," instead of being an advantage survivorship can

interfere with the estate plan embodied in the will and/or revocable trust. This is especially so when the assets are jointly owned with adult offspring.

Mistake 6: Naming minor children as life insurance beneficiaries. This is a subtle mistake. A natural reaction when completing insurance forms is to equate who you want to benefit with who should be beneficiaries. Thus children are often named as secondary beneficiaries, to receive the death benefit if the spouse (as primary beneficiary) is not surviving. If the children are minors at that death, the insurance company cannot pay the policy proceeds to a trust set up in the will of the deceased parent. By law the company must instead pay to a conservatorship established by order of the probate court. The estate of the insured that has a well-drafted will, or even a testamentary trust, is usually the better choice as secondary beneficiary.

Mistake 7: Failing to update your estate plan. Marriage and birth or adoption of a child are events that may render a will obsolete, unless the event is specifically anticipated in the document. A person's financial situation changes over the years. Who to use for certain roles can change. I tell people that getting five to ten years use out of their wills should be considered normal. Asking for more could mean trouble. A periodic review allows one to conduct "a reality check," with adjustments to account for changes in the law or situation.

Having no written estate plan leaves one with the standard estate plan written by the General Assembly in the laws of inheritance. Trust me. You probably won't like it.

Patrick J. Gibbs practices law in Roswell with a concentration on Wills, Trusts and Estates. This article is intended to be educational. Legal advice should be obtained as to individual needs before taking any action.