OC ESTATE & ELDER LAW
ATTORNEYS

COMMON ESTATE PLANNING MISTAKES: HOW TO AVOID THEM

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Hello! We are Fernando Orrego and Natasha Chipiga, attorneys-at-law, and founding partners of OC Estate & Elder Law.

While creating your Estate Plan is important, creating one that avoids mistakes is essential! After all, you are putting in the time to create a plan that protects your loved ones, not end up with a plan full of errors that causes them unnecessary stress.

We have compiled a list of the most common estate planning mistakes that we help our clients avoid. Whether you are creating your first plan or updating an existing one, understanding potential pitfalls will help you craft a flawless plan. Working together, we will help achieve your goals. We are trusted lawyers providing you with peace of mind.

20 Most Common Estate Planning Mistakes

(And how to avoid them)

1 Failing to Plan (a/k/a Doing Nothing)

The biggest mistake when it comes to your estate plan is simply not taking the time to do it. It is something too many of us put off – no one likes thinking about their death and what will happen to their family after they are gone. Creating your estate plan makes you face your own mortality and make those difficult decisions. Decisions such as how will I split my money between my loved ones, who will care for my underage children, and who do I trust to carry out my last wishes? Unfortunately, if you do not make those decisions through validly executed legal documents such as a Last Will and Testament ("Will") or a Trust, Florida's intestacy laws will make those decisions for you.

2 Waiting Until You are "Old" to Start Planning

One of the biggest misconceptions about estate planning is that it is something you only need to worry about when you are older. In reality, it is something you need to put on your "to-do-list" as soon as possible. No one has a crystal ball notifying them when their time is up. Regardless of your youth and good health, unforeseen accidents or sudden illnesses can occur. Once an unforeseen disaster strikes, it is often too late to create your estate plan. This is especially the case for parents with young children – it is imperative to appoint a guardian for your children (through your Will) in case both parents pass away, otherwise the court will decide who raises your children.

3 Naming Just One Beneficiary on Your Accounts

You should always have more than one beneficiary designated for any of your assets, such as your financial accounts, life insurance policy, brokerage accounts, etc. In the event that a beneficiary passes away before you do, you will want to have a "contingent beneficiary." This is a back-up plan in case your main beneficiary fails to survive you.

4 Trying To Leave Property to a Minor Child or Grandchild (under 18 years old)

It is a colossal mistake to designate minor children as beneficiaries on any accounts. For example, no insurance company will knowingly pay $500,000 on a life insurance policy to a twelve-year-old child. They will only pay that death benefit through a court-appointed guardianship process for the benefit of the minor (which is not something we recommend).

In Florida, if a minor is to receive an inheritance with an aggregate amount of $15,000 or more, then guardianship must be established for the minor through the court process known as "guardianship". The guardianship of minors is a legal process designed to protect the well-being and interests of children under the age of 18. The cost of your family members starting such a guardianship is very substantial as it entails court fees and legal fees – all of which eat away at the inheritance the minor child is set to receive.

The only way to avoid such situations is by establishing a Trust that will dictate how you wish your children to inherit your assets. This will also involve selecting a trusted individual (called a Trustee) to monitor your children's inheritance until they can legally receive it.

An inheritance left in Trust for a child will specifically indicate who you select as the Trustee to manage the funds while the child is a minor (and how the funds should be spent for the benefit of the child). It can also indicate the age at which the funds can be distributed (either the full amount or partial distributions) to your now adult child and when the child can legally manage their own inheritance.

5 Putting Your Child's Name on the Deed to Your Home

Adding your adult child's name to the deed on your home may have unintended and potentially adverse consequences. While it may seem like a simple way to transfer ownership, avoid creditors, or avoid probate, this kind of "do-it-yourself" solution often backfires.

By listing your child's name on the deed, you are making them part-owner of your home, and ultimately, you lose control of your asset. Firstly, adding your child's name exposes your property to their financial and legal issues, such as creditors, lawsuits, or divorce proceedings. Secondly, gifting your child a share in your property could trigger tax implications and may affect your future eligibility for certain government benefits, such as Medicaid. Thirdly, you can only sell your home if your child is willing to sign off on the closing documents. Finally...you jeopardize the beautiful homestead exemption that Florida offers if the county sees that another individual has now become part-owner of your property.

There are many ways to transfer your home to your children that do not involve adding their name onto the title. A more suitable alternative is to establish a well-structured estate plan, involving tools like a Living Trust or a life estate, which can protect your interests while ensuring a smooth transfer of assets to your child upon your passing.

6 Making Your Children Joint Owners of Your Assets

Another estate planning pitfall is to name your adult children as joint owners of your assets, as this grants their creditors access to your money. Specifically, if your children go through a divorce, get sued, do not pay their bills, or acquire creditors – these creditors can now pursue any asset that lists your child as an owner. For example, if you added your son to your bank account and your son is now getting divorced, your bank account is now considered an asset in those divorce proceedings.

7 Failure to Protect a Beneficiary with Special Needs That Receives Government Benefits

If you have a child or family member with special needs, leaving them an outright inheritance may do more harm than good. Leaving behind a lump sum of money or outright inheritance may disqualify your loved one from receiving needs-based public assistance and force them to spend their entire inheritance within a few years on medical needs. In these cases, you should consider special needs planning, which is simply estate planning for individuals with special needs. This is often accomplished through a Special Needs Trust which allows funds to be set aside to care for a disabled loved one while preserving crucial government benefits like Medicaid or Supplemental Security Income (SSI). These types of Trusts come to life upon the death of the second parent and are much more effective than simply leaving behind a lump sum of money.

8 Trying To "Do It Yourself"

Drafting your own Will using online websites and software that offer templates, can be very tempting due to the considerably lower costs compared to hiring an attorney, along with the added convenience it offers. BUT BUYER BEWARE! Individuals frequently overlook the crucial intricate details and legal requirements necessary to ensure the Will is valid. If you answer a question incorrectly or do not execute the Will according to the formalities of Florida law, the Will can be declared invalid by a Judge, and your estate will be distributed according to Florida law (and not the terms written in your Will). The worst part is that the mistake will only be uncovered after you are no longer here, when it is too late to correct it. Under Florida law, a Last Will and Testament:

Must be in writing

Florida probate courts do not allow oral declarations (called nuncupative Wills or deathbed Wills) and rarely accept handwritten Wills (holographic Wills). Every Will must be in writing and the testator (person making the Will) must sign the Will at the end (along with other legal formalities such as two witness signatures).

Must be made by a competent person

The person making the Will must be at least 18 years old and have testamentary capacity (the mental and legal ability to understand the nature and extent of their property, and the practical effect of the document they are signing) at the time of creating the Will.

Must be signed by the testator

A testator must sign the Will. They can make any mark, symbol, letter, or initials if they intend for that mark to serve as their signature.

Must be signed by and in the presence of at least two witnesses

Witnesses must sign the Will in the presence of the testator, and in the presence of each other. It is generally advisable to avoid having individuals named in the Will serve as witnesses, as this can create its own problem in the realm of undue influence.

Can be amended or revoked

A Will may be revoked or amended at any time if the testator follows the appropriate legal procedures, such as creating a new Will or codicil.

Using an attorney

Although it is not required to use an attorney to create a Will, we have seen multiple problems emerge from online or do-it-yourself Wills. Opting for legal guidance can ensure a clear understanding of how your Will works, spotting any potential pitfalls, and lessen conflicting outside beneficiary designations or potential Will contests. Likewise, an attorney can explain the probate process and how best to avoid probate through a Revocable Living Trust.

9 Thinking A Will Alone Is Enough

Many individuals mistakenly believe that a Will is sufficient. While a Will is a crucial component of almost every adult's estate plan, as it ensures proper distribution of your assets upon your death, relying solely on a Will comes with some serious limitations, including the following:

Wills still require your family to go through the court process known as probate, which is lengthy and expensive, completely open to the public; thereby allowing potential creditors to come forward and submit their claims against the estate. The Personal Representative (as nominated in the Will) of the estate must identify and locate various important documents to submit to the probate court such as a death certificate, Last Will and Testament, real estate deeds, financial information, funeral bills, etc.

In cases where an asset has a beneficiary designation or was jointly owned by the decedent and someone else, the asset transfers directly to the designated beneficiary or joint owner, effectively bypassing the instructions outlined in the Will.

Considering these factors, having a Will alone forces your family to go through probate court and omits essential protections for your assets. Fortunately, all the mentioned concerns can be effectively addressed by incorporating a Revocable Trust into your estate plan.

10 Beneficiary Conflicts and Mistakes

The beneficiaries you designate on your financial accounts require careful attention. If your estate planning documents, such as your Will or Trust, conflict with the beneficiaries listed on your accounts, the assets transfer directly to the designated beneficiary, effectively bypassing the instructions outlined in your Will or Trust. Such conflicts often lead to probate litigation amongst family members. Attorneys can spot these pitfalls and offer advice to make sure that beneficiary designations do not conflict with the beneficiaries you list in your Will or Trust.

11 Creating a Trust and Not Properly Funding it

A Trust is a valuable estate planning tool often used in place of a traditional Will. The Trust is created, and then certain assets are transferred into the Trust (called "funding your Trust"). Examples of funding your Trust are transferring your home into your Trust or listing the Trust as the primary beneficiary of your financial accounts. Yet, the Trust is futile unless it is actually funded. Creating a Trust is half the battle; properly funding your Trust is the second crucial step.

12 Forgetting about Power of Attorney or Healthcare Representatives

A comprehensive estate plan consists of more than just a Will or a Trust. It should also include a Durable Power of Attorney and Health Care Surrogate\Living Will. Naming a trusted individual as your Power of Attorney (for financial decisions) and a trusted individual as your Healthcare Surrogate (for medical decisions) is important, as these are the people who would step in to make decisions should you become incapacitated. Note that these documents are only valid during your lifetime and expire upon your death.

13 Forgetting about Final Arrangements

Incorporating funeral arrangements (such as burial, cremation, religious preferences, etc.) in your estate plan ensures your final wishes are honored and provides clear instructions to those planning your funeral service. This thoughtful preparation allows for a smooth and respectful transition, offering peace of mind to both you and your family.

14 Forgetting about Your Digital Assets

Digital assets refer to any type of content, data, or information that you keep in an electronic format. This includes your email account, social media accounts like Facebook, Twitter, Instagram, LinkedIn, etc., online access to your bank accounts, or photos and contacts in cloud storage, like Google Drive, Dropbox, or iCloud. The concept of putting digital assets into your estate plan is relatively new but getting much attention. Adding these assets into your estate plan ensures that your loved ones can access your accounts after you pass away, preserve valuable information, and safeguard memories.

15 Forgetting about Charities that are Close to Your Heart

There are many reasons that you may want to leave something to a charity that is important to you. Some people say their loved ones are already provided for financially, or that they don't have any close heirs that survived them, or simply want to continue providing for a beloved charity after they pass away. There are multiple ways you can leave parts of your estate to charity, such as leaving a lump sum of money or naming a charity as a beneficiary of an investment account or life insurance policy.

16 Forgetting to Let Your Family Know Where You Keep Your Estate Plan

Having the best estate plan in the world will not accomplish anything if your family cannot find it. Do not keep your estate planning document in a safe at home, a safe deposit box at the bank, or in a place in your home that can easily flood. Additionally, let your trusted friends or family members know where the estate plan is located in your home. Your estate planning attorney should also keep a digital (scanned copy) at their office so that it can be easily emailed or printed to loved ones (with your permission) should they need it.

17 Forgetting to Pre-Plan for Nursing Home Care

It is a good idea for some people to pre-plan for nursing home care while they are doing their estate planning. Proactive Medicaid Planning can be an extremely useful tool for older individuals who may be faced with the need for nursing home care. Nursing homes are tremendously expensive and can eat up accumulated assets quickly. For the spouse remaining at home, this often creates financial hardship. There are numerous legal and ethical methods allowed in Florida that will transfer your assets so that you may qualify for Medicaid later in life. The most common method is by creating a Medicaid Asset Protection Trust. These types of Trusts are highly complex. Our elder care attorneys will guide you through the process and advise what is best for your particular situation.

18 Forgetting to Update Your Estate Plan after the Big Four Life Events

Regrettably, estate planning cannot be approached as a set-it-and-forget it deal. You may need to update it to make sure it reflects any life changes, especially the "Big Four." These big four changes are marriage, divorce, birth, or death of a loved one. Additionally, it is important to review your estate plan every 3-5 years to make sure the important actors in your plan are still applicable (even if no major life events have occurred).

19 Failing to Consider Your Business

A family business or a business that you wish to include in your estate requires careful management. There are partners, bills, rent, payroll, and taxes to consider in addition to the normal business operations. The probate process can delay business decisions and leave your company in limbo for months. Not only that, but the business could be considered part of the estate if the right steps are not taken.

20 Not Understanding Your Plan

Even the savviest of clients may become passive when doing estate planning. Even though our attorneys explain the important aspects of your estate plan in great detail, it is equally crucial that you understand the explanation, and are not afraid to ask questions. Failing to fully understand how your legal documents work results in undesirable consequences. Examples include assets inadvertently excluded from the plan, beneficiary designations conflicting with your estate plan, failure to speak to your accountant about potential tax implications, and last but not least...failure to communicate the aspects of your estate plan to the important actors in your life. For example, if you nominate someone to be the guardian of your children in case of your sudden death, that person should be notified ahead of time. Our firm is here to guide you through every step of the estate planning process. We encourage your questions to ensure you get the full benefit of using our law firm, as well as peace of mind for you and your family.

Bonus Round: Choosing the Wrong Trustee

Deciding who should serve as the trustee of your estate is one of the most difficult choices to make when creating an estate plan (after choosing a guardian for your children). A trustee will act as the legal owner and manager of the Trust's assets and is responsible for ensuring the terms you wrote in your trust are carried out. Not everyone is qualified to assume such a role. The trustee must be reliable, savvy, and someone you trust. Some of the trustee's duties will include managing your assets, record keeping, selling off your real estate, dealing with banks, paying off certain debts, and obtaining a Tax ID for the Trust. The person you select to act as your trustee should be a trusted friend, family member, or other professional such as an attorney, accountant or other trusted advisor. When deciding which trustee is right for you, consider family dynamics, financial responsibility and, in the event of looking outside of your own family, administrative and management experience or skills.

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Our Mission is Your Peace of Mind

How can we help?

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