

Six Estate Planning Assumptions to Avoid

Office of the Staff Judge Advocate, Aberdeen Proving Ground

1. ***Assuming you don't need a will, everything will go to your spouse.*** Estate distribution is dictated by state law which doesn't always provide that a spouse will receive the entire estate. Most states provide rules for people that die intestate (without a will). Most determine that the estate will be divided between the spouse minor surviving children.

Advice: In order to have your wishes for estate distribution followed, obtain a fully executed will.

2. ***Assuming the will distributes all of assets upon death.*** An estate consists of probated assets (property titled solely in an individual's name) and non-probated assets (property titled jointly with right of survivorship or property that has a transfer on death (T.O.D.) or pay on death (P.O.D.) beneficiary). Probated assets are distributed according to the provisions of the will, while non-probated assets are distributed "by-law" to the survivor or named T.O.D. or P.O.D. beneficiary.

Advice: List all non-probated assets to determine whether or not they pass to the same beneficiaries named in your will. If they do not, and you would like them to, you need to change your beneficiary designation (s) for your non-probated assets.

3. ***Assuming that a will is invalid because it's old.*** Estate documents don't expire. An old will is just as good as the day it was signed and does not lose its legal validity until it is revoked by being destroyed (tearing it up, burning it, putting a line through it, etc.) or is superseded with a new will.

Advice: Review your will at least once a year to ensure your estate plan is up to date.

4. ***Assuming that leaving assets to a family member will take care of minor children.*** This is a dangerous assumption. Once an asset is given to someone it belongs to them, and they could decide to use the asset to benefit themselves instead of your minor children. In addition, giving the estate to the family member has the following pit falls: 1) the family member could go on a luxury vacation, 2) the asset would be subject to the family member's creditors (like Visa, American Express, etc. 3) if the family member choose to transfers the asset back to the children the distribution would be subject to the IRS gift tax rules 4) if the family member dies, the asset passes to the person(s) named in the family member's will or by state law (meaning if the family member is married, the property would likely pass to the family member's spouse and the minor children).

Advice: To avoid this issue, create a testamentary trust in your will and appoint the family member as trustee. This ensures assets legally belong to the children.

5. Assuming that the spouse will properly care for children from a prior relationship. There is danger in assuming that your spouse will follow your wishes. You love your current spouse and would never think of divorcing them. They have even promised to support your children if something were to happen to you. However, there are no guarantees that your spouse will actually support their stepchildren and unless it's contained in the will, there is nothing legally requiring them to do so. Also, if the spouse remarries, they could leave all of their assets to the new spouse.

Advice: Create a pre-residuary trust in your will naming your children as beneficiaries and fund it with a portion of your life insurance. This will ensure that your children receive a portion of your estate regardless of the surviving spouse's actions after your death.

6. Assuming you can disinherit your spouse by cutting them out of the will. Most states don't allow a spouse to completely disinherit their spouse unless there is a prenuptial or postnuptial agreement. If no agreement exists, one would need to contact an attorney to explore available options that will help ensure the estate is distributed according to your wishes. **Advice:** Contact an attorney to see if signing marital separation agreement would benefit you.

There are a lot of assumptions floating around when it comes to estate planning which have the potential to cause legal issue for your family after your death. If you are an eligible client in need of estate planning services, please contact the Client Services Division of the Office of the Staff Judge Advocate at 410-278-1583 or visit Building 4305, 3rd Floor, Room 317.