

## **Top Ten Mistakes in Estate Planning**

By: Kimberly H. Whitley, Esq.

### **1. Not adding beneficiary designations to assets, including bank accounts.**

Assets which pass by beneficiary designation in North Carolina are not subject to probate or probate tax. Even bank accounts can bear a beneficiary designation. Adding a designation to an account avoids probate and probate tax. Make sure contingent beneficiary designations are updated as well.

### **2. Naming the estate as the beneficiary of any tax deferred funds.**

Retirement accounts are subject to strict payout provisions if the estate is named as a beneficiary. It can be a tax disaster. Don't do it.

### **3. Putting the names of both spouses on a vehicle.**

Vehicles do not pass by right of survivorship. If both spouses are on the name of the vehicle, the surviving spouse may have to administer an estate when he or she would not otherwise have had to do so in order to pass the one-half interest in the vehicle.

### **4. Naming a minor as a beneficiary of an account or in the Will without providing Trust or custodial provisions.**

If a minor is named as beneficiary in a Will or on an account without additional Trust or custodial language, a guardian must be appointed to handle the funds of the minor.

### **5. Establishing a Revocable Trust and failing to fund it.**

A Revocable Trust will only pass assets which are titled in the name of the Trust. If assets are not titled in the name of the Trust, they may pass through the estate and be subjected to probate tax in order to pour over into the Trust. Essentially, the individual has expended funds on a transfer mechanism which does not work as intended.

### **6. Establishing a Revocable Trust when it is not necessary.**

In North Carolina, many assets can bypass probate simply by adding a beneficiary designation. North Carolina does not subject real estate located in North Carolina to probate tax. Therefore, in most cases, a Revocable Trust is not necessary.

## **7. Owning out of state property in individual names.**

If out of state property is owned by individuals without being transferred to a trust or to a limited liability company, then a full estate administration may be necessary in the other state in order to pass title to the property. Establishing a simple trust or an LLC to hold the real estate avoids these issues.

## **8. Failing to execute a Prenuptial Agreement or Waiver of Inheritance Rights in a second marriage.**

Even though assets which are acquired before the marriage or which are acquired by inheritance or gift during the marriage are not generally subject to being split in an Equitable distribution action, this rule does not apply at death. Therefore, in the absence of a Prenuptial or Postnuptial Agreement or Waiver of Right to Inherit, the surviving spouse can make a claim against the estate of the deceased spouse in an amount up to 50% of all of the assets.

## **9. Failing to execute a Durable Power of Attorney.**

Often, spouses assume that the other spouse can make financial decisions for them in the event that they become incapacitated. To the contrary, if an individual becomes incapacitated, no one can access any assets owned by that individual except jointly owned bank accounts or jointly owned liquid assets. Real estate and vehicles cannot be accessed or managed. Neither the spouse nor the child can deal with insurance companies, retirement plans, or any other assets. The Durable Power of Attorney solves these problems by avoiding the need for a guardianship proceeding.

## **10. Executing a Durable Power of Attorney and not recording it.**

North Carolina law provides that, once an individual becomes mentally incapacitated, the Durable Power of Attorney is no longer valid until it is recorded in the county of residence of the individual who signed it. The Register of Deeds will not record a photocopy. Therefore, failing to record the Durable Power of Attorney can have disastrous consequences.

*Kimberly H. Whitley is an attorney at Patrick, Harper & Dixon, LLP in Hickory, North Carolina. She is a board certified specialist in the areas of estate planning and elder law. Kimberly may be contacted at 828-322-7741 or via email at [kwhitley@phd-law.com](mailto:kwhitley@phd-law.com). Patrick, Harper & Dixon is Hickory's oldest and largest full-service law firm.*