Estate Planning Mistakes and Misconceptions

by Attorney Michael Hooker

Here are some common pitfalls and misconceptions about our laws that travel by word of mouth across backyard fences, across dining booths at the Blue Bonnet Diner and at church socials.

1) "I can protect my money from the nursing home or state because the IRS allows an elder to transfer $13,000 and have that be tax exempt, without having to file a gift tax return". Wrong. This is an inheritance tax minimization strategy, not a Medicaid strategy. The threshold for federal inheritance taxes is $3,500,000. So how many of us really need to make annual $13,000 gifts? Certainly not Joe Middleclass. More importantly, IRS rules and nursing home Medicaid rules are mutually exclusive. Many of you are familiar with the so-called 5year look back period which makes an elder ineligible for Medicaid if he or she is placed in a skilled nursing facility within five years of a gift (such as transferring a deed). I have recently lost two Medicaid appeals where the children said "but the IRS lets us make gifts of $13,000 per year". Medicaid doesn't care. That, according to them is an inapplicable IRS rule. Apples vs. Oranges.

2) Adding a child's name to a bank account protects your assets from "the state" or "the nursing home". Wrong. You need to get the account completely out of your name. Many of my clients are understandably leery of such a dramatic move.

3) Revocable Trusts protects assets. Wrong. Only Irrevocable Trusts do, and in that instance only if the transfer to the Trust happened at least 5 years ago. Irrevocable Trusts are far more complicated and dramatic.

4) Adding a child's name to the house is the safest and cheapest way to avoid probate. Wrong. The safest way is to transfer what is known as the "future interest" to the child while reserving a life estate. A retained life estate is the ability to live there for the balance of your life without exposure to children's debts, divorce, bankruptcy etc.

5) It is true that joint assets pass to the surviving spouse outside probate. What about a very old life insurance policy taken out pre marriage which names the policy holder's "estate" or in some cases, the decedent's parents as beneficiaries. Will that also avoid probate? No. Make sure your beneficiary designations are current.

6) In an effort to be fair to all your children, it is advisable to have all their names added to a deed and or named as Power of Attorney or Executor. Wrong. This simply makes things more cumbersome and complicated. I once had a client who wanted their 8 kids' names on the deed. I replied, "Are you crazy?" If you want to do that, create a Revocable trust with one kid as Trustee and the others as beneficiaries. On the POA and Will, name one child for the task with backup alternates in the event the first named POA or Executor dies or can no longer handle the task of managing the elder's funds.

7) Money held in 529 b college plans for grandchildren are protected from nursing home costs. Wrong. If you want to fund their college gift money out of your name now and get the 5 year clock ticking.

8) A Health Care Proxy allows me to manage my relatives' finances. Wrong. That is what a Power of Attorney does.

9) A Power of Attorney allows the relative to handle the elder's money even after death. Wrong. The POA's authority stops at death.

10) "I can handle my aunt's funds while she is alive because I'm the executor." Wrong. An executor handles post mortem affairs.

11) "My aunt has early dementia I guess I need to pursue guardianship and Conservatorship." Wrong. You should first have the physician determine if the elder has retained enough cognitive ability to name a trusted family member as POA. It is cognitively easier for the elder to understand that concept, to delegate authority than it is to actually handle their own finances.

Attorney Michael Hooker, Elder Law | 25 Main St, Suite 439 | Northampton, MA 01060
T 413-582-0200 | F 413-582-9006