Seven Common Gaffes in Estate Planning and What to Do Instead

Joanna C. Feldman, Esq.
Partner
Maker, Fragale & Di Costanzo, LLP

Northern Westchester Office
2074 Crompond Road
Yorktown Heights, New York 10598
(914) 245-2440

Southern Westchester Office
350 Theodore Fremd Avenue
Rye, New York 10580
(914) 925-1010

jcf@mfd-law.com
www.plantodayfortomorrow.com

Thursday, October 8, 2026

Senior Law Day – Westchester County Center

What Is Estate Planning and to Whom to Turn for Help

- "Estate Planning" involves both life *and* death
  - Most common documents:
    - Power of Attorney – allows someone else to manage property and financial matters while alive
    - Health Care Proxy – allows someone else to make health care decisions while alive (if unable to make them)
    - Last Will and Testament ("Will")
    - Beneficiary Designations
    - Trust(s) – revocable and/or irrevocable
- Seek legal advice, and choose legal professionals wisely:
  - Estate Planning attorneys are generally concerned with what happens *after death*
  - Elder Law attorneys are generally concerned with what happens *after death* and with preserving income and assets in anticipation of needing long-term care *while alive*
  - Both are concerned with maximizing assets available for beneficiaries

#1: Not Having An Estate Plan (or Having an Incomplete or Insufficient Plan)

- No estate plan whatsoever?
  - The state of residence dictates who gets what
  - Administration Proceeding:
    - Similar to probating a Will, but the state of residence dictates the order of priority of who is in charge of the estate
    - Court will likely require the administrator to obtain a bond
    - Cannot set up a trust for beneficiaries through administration
- Incomplete estate plan or advance directives?
  - Possible guardianship/conservatorship
  - Possible distribution of assets after death in an undesirable way
  - Possible negative tax consequences to beneficiaries
  - Possible loss of assets that could have been protected for beneficiaries
- *"Dovetailing"* – everything should work together

#2: Not Actually Implementing an Estate Plan

- Most often, this is seen when someone
  - (1) fails to fund their living trust, and/or
  - (2) fails to designate beneficiaries on certain accounts

- So you've set up living trust (i.e., a trust you establish while alive). Congratulations!
  - Now what? Are you done?
  - What, if anything, has been put into the trust?

- Pay attention to beneficiary designations
  - Retirement accounts, in particular
  - Contingent beneficiaries

#3: Not Understanding How Assets Pass Upon Death

- A Will *only* controls assets that are owned individually and without a designated beneficiary
  - Joint Tenants with Rights of Survivorship ("JTWROS"):
    - Upon the first joint tenant to die, the other owner(s) is automatically the sole owner
  - Tenants-in-Common:
    - Each tenant's share is part of their estate that must go through probate or, if no Will, administration
- Trust assets are controlled by the terms of the trust
- Beneficiary designations control the assets to which they are attached

#4: Not Understanding How Probate Works and Whether Avoiding Probate is Preferable

- Probate: a proceeding in Court through which the petitioner asks the Court (1) to deem a decedent's Will valid and controlling, and (2) to appoint someone to take control (usually the "executor")
  - Probate can be complicated and take a lot of time and money
  - Having a Will does not mean that heirs at law are excluded from the initial process – it's the opposite in NY
  - Heirs at law must be identified, if possible, and given opportunity to participate (and object…)
  - Must probate in all states where the decedent owned real property (called "ancillary probate")
  - Legal fees could be costly
  - Trusts established in a Will require ongoing Court involvement

- Trusts avoid probate (and administration) *for the assets in the trusts*
  - Trust administration is often faster, at least in the beginning
  - Trustee can easily manage trust assets after the creator's death

#4: Not Understanding How Probate Works: Reasons to Avoid Probate

- Property in more than one state
- Distant heirs at law
- Disinheriting heirs at law
- Estate plan includes trusts
  - Minor beneficiaries
  - Disabled beneficiaries
  - Estate tax planning
- If Medicaid recipient
  - Medicaid has a claim against a Medicaid recipient's probate estate, so want to avoid probate

What assets do <u>not</u> have to go through probate (generally)?

- Assets with joint owners with rights of survivorship, beneficiaries designated, or in trusts

#5: Not Having Proper Beneficiary Designations on Retirement Account(s)

- Generally, it is not advisable for retirement accounts to wind up in someone's estate
- Retirement accounts without beneficiary designations (or contingent beneficiaries) become part of the decedent's estate
- If the retirement account becomes part of the estate:
  - Estate administration can become more complicated
  - Estate income tax returns can before more complicated
  - Timeframes by which the account must be distributed can be much shorter than if the retirement account was inherited directly by a beneficiary
    - The time for tax-free growth can be significantly compressed…
- Sometimes, the retirement plan or custodian has default provisions if a beneficiary is not named, and sometimes that's not what the decedent would have wanted

#6: Not Planning for Long-Term Care (Because Long-Term Care Can Wipe Out an Estate)

Basic tenets of Elder Law:

- Everyone may fall ill some day, and those who fall ill may require long-term care
- Protecting assets and income is a common goal
- Planning in advance is important

Costs – on average in Westchester County, New York

- Nursing homes: approx. $14,000.00 - $22,000.00/month
- Home care aides: approx. $30.00 - $40.00/hour, if not more
- Assisted living facilities: start around $5,000.00/month (but check the add-ons…)

Four Ways to Pay for Long-Term Care:

- Private (out of pocket)
- Long-Term Care Insurance (which most people do not have)
- Medicare (very limited)
- Medicaid (means-tested; possible penalties for gifts/transfers)

#6: Not Planning for Long-Term Care: Importance of Planning in Advance

- Long-Term Care Insurance: typically gets more expensive as one gets older

- Medicaid has look-back periods – in other words, what happened to one's assets during a certain number of years before the application is submitted?
  - If assets were given away / transferred during that time, Medicaid can impose a penalty period during which Medicaid will not pay
  - Gifts include uncompensated/undercompensated transfers and changing beneficial interests
  - Nursing home care: look-back period is five (5) years (in New York)
  - Home care: none right now (in New York), but expected to be two and one-half (2.5) years – delayed since October 1, 2020, because of the pandemic

- Even with long-term care insurance, there can still be a shortfall – Medicaid can stop the bleeding
- Medicaid is often an option, even if last minute

- Tools in our arsenal: strategic gifts, trusts, comprehensive Power of Attorney

#7: Not Identifying Basic Estate Planning Issues

You may not know the answer to every question (and that's okay!), but identifying basic estate planning issues can help you ask the right questions *for your particular situation*.

- Is avoiding probate preferable?
- Is a beneficiary incapacitated or a person with special needs or someone receiving public benefits?
- Is a beneficiary a minor or under a certain age?
- Is there a taxable estate – either at the federal or state level?
  - Who is to pay the estate taxes?
- Are the possible tax implications of an estate plan understood?
  - Some assets will likely result in taxable income to the beneficiary; some assets do not
- Are the possible tax implications of certain actions, like gifting real property and investments, understood?

SPEAKER INFORMATION

Joanna C. Feldman is a partner with the law firm Maker, Fragale & Di Costanzo, LLP, located in Rye, New York, and Yorktown Heights, New York. Joanna is a member of the National Academy of Elder Law Attorneys. She is also an active member of both the Elder Law and Special Needs (ELSN) and Trusts and Estates Law sections of the New York State Bar Association and is currently a member of the Executive Committee of the ELSN section as a Co-Chair of the Practice Management Committee. Since 2022, she has been a Director on the Board of Directors of the Estate Planning Council of Westchester County and is currently on its Executive Committee as its Vice President. She is also a former member of the Trusts & Estates section and Elder Law and Special Needs Planning committee of the Westchester County Bar Association. She is an active lecturer and volunteer for Westchester County Senior Law Day Collaborative. Licensed to practice in New York, she is a frequent author and speaker on current elder law and estate planning topics. She has been recognized by Best Lawyers in America® and Hudson Valley Magazine for her continued excellence in elder law.

Joanna received her Juris Doctor, *cum laude*, from American University, Washington College of Law, where she was the Vice Magister of the international legal honor society Phi Delta Phi and tutored children in the community. She received her Bachelor of Arts from Colgate University, where her studies concentrated in piano and English Literature, and was an accepted member of a competitive study program in London, England.

Prior to joining the firm, Joanna served thirteen years with a prestigious Westchester County law firm primarily representing local governments in all areas of municipal law, including tax certiorari, and counseled elected and appointed officials. She began her legal career appointed to a year-long judicial clerkship during which she advised judges and drafted judicial decisions.