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ESTATE PLANNING R.A.Q. (Rarely Asked Questions)

The Top Seven Misconceptions about Estate Planning

1. "My Spouse Died Without a Will, so I Automatically Inherit Everything."

Many people assume that, because they can usually access bank accounts and live in the family house after their spouse has died, nothing needs to be done legally. And then, sometimes 30 years later, the surviving spouse dies, and their family finds that the first one is still on the title to the house, and, by the way, he had a child from a previous marriage whom no one can locate, and that child and the six other children all own his half of the house, regardless of what the will of the surviving spouse says. Title to the house, and other property, does *not* just automatically pass to a surviving spouse.

1(B): "No, really: I called the appraisal district, and now the tax statements are in my name so everything's fine."

The appraisal district collects taxes, and all they care about is who is paying. Although they do work with filed deeds, what the appraisal district has on their records has *no bearing* on who has legal title. Further, the legal description on their statements is an *abbreviation* of the *actual* legal description required for a deed, and is *not* something you can work with in legal documents.

2: "If I want to disinherit someone, I need to leave them a dollar."

A lot of people have the idea that one should not just disinherit a child: that there is some legal requirement that they must get *something*, however small. This actually comes from the idea that if a child is omitted, that means that perhaps the testator lacked capacity and that child has grounds to challenge the will. However, doing this is actually *worse* than leaving them nothing, because that person is now a beneficiary who is entitled to notice and copies of papers, and often will not accept the dollar anyway. That means unnecessary legal fees. The better course of action is to either (a) specifically mention the child, and state that it is your intention to make no provision for him or her in your will (do *not* say why – that will just increase the odds of a challenge), or (b) in some jurisdictions (not Texas), you are required to leave an heir *something*. In that case, have a no-contest clause in your will and leave the child a large enough sum of money to discourage him or her from causing a problem. It needs to be large enough that losing it will make a difference, as opposed to "a dollar," which is just an insult. That is also worth considering doing with regard to someone who might contest the will.

3: "The will names me as executor, so I can go ahead and handle things."

No. A will is not like a power of attorney: the executor appointed in the will has *zero* legal

authority until he or she is appointed by the court. Wills *must* go through probate to be legally valid and effective.

4: "Mom has a trust and once she died everything went into the trust."

There is a lot of advertising out there telling people they need to "avoid probate" and get a trust in place for your estate planning. There are pluses and minuses to trust-based estate planning which depends on each client's individual situation. But one thing that advertising often misses is that for a trust to work, your property *has* to be transferred into it. And when someone dies, if all of their property has not been properly titled in the trust, it does not just go there automatically; you will need a probate to make the trust effective.

5: "Now that Dad has died, it's our house, so we have the right to kick our stepmother out."

Even if the house is Dad's separate property, our Texas Constitution gives a surviving spouse the right to occupy the homestead as long as he or she wants to.

6: "Mom told me she wanted me to have her jewelry, so her wishes need to be honored."

The only wishes of a decedent (that being a deceased person) that have any legal effect are those contained in a legal will or trust, period. And a legal will must either be (a) signed and entirely in the person's handwriting, or (b) signed and attested to by two witnesses. Even a notarized document claiming to be a will does not count.

7: "We really do not have a lot of money or property, so don't need wills or trusts."

Frankly, these are the most frustrating situations I run into, and I run into them often. People often do not think planning is necessary, and after Mom and Dad pass away you find that their intestate heirs are eleven siblings, three of whom are deceased leaving five grandchildren, some of which are minors, and ALL of whom have to be brought into an heirship and administration proceeding to deal with their house which is worth maybe $100,000. And it will cost thousands and thousands to jump through all the legal hoops to get this property into an administration, sold, and the proceeds distributed to the heirs, because there are all sorts of safeguards in the Estates Code that have to be observed. And, most often, nobody has the funds to pay for it. Had Mom and Dad signed proper, simple wills, the probate would be quick, easy, and efficient, and their beneficiaries could get the benefit of their home.

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Everyone needs to have estate planning in place, whether it is in the form of setting up joint ownership, survival rights, beneficiaries, and/or actual estate planning documents to cover circumstances.

More details may be found in the "Estate Planning Checklist" on my site.