

· UPDATE ·

TOP 7 ESTATE AND ELDER LAW MYTHS YOU MUST KNOW

By Timothy J. Rice, Esq.

The Law Office of Timothy J. Rice focuses on estate and elder law. That means that we help clients:

- Set up their estate planning by preparing wills, trusts, financial powers of attorney and advance medical directives.
- Help clients to administer estates starting with the probate of the wills through the final settlement of the estate. I represent executors of estates or estate beneficiaries in probate litigation such as will contests and contested estate accountings.
- Help to guide clients through numerous elder law issues such as Medicaid eligibility for those people who may need long-term care in a nursing home or an assisted living facility.

When I meet with clients, I find that many of them share common false assumptions or myths about estate and elder laws and the best planning options.

So, I thought it may be helpful to list the top 7 client myths:

MYTH #1: *“I signed a will, power of attorney and a living will 15-20 years ago and I am all set.”*

TRUTH: I tell clients that it is a good idea to pull those documents out of the safe deposit box where they have resided for years. They should look at them and also have an estate attorney review them. The clients may be surprised to see who the documents appoint as Executor, Power of Attorney or Health Care Representative. Maybe the client no longer has a close relationship with those persons that they named in the documents years ago. Maybe those persons have died. Perhaps those old documents have no backup executors or financial or medical agents, and the documents will be worthless if the first named people cannot serve and a court will need to appoint guardians or executors.

MYTH #2: *“I am leaving my money to my children equally because my Will says so.”*

TRUTH: I ask clients whom they have named as beneficiaries of their life insurance policies, IRAs, 401Ks and whether they have joint accounts. All of those assets are considered non-probate assets, meaning they do not pass through the Will but directly to the named beneficiary or joint account holder. I have seen many estate plans which led to estate litigation because the client did not realize the difference between probate assets and non-probate assets and those estates were distributed in a drastically unequal fashion.

MYTH #3: *“If I want to make changes to a Will or other legal document, I will just mark the documents up and initial them and I don't need to go back to the estate attorney.” Or the client says: “I will just write my own Will or notes about where I wish to leave my money when I die.”*

TRUTH: The problem with writing changes on an original Will or trying to write your own Will is that it will probably result in your estate and family going to probate court. I have been involved in about a half dozen of these situations. In one case, a gentleman wrote on his original Will and he also wrote notes on cocktail napkins about whom he wished to get his annuity. Needless to say, the cost of having 4 lawyers including me litigate my cocktail napkin case in probate court far exceeded what it would have cost to have an estate lawyer make the changes to his existing Will and help him with his beneficiary designations on his annuity.

MYTH #4: *“I want to avoid probate so I will do a revocable living trust and avoid probate of my Will.”*

TRUTH: Probate is not expensive in New Jersey or Pennsylvania. It typically costs about \$150 in probate costs to the County Surrogate to probate a Will. For clients who were sold a Revocable Living Trust in order to avoid probate, the cost will probably be 20 times the \$150 probate fee. Revocable Living Trusts (RLT) are very commonly used in Florida, where probate is more expensive and time consuming than in NJ or PA. And there are other good reasons to consider RLTs in one’s estate plan, but in my opinion, it is not a good move to have a RLT if the sole purpose of the trust is to avoid probate.

MYTH #5: *“Spouses have the automatic right to access the other spouse’s accounts, so my spouse and I don’t need a Power of Attorney.”*

TRUTH: No automatic right exists for one spouse to access another spouse’s accounts under law. I have had to do guardianship cases to get one spouse appointed as a guardian of the incapacitated spouse because there was no Durable Power of Attorney done before the spouse became incapacitated. A Durable Power of Attorney is much less expensive than having to go to court on a guardianship action, and certainly the Durable Power of Attorney is a private family document which avoids the public forum of a guardianship court proceeding.

MYTH #6: *“Married couples should transfer their residence to their children to “protect it” from the nursing homes or Medicaid.”*

TRUTH: Such a transfer would create a Medicaid disqualification period if either spouse needs to apply for Medicaid benefits within 5 years of the transfer of the house, and the transfer would likely result in capital gains taxes when the house is later sold because of what the IRS calls “carryover” tax basis. For a married couple, the best plan is to deed the house from the couple’s names to just the healthy spouse’s name to avoid a possible Medicaid lien. That transfer will not cause any Medicaid gift penalties or adverse income tax consequences.

MYTH #7: *“The law says that I can gift \$10,000 to each of my children each year without penalty.”*

TRUTH: Actually, that is an old law which now says that each person can gift up to \$13,000 to any individual each year without incurring any gift taxes. These gifts are often made to reduce one’s taxable estate. However, they can become problematic when the gifting party needs to apply for Medicaid benefits within 5 years of making those gifts. Medicaid gifting rules are completely different than estate tax and gift tax rules. Gifting can be a very important planning option, but a variety of laws – such as estate and gift tax, income taxes and Medicaid - should be considered carefully before the gifts are made.

Don’t let these myths become you and your family’s reality. Contact the Law Office of Timothy J. Rice to address your estate and elder law planning needs today at 856-782-8450.

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