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The 5 Most Common Mistakes Executors Make and How to Avoid Them

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**NOTE: THIS PIECE WAS WRITTEN BASED ON A TRANSCRIPT I WROTE FOR A PRESENTATION. IT IS VERY CONVERSATIONAL IN MANNER. I DECIDED TO KEEP IT THIS WAY IN ORDER TO (HOPEFULLY) BETTER COMMUNICATE MY MESSAGE. I APOLOGIZE TO THOSE GRAMARIANS OUT THERE WHO BRISTLE AT MY FAILURE TO OBSERVE ALL THE NORMAL CONVENTIONS OF THE WRITTEN WORD.**

Welcome! I’m grateful for the opportunity to provide you with information about the duties and responsibilities you now face as the executor of an estate

During my more than 15 years in practice, I’ve focused primarily in the areas of estate planning and estate administration. And in that time, I’ve learned that executors are often confused as to exactly what they are supposed to do. In fact, there is so much confusion and so many misconceptions that I’ve decided to offer this consumer education guide so when the time comes to perform your duties, you won’t make these common mistakes.

In just a moment, I’ll share with you the 8 Most Common Mistakes Executors Make and How To Avoid Them. Now I know this information can be a little intimidating and overwhelming so if at any time you feel like throwing your arms up into the air in disgust, just call me at 763-7631. Oh yeah – one more thing – just like a typical lawyer I have to give you my disclaimer - I am required to let you know that anything I tell you is not LEGAL ADVICE. It is simply general information designed to help you become a better informed consumer. Now that wasn’t so bad was it?

Now Here Are 8 Biggest Mistakes and How You Can Avoid Them…

**Mistake Number 1 - Probating The Wrong Documents**. Oh no you’re thinking, he’s just getting started and he’s already mentioned the dreaded P word. So let’s take a deep breath…now exhale. When people hear the word probate they naturally become alarmed because of all the things they’ve read saying that probate is to be avoided.

Relax – if you’re an executor in Pennsylvania, probate is not nearly as bad as it is in many states. Yes, in some states probate can certainly be a very long drawn out and expensive court supervised process. But not so much in PA. In fact most of the executors we represent NEVER go through what’s generally envisioned as the probate process.

We simply administer the estate and then do what’s called a family settlement agreement. This allows you to essentially opt out of much the probate process. In any case, Pennsylvania is a high tax and low probate fee state, and PA has a fairly easy, fairly simple, fairly straightforward probate system. So when I talk about probate, I’m not talking about the scary part of it. I’m talking about getting you appointed as executor so that you can handle things.

Anyway – sorry to digress – but I wanted to get that out of the way early. One of the first duties of an Executor is to make sure you’ve got the right will or the right trust and just the right documents in general. Sometimes it can be a challenge to dig all of this stuff up. A lot of times people stop too early. You know, they’re going through a desk and they find a will dating from 1982 figure they’ve got what they need. They take it to the registrar of wills to have it probated.

However, it’s really part of your duty to make sure that you’ve identified the most recent, in this case Will, and to make sure what you’ve got hasn’t been revoked or superseded.

So one of the things that you should do is to make sure you’ve checked the safe deposit box and any other places they might have stored important documents. It’s also a good idea to check with the lawyer who wrote the will to see if they are aware of any later revisions.

This is REALLY REALLY important because if you start down the wrong path because you’re using the wrong documents, you may find that you’ll now have to spend a lot of time and energy and thousands of dollars in some cases to fix the problem.

So far we’ve discussed this in the context of probating the wrong will but the exact same logic applies to a trust. Even if the trust has no will to probate, you still need to make sure you have the most recent version – people often make changes to these documents throughout their lives so be vigilant. The last thing you want to do is give out money or property to the wrong heirs. That’s a good way to get sued by the rightful heirs. This is a really good segue to Mistake #2 which is…

**Mistake Number 2 – Making Early Distributions Without Protecting Yourself** – I would say one of the things that executors do is to make distributions too early.

And this is something all of you listening that who are executors or expect to be executors or trustees, put a big star by this one because this can cost you money. **You can be personally liable for this.**

When you are an executor or a trustee and you get money, there’s a lot of so-called common wisdom out there, especially if you have a trust. You just get the money and give it out. You don’t need to worry about probate or any court process.

But that is wrong! When executors or trustees make distributions before they’ve done all the other things they’re supposed to do, these are legally known as “**at risk distributions.**” And guess who’s at risk? The executor or the trustee. So I’ll give you a real world example. You find out that Aunt Susan has passed away. You gather together all of her assets, you sell her house and find out you have a pool of $400,000 and you and your sister are the beneficiaries. You give your sister and yourself the money. Then you find out you owe an inheritance tax liability. You thought because you were a trustee it wasn’t subject to probate and that you didn’t owe the inheritance tax. But you do!

You go to your sister, and say “Hey, I need $50,000 of that money back,” and she says “Forget about it.” What are you going to do because you’re liable to the state and you’re liable to those creditors. So you have to go through the process meticulously and you have to make sure you’ve paid all the creditors that can assert claim. You have to make sure you’ve done everything right before you give the money out.

Also, that doesn’t mean that you can’t give some money out in the mean- time. But you better have a document that makes that person promise to give it back and you better make darned sure that you’re distributing it under the right document and to the right person and that you’re not giving so much that you’re going to be stuck without the money to pay off other expenses that may occur.

**Mistake Number Three – Failure To Comply With Legal Notice and Other Requirements**

Again probate requirements in Pennsylvania are pretty simple.

For example, when you go and get sworn in as the executor, it’s a requirement under Pennsylvania law that you give everybody that’s named in the will a copy of the will or at least notify them that it’s in probate. I give them a copy as a courtesy because they can go to the court and get it, and I think if you just say to people if you want a copy go get it - you come off as kind of rude, so in the interest of keeping family peace and being cooperative, I usually give people a copy of the will.

And then once you’ve notified everybody, you’re required to then file a certification with the court saying that you’ve notified everybody. Now if you have legal counsel they’ll do that for you. That will be part of what they do and it doesn’t add too much cost and they make sure they do it the right way. That’s important, because if you don’t do that you can be held personally liable for failure to notify – And here’s why - For example, if someone has passed away who would have been entitled to inherit under intestacy law their heirs who would be entitled to inherit would have to be notified.

Or if someone’s been disinherited – for instance a child’s been disinherited under a will, they have to get notice. So who gets notice is not often as simple as it appears. You want to make sure that that’s taken care of, because if you don’t do it, you can get into some serious trouble. Certain people have the right to challenge the will. I’m sure you can understand this. If you were a child and your parent didn’t include you in the will, but included your brother and sister, a question naturally arises. Did they mean to omit you or was it a mistake – and who committed the mistake? Was it them or was it the lawyer who drafted will? So, there’s a whole process in Pennsylvania, just to make sure everybody who’s supposed to know about this will does know about the will

**Mistake Number Four: The Failure To Follow The Terms Of The Will**

I can’t tell you how many times executors come to me when they’re in trouble and the reason is that they got this will and it was the right will - and they probated it - and they followed the notices and they did all the things that they were supposed to do, but then they didn’t follow what the will says. They were either inattentive to the terms of the will or they’ve misread it or misinterpreted it. For example, it’s very common for a will to say my three children should divide my personal things up among themselves, or my executor gets them and my executor should give them out according to a memo. And then for some reason, the executor sells all of the items. Well, that’s not what the will says. And if an executor fails to follow the will he or she can be held personally liable.

A lot of times you’ll see a specific bequest. Pay $3,000 to Uncle Joe and pay $5,000 to this charity. Specific bequests do need to be paid, as long as there are sufficient funds to pay the creditors and the tax. Specific beneficiaries do need to be paid within a relatively short period of time or interest starts to run on those. So executors need to review the will and create a check list for themselves and establish a clear order in which they need to do things and clearly understand what the will says.

Now I’m going to make a suggestion that to a lot of people may sound crazy. But if the will is ambiguous, going to court and going through the probate process – you know the court supervised part that all of the so-called gurus tell you to avoid – makes perfect sense. Where a will is drafted improperly or where there’s some confusion about the language, and even language that seemed plain to the mom or dad - or the grandparent - or whoever passed away, might be confusing in terms of modern interpretation or personal circumstances. Now you can go to court and say to the judge, “your Honor, this is how we read this will, and this is how we interpret it, and we’ve given everybody notice”, and if nobody shows up the judge is probably going to interpret it the same way.

But if somebody shows up and says “I interpret it differently”, then you’ve put the issue before the court, and you are in the clear because the court will decide how it’s to be interpreted. It’s when you, the executor, make a judgment about the intent of the will – that’s when you run into potential problems. So sometimes the court can be your friend. Everybody tends to think when we read these articles about avoiding probate, the court is the enemy and that it increases costs. But sometimes heading off a problem at the pass costs a few hundred dollars or a few thousand dollars whereas failing to solve the problem can be much, much more expensive. So, failure to follow specific instructions of the will is a common mistake and unfortunately one that subjects executors to personal liability again and again.

 **Mistake Number Five: Failing To Get The Early Payment Discount For Inheritance Taxes**

The next mistake is the failure to pay taxes early or paying taxes early. Let me explain what I mean by that since that sounds kind of weird. There is a discount under Pennsylvania law for paying the inheritance taxes within 3 months rather than at 9 months when the inheritance tax return is due. And a lot of times it’s prudent to make that payment. For example, if you have an estate that has a lot of cash, and the money’s available and it’s not earning 10%, then you’re going to get a 5% discount for a 6month period. That’s effectively a 10% per year return. So if you’ve got lots of cash and it’s earning less than 10% it may make sense to pay that tax early and get that discount.

However, if you’ve got a house and not a lot of cash you may need to hang onto the money in order to pay taxes, heat, and insure it. Or perhaps you’re earning more than the value of the discount with the money. Then it may not make sense. But I see people pay this tax or not pay this tax without thinking it out clearly. People see a discount and go into a certain mindset and act like people that rush to a store because it’s having a sale and buy things they don’t need – just because they’re on sale - and then later wonder what the heck they were doing.

So again, this is an area where you want to get advice, so your reasoning for paying or not paying the tax early is well thought out.

**Mistake Number Six: Failure To Advertise The Estate Administration**

You may have seen these little ads in your local newspaper – You know, the ads which say that such and such law firm has been appointed the solicitor and so and so has been appointed the executor of this estate?

The law requires that the appointment of the executor and the existence of the estate be advertised for a couple of reasons. One is that if there were debts owed, it notifies the creditors to come forward and make their claim against the estate. Now you might be saying, why waive a red flag in front of the bull? Well, if I’m representing you, you’re my client, you’re the executor, I want to make sure that you know about all those creditor’s claims because you don’t want somebody who put a new roof on your grandmother’s house - if they didn’t get paid - showing up 3 years later with a valid claim if the estate administration is done.

So the law in Pennsylvania says that if you advertise this once a week for three weeks in a paper of general circulation and in the legal newspaper of the county in which the decedent died, it cuts off claims after one year, rather than, three years, four years, five years, six years under various statutes of limitations. That’s very important for you, the executor, so you can manage your liability exposure.

Something else trustees should know is that there is now a similar process for trusts. This procedure is very dangerous to ignore because if you distribute all the money as a trustee, and you don’t hold back an escrow, and claims crop up you, could have a liability exposure. So that is a reason, in Pennsylvania at least, why sometimes executors have a little bit higher level of protection than trustees do distributing under a revocable living trust. So failing to advertise the estate isn’t always a good idea. Sometimes people do tell us they don’t want to. In that case we have them sign a release telling them that we’ve informed them to do it. As executor it only costs you about $185 to do advertise in the two papers. It’s fully deductible, and most of the time you’re being penny wise, pound foolish to skip that.

**Mistake Number Seven: Failure To Meet The Income, Inheritance, and Estate Tax Deadlines**

When someone passes away, you’ll almost always have to file a final lifetime Federal and Pennsylvania tax return. And even though a lot of advisors say don’t do it if they didn’t make much money, I recommend that the executor does this because it then removes that deceased taxpayer from the tax rolls.

The IRS therefore knows that they’ve passed away and removes them from the tax rolls so that things don’t crop up later causing trouble. These returns are due by April 15th. So, for example, if you’re an executor, and the decedent passed away any time in 2014, that 2014 return is due by April 15, 2015.

You may also have to prepare a fiduciary income tax return from the time the decedent passes away until the end of that tax year. This return reports the income that the estate earned. So if the estate earned interest on the bank accounts, and the estate earned dividend income or the estate earned rent, the estate now has to file an income tax return for that. Typically, we encourage the same CPA or tax preparer who’s preparing the decedent’s final income tax return to also prepare these 1041’s

Also, within 9 months of death, you must file both a Pennsylvania inheritance tax return and, in some cases, a Federal estate tax return. Although these returns look relatively simple, they contain a lot of strategic issues that require you to make certain elections and they have to be made on a timely filed return or you could get into trouble again. Also, when I file returns with the state and federal government, I like to attach everything I can think of.

So, it’s important to file these in a timely way. It’s important to have them prepared professionally and to have professional preparers that really know what they’re doing. They know the red flags, they know the things to avoid, and they know the documentation that needs to be attached. This is money that is extremely well spent. And the money that’s spent to prepare those returns is deductible.

 So filing these returns, failing to file them in a timely manner, failing to file them at all, filing them in a messy way, or filing them without the appropriate documentation are all mistakes that are very common and that can be very, very costly. If you incur penalties as a result of that, you’re personally liable - NOT the estate. You, the executor, could be charged for these additional penalties and expenses.

**Mistake Number Eight: Failure To Properly Conclude The Estate Administration And Exposing Yourself To Personal Liability**

So the Executor finally gets to the end of estate administration and they just give the money out. They fail to conclude the estate in one of the two appropriate ways. One way is to go through the court accounting process, and to say to the judge, here’s everything that we did and here’s how much is left and here’s how much is going to everybody, and the judge ok’s it. Now I’m not recommending that - and very, very rarely do we ever have to do that. I mean just the tiniest percentage of cases where that’s ever necessary and usually that’s because there’s some kind of a dispute. Where the family’s all in agreement, we want to skip that whole piece of the probate process. So we will often employ the second method where I will prepare a family settlement agreement. The agreement will state that everyone agrees that I reviewed the records of the estate administration, I know how much the lawyer was paid, I know how much the accountant was paid, I know how much the funeral expenses were, I know how much the executor took in commission if anything, I know how much money they made on the investments, I know how much money they sold the house for, I know how much is left after the payment of expenses for me and I agree with that, and I will take that and I will not hold the executor liable for any mistakes that may have been made - because I don’t think there were any made.

There’s a whole process of documenting all of this among family members so that if later a debt does crop up, everybody agrees to give the money back. But most importantly, the executor has managed his or her liability exposure. Neither an accounting firm nor a bank can assist you with that. That is something that you will need legal counsel to prepare for you. That is commonly called a receipt release and indemnification or family settlement agreement. From the executor’s standpoint, this is a very powerful tool in protecting them from ongoing liability exposure. And it is a very powerful tool from the whole family’s standpoint as a way of staying out of court and saving thousands of dollars in legal fees.

It’s absolutely true that if you go through the full probate process with the accounting, it is going to slow down the estate administration, and it is going to result in bigger legal fees. Therefore families that get along will not want or need that. So you should consider having a family settlement agreement. The major mistake that executors make is that they do neither and just start handing out money to people. That leaves them open to those people coming back and, in fact, using that money to hire lawyers, and sue them for things they thought they did wrong during the estate administration.

Look, if you follow my recommendations you’ll have most of the information you need to do a great job as executor and keep yourself clear of any personal liability claims. Of course, if you have any further questions I invite you to call me. Just dial 717-763-7631 to be connected to my office. I’ll be happy to answer your questions.