

# Harvell and Collins, P.A. Quarterly Report

1107 Bridges Street  
Morehead City, North Carolina 28557

phone 252-726-9050

facsimile 252-727-0055

[charvell@harvellandcollins.com](mailto:charvell@harvellandcollins.com)

[wcollins@harvellandcollins.com](mailto:wcollins@harvellandcollins.com)

---

---

## *JANUARY 2008*

---

---

*It is our pleasure to send you the January Edition of our **NEWSLETTER** for the year 2008.*

*This **NEWSLETTER** will concentrate on various legal concepts and we would suggest that you keep it with your important files to refer to from time to time.*

*For those of you who have not received our **NEWSLETTER** in the past and are new clients, our **NEWSLETTER** attempts to keep you informed of any new developments in local, state, and federal law that might affect your personal life or your business. The **NEWSLETTER** will advise you on these developments and, when appropriate, make suggestions that will help you deal effectively with these changes. Also, the **NEWSLETTER** will serve as a way to communicate with you. As always, if you would like to have us address a particular matter, please feel free to call or write, and we will address that issue in a future **NEWSLETTER**.*

### **Ten Legal New Year's Resolutions**

1. **Do you have a Durable Power of Attorney?** Is it up to date? A Durable Power of Attorney is a legal document wherein you give someone legal authority to sign checks, handle your legal affairs, including but not limited to, banking affairs, filing tax returns, negotiating insurance settlements, managing real property. The Durable Power of Attorney needs to be very specific. Also, you should name an alternate attorney-in-fact.
2. **Do you have a corporate book and if so, is that book up to date?** Have you had regular meetings and are those meeting minutes in the corporate book? Have bylaws been adopted and stock issued? If you have a corporation, then you need to act like a corporation. North Carolina General Statutes require you to do so.
3. **Check your Beneficiary Designations.** Life insurance, annuities, IRA, 401k...so many assets do not necessarily pass according to terms of a Last Will and Testament, but pass by contract terms or by beneficiary designation. It is very important to call your life insurance company, call the holder of your IRA, and get in writing the name on the Beneficiary Designation and put this information with your legal papers. No matter what

your Last Will and Testament may state, these non-probate assets such as life insurance, IRAs and accounts marked POD (payable on death) or JTWROS (joint tenants with right of survivorship) will pass pursuant to terms of the account, not pursuant to the terms of the Last Will and Testament.

4. **Does your family need a survey on family property?** If you own a large tract of property, etc., more than likely you as parent or grandparent know the property lines and know the history of your property. Many times children do not know the property lines and/or the history. If you have a large piece of property, have a survey done while there are still family members living who know the history of this property. It is important to have a survey certified so that it may be recorded .
5. **Keep a copy of all legal documents in one place.** It is so very important to keep a copy of your most recent Last Will and Testament, Trust, Durable Power of Attorney, Health Care Power of Attorney, Living Will, Deeds, Beneficiary Designations, cover page of stock accounts and bank statements in one location. Keep these copies up to date about every three (3) years. Attempting to alert your next of kin where to begin the process of marshalling together the assets is invaluable. So many people have older documents that they hold on to....go ahead and discard older documents...shred them! Keep the latest and greatest in your summary file so that your next of kin knows that this is where to begin. Use a strong box at home or a safety deposit box at the bank. Make sure that a child is named as a deputy and has a key. We strongly advise clients to not write on their documents. Do not make handwritten changes on your documents. This opens the door for misinterpretation and the original intention of the testator can be lost. If you want to make changes, meet with your attorney to do this properly.
6. **Has your Will been looked at in the last five (5) years?** It is important to have your Will reviewed by a competent lawyer every five (5) years and certainly more often if you have life change situations such as death, divorce, long term illness, birth of a child or birth of a grandchild.
7. **Guardianship of Minor Children.** If you have a minor child, it is your responsibility to have a Will that names a guardian for your minor child. You want to have a legal document that names a legal guardian for your child, someone who will take care of, love and nurture your child. This needs to be reviewed because life circumstances with the named guardian may change also.
8. **Registration on Bank Accounts and CDs.** Go to your bank and ask to see registration information on your accounts and CDs. If you have an account or CD marked payable on death (POD) to an individual, then that is how the account will be paid, not pursuant to terms of your Last Will and Testament. It may be your intention to distribute equally to your children, however, you have taken one child to the bank to have them made a signatory on the account. The account is then changed to POD (payable on death) or marked JTWROS (joint tenants with right of survivorship). Make sure that you understand the affect of changes on your bank accounts. The bank needs to have on record a copy of your recorded Durable Power of Attorney.

9. **Statute of Limitation Issues.** When did you learn about the leak in your roof? How long ago was your house built? Have you been involved in an automobile accident and the settlement is not finalized? Do you have leaky windows or is your HVAC not working? Is there permissive use of your property? Is someone using property to dump certain debris? Are you allowing your property to be used in a certain way? Keep in mind that the law is very time driven and if you have a legal issue, it is better to confront it now, not later. Do not continue to put off dealing with these issues.
  
10. **Check registrations to title to real property.** Is it tenants by entirety? Is it tenants in common? Is it joint tenants with right of survivorship? Is it joint tenants? Tenants by the Entirety is when the joint owners are husband and wife. The property automatically goes to the surviving spouse. Is the intention for the surviving spouse to receive the property? Maybe the property should be held as tenants in common for estate planning purposes, so that high value property is not in the name of one spouse only, but held 50/50 in each name. Tenants in common have no right of survivorship. If one owner dies, that owner's interest will pass pursuant to the terms of the Last Will and Testament, not necessarily to the survivor. Joint tenancy is similar to tenants by the entirety, but the co-owners are not married. Joint tenancy includes right of survivorship, provided it is set out in the deed. Upon the death of a joint tenant, title remains in the surviving joint tenant without further action. You cannot leave joint tenancy property to someone else in your will. It is very important to make sure that titles to real property are as you intend them to be.

### **The Right Time to Refinance!**

If you have been thinking about refinancing your real property, now is the time. Interest rates are dropping for 15 year and 30 year fixed-rate mortgages, giving homeowners more incentive to jump at the opportunity to refinance their property. Harvell and Collins, P.A., is a full service firm, and can provide you the assistance you need in order to close on your loan. Call our real estate attorney, Julie Glanzer, to set up a date to close on your loan.

### **"Let's Talk Legal"** **Radio Station: WTKF - 107.3 FM**

As many of you know, Harvell and Collins, P.A., presents a talk radio program each and every Tuesday at 7:30 a.m. The purpose of the live radio program is to present to the listening audience legal information and allow the listeners to call in and ask questions. We have thus far discussed the following topics:

1. Estate Planning
2. Elder Law and Medicaid Planning
3. Litigation in all Courts

4. Estate Administration
5. Real Estate Transactions
6. Corporate and Business Transactions
7. Family Law and Domestic Relations

If you have suggestions for a topic to be discussed, or if you have a question, give us a call. Or, call in during the show at 1-800-818-2255. Please join us on Tuesday mornings, bright and early on the talk station at WTKF - 107.3 FM.

We are now archiving our weekly radio program on the website so that our clients may listen once again to the program by visiting our website at [www.harvellandcollins.com](http://www.harvellandcollins.com).

### **Prenuptial Agreements**

When you are planning a wedding, you assemble a team of experts to help, including the photographer and caterer. Don't stop there, but remember to include your attorney on that team and have a consultation relative to how to title your property, hold your money and pass on your assets. The idea of signing a prenuptial agreement may not sound very romantic, but we all know that communication is key in any relationship, so begin to strengthen this skill now by talking about the hard stuff - prenuptial agreements.

The prenuptial agreement (also known as an antenuptial agreement or premarital agreement) is a signed and notarized contract entered into by a couple before marriage. The content of a prenuptial agreement can vary widely, but commonly includes provisions for various financial issues such as the control and possession of property and other assets taken into the marriage and/or later obtained during the marriage either individually or jointly, as well as the couple's future earnings, and how property and/or assets will be distributed in the event of divorce or death.

Prenuptial agreements are not just for the wealthy. Sometimes the smaller assets are the most guarded because of all the hard work it takes to accumulate those assets. A person who has managed to save \$30,000.00 may be more protective of their nest egg than someone who has millions. These agreements can help protect funds either spouse may have saved for a child's college education or their own retirement, prior to marriage

You should consider having a prenuptial agreement if you fall into any of the following categories:

- You have assets such as a home, stock or retirement funds
- Own all or part of a business
- You may be receiving an inheritance
- You have children and/or grandchildren from a previous marriage
- One of you is much wealthier than the other

- One of you will be supporting the other through college
- You have loved ones who need to be taken care of, such as elderly parents
- You have or are pursuing an advanced degree or license in a potentially lucrative profession

You may have heard that a premarital agreement will not hold up in court, but this is not true. A properly written and executed prenuptial agreement is enforceable. Prenuptial agreements are valid in all fifty (50) states and the District of Columbia. North Carolina, along with at least twenty-five (25) other states, has enacted a variation of the Uniform Premarital Agreement Act (UPAA) which encourages the enforcement of prenuptial agreements.

Five elements are required for a valid prenuptial agreement:

- Agreement must be in writing (oral prenuptial agreements are always prohibited);
- Agreement must be executed voluntarily;
- There must be full and fair disclosure at the time of execution;
- Agreement cannot be unconscionable;
- It must be executed by both parties (not their attorneys) in the presence of a notary public

Despite their enforceability, a premarital agreement can be set aside for fraud, duress, failure to disclose, unfairness, and failure to be adequately represented. Failure to disclose is the biggest issue. All states require that there be full disclosure of all property and assets and that each prospective spouse be fully aware of what they are getting and giving up. Each prospective spouse should hire their own attorney. This helps avoid any charges of fraud if the marriage ends in divorce. Your attorney will prepare the agreement with your best interest in mind.

Following the execution of a prenuptial agreement and marriage, it is very important to update your estate planning documents, review beneficiary designations, update and/or purchase insurance policies, and decide how to hold title to real property. Make sure that your legal documents and your financial documents are up -to-date and consistent. Otherwise, your former spouse could end up with an unintended bequest or your assets could go to your new spouse and your children could wind up with nothing.

### ***Understatements on Joint Tax Returns: Innocent Spouse Relief***

Many married couples choose to file a joint tax return because of the benefits allowed by that filing status. Filers of a joint tax return also assume joint and individual responsibility for payments of all penalties, interest and fees associated with an understatement of taxes, regardless of which party is responsible for the income. This liability applies even after the couple divorces or one of them dies.

Under certain circumstances, spouses (or former spouses) can be relieved of their tax liability. Three types of relief available include Innocent Spouse Relief, Separation of Liability and Equitable Relief. These methods are described in detail by the Internal Revenue Service's Publication 971 which contains instructions and examples helpful in pursuing these methods of relief.

If you were widowed or divorced and the IRS provided you with notice of liability for an understatement of taxes for a joint tax return filed with your former spouse, you could be eligible for Innocent Spouse Relief. In order to do so, you must meet several criteria:

- You filed a joint return which has an understatement of tax
- The understatement owes to erroneous items of your former spouse
- When you signed the joint return, you did not know or have a reason to know of the erroneous items
- Under the circumstances, it would be unfair to hold you liable for the understatement

An understatement of tax is generally the difference between the total amount of tax that should have been shown on the return and the amount that was actually shown. An erroneous item is either some form of unreported income or an incorrectly claimed deduction, credit or property basis.

If you knew or had reason to know of the understatement of tax, you will not be eligible for the Innocent Spouse Relief. Reason to know means that a reasonable person in your situation would have known of the understatement. In making this determination, the IRS considers factors such as the nature of the erroneous item and its amount relative to other items, the financial situation of you and your spouse, your educational background and business experience, the extent of your participation in the activity resulting in the erroneous item, whether you failed to ask about the items that a reasonable person would question when signing the return, and whether the erroneous item was a departure from a recurring pattern reflected in prior year's returns.

The final criterion that is considered is fairness. The IRS will consider whether, in view of the circumstances of your particular case, it would be unfair to hold you liable for the understatement. It will take into account factors such as whether you received a significant benefit, whether your spouse deserted you, whether you and your spouse are divorced or separated, and whether you received a benefit on the return from the understatement. Significant benefit simply means that you have derived a benefit from your spouse's understatement in excess of normal monetary support for that fiscal year.

As an aid to the process, the IRS provides an online explorer as well as Form 12510 to determine if you may qualify for Innocent Spouse Relief. This questionnaire should be filled out and submitted to the IRS as well as the request for relief Form 8857. These forms are available online at [www.irs.gov](http://www.irs.gov). After submitting these forms, the IRS will determine the amount of understatement of tax for which you are liable. The IRS offers help over the telephone and the

internet in addition to the instructions included in Publication 971. If you have any questions or need further assistance, please feel free to contact our office.

***“The Right Advice at the Right Time”***  
***Visit us at [www.harvellingcollins.com](http://www.harvellingcollins.com)***

If you have not done so already, we encourage you to visit our website. The website serves as yet another way to render superior service to our clients. There is a wealth of information disclosed on the website, including important links to useful government agencies that will assist our clients in obtaining valuable information.

“About the Firm” presents the history and purpose of the law firm. “Staff Profile” introduces our lawyers and legal assistants. Contact information is provided for all employees. The website provides an extensive list of services offered by Harvell and Collins, P.A.

Please visit us at [www.harvellingcollins.com](http://www.harvellingcollins.com). We look forward to comments from our clients regarding our website.

**HARVELL AND COLLINS, P.A.**

**PROFESSIONAL STAFF**

Cecil S. Harvell  
[charvell@harvellandcollins.com](mailto:charvell@harvellandcollins.com)

Wesley A. Collins  
[wcollins@harvellandcollins.com](mailto:wcollins@harvellandcollins.com)

Julie H. Glanzer  
[jglanzer@harvellandcollins.com](mailto:jglanzer@harvellandcollins.com)

**SUMMER INTERNS**

Jennifer L. Manning  
Russell C. Alexander

**SUPPORT STAFF**

Debbie W. Morris  
[dmorris@harvellandcollins.com](mailto:dmorris@harvellandcollins.com)

Elaine W. Davis  
[edavis@harvellandcollins.com](mailto:edavis@harvellandcollins.com)

Tina Willis Rodriguez  
[trodriguez@harvellandcollins.com](mailto:trodriguez@harvellandcollins.com)

D. Patricia Kinney  
[tkinney@harvellandcollins.com](mailto:tkinney@harvellandcollins.com)

Donnis C. Rode  
[drode@harvellandcollins.com](mailto:drode@harvellandcollins.com)

Mallory G. Bryd  
[mbyrd@harvellandcollins.com](mailto:mbyrd@harvellandcollins.com)

Brandie D. Mitchum  
[bmitchum@harvellandcollins.com](mailto:bmitchum@harvellandcollins.com)

Andrew D. Hardin  
[ahardin@harvellandcollins.com](mailto:ahardin@harvellandcollins.com)

**Postscript**

This writing is intended to generally familiarize you with various legal issues. The scope of this document is necessarily limited, and consultation with your attorney or tax advisor should always precede taking any action.