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ESTATE, PROBATE AND TRUST PITFALLS

Claims made against attorneys who practice in the area of Estate, Probate and Trust have been steadily increasing. What is responsible for this increase in claims and what can be done to risk manage this area of practice? Please read below for a discussion on trends and risk management advice.

The Great Wealth Transfer

As the Baby Boomer generation ages, we are experiencing the largest generational transfer of wealth than at any other time in our history. While the Boomers are the wealthiest of all previous generations, they often lived with a "can't take it with you" or "you only live once" mentality. Therefore, some beneficiaries may be disappointed when they discover that their inheritance has been spent down. These unpleasantly surprised beneficiaries often search for someone to blame; that someone is oftentimes the drafting attorney.

Moreover, even with relatively large estates, some beneficiaries are surprised to find that unexpected charitable gifts or provisions were made to friends, neighbors, and relatives outside the nuclear family or surprised to find an inequitable distribution among siblings.

Disappointed beneficiaries blame the drafting attorney by questioning testamentary capacity, testamentary intent, or by questioning estate tax planning strategy or substantive legal work. Moreover, even without a clear drafting error, beneficiaries may assert conflict of interest allegations if it appears that the attorney's loyalty was divided among more than one family member. Further, as more states have expanded privity, these beneficiaries are now often permitted to maintain these lawsuits notwithstanding the fact that they were not direct clients.

Risk Management

As increased claims are made against estate, probate and trust attorneys, the following are trends and risk management suggestions for consideration:

- Expanded Duty Estate planning lawyers are learning that they may have broadened exposure to malpractice liability claims depending upon where they practice due to the application of the third-party beneficiary rule and/or the erosion of strict privity. These claims are difficult to defend as: 1) the original client is often deceased or incapacitated and unavailable to explain his/her intentions; and 2) the file often lacks documentation reflecting any explanation of estate planning implications. The challenging family member may present as sympathetic and blame the lawyer for frustrating the client's true intentions. The jury may want to make amends and restore an inheritance by finding fault with the lawyer's legal services.
- Document the file One allegation beneficiaries sometimes advance is that the drafting attorney failed to explain the nature of the estate plan to the client, frustrating the client's wishes. For example, if certain property was kept out of

an estate plan, or if certain parties were required to pay unexpected taxes (such as on gifts to a charity), the file should reflect the client's understanding of the plan and its resultant consequences. Without a clear and documented file, beneficiaries may contend that a surprising result is necessarily malpractice, as they "knew" the true intent of the actual client was contrary to the plan.

- Avoid dabbling Estate, probate and trust is an extremely complicated area of practice. Many attorneys, however, dabble in this particular area for numerous reasons. Generalists will sometimes learn just enough to draft "simple" documents to round out their practice and other attorneys will provide "favors" for friends and family members. Statutory changes or case law, however, may lead to unintended consequences incapable of correction once the client is unavailable due to death or disability. Attorneys should avoid dabbling in this very complicated area.
- Tax issues Attorneys should discuss, and then document who is (and who is not) responsible for the filing of tax documents and for advising on tax consequences. *In particular, attorneys should document in writing who is responsible for the filing of gift tax forms, a common source of confusion*. The client should understand and be advised that tax consequences and tax filings are important, but, when necessary, are unrelated and outside the scope of the engagement.
- Serving as Trustee or Executor Attorneys should carefully consider all risks before agreeing to serve as a Trustee or Executor. During the financial crisis, for example, it was common to see claims filed against an attorney for "wasting" trust assets with an overly critical analysis of all financial decisions. Serving as a Trustee or Executor carries much responsibility and often much critical oversight. Consequently, it is good practice for a Trustee or Executor to have the Court approve every action taken, even if the heirs or beneficiaries are aligned and getting along. Further, if there are any legal disputes or services for which the trust needs counsel, the Trustee or Executor should avoid hiring his or her own law firm as the legal fees will generally be questioned.
- Conflict of interest In the absence of any discrete error, an allegation of conflict of interest may be the only theory left to a beneficiary to advance against the drafting attorney. As the beneficiary will generally argue that the attorney's loyalty was divided, the attorney should always keep the actual client in mind. If there is anyone involved in decision-making or review other than the actual client, and if that individual then benefits from the estate plan, conflict of interest allegations may follow. Keep children or other interested parties out of the room and off correspondence to the client.
- Testamentary intent: risk managing common fact patterns Lack of testamentary intent and/or undue influence or duress is another common allegation often asserted by disappointed beneficiaries. There are a few fact patterns that seem to draw these allegations, and they are as follows:
    - a testator who is in failing or fragile physical or mental health at a time when he or she makes changes to estate documents;

- a testator who makes drastic changes in estate documents shortly before death or incapacity or significantly decreases one or all of his or her children's relative share of the estate;
- a testator who leaves his estate to a beneficiary who was actively involved in the estate plan, such as being present at the execution of the will or trust, recommending a new will or trust, providing instructions to the drafting attorney, reviewing estate documents, securing witnesses, and/or safekeeping the will. This point should be underscored if the beneficiary is new to the estate plan or outside the nuclear family.

Some risk management considerations to help mitigate against such claims of undue influence or lack of testamentary intent are as follows:

- To record or not to record? Some practitioners advocate recording the client when the documents are executed. If all goes well and the client appears confident, healthy, and lucid, then presuming its admissibility, the recording may be persuasive on the issue of testamentary intent and capacity. Other experts and practitioners caution that sometimes a robust and healthy client will appear surprisingly frail or stumble over words (as we all do at times). Moreover, everyone present for the taping is a potential witness to be called at a will contest or malpractice trial. Further, the recording may lose some of its impact if medical or lay testimony establish that the client experienced moments of lucidity followed by moments of confusion. Finally, introducing the recording is necessarily creating evidence that may only serve to generate arguments over interpretation. Whether to tape a client, therefore, is a case-by-case decision that should be made with careful consideration as to the entirety of the circumstances.
- Stair stepping Some attorneys and experts suggest stair stepping any changes to the size of various distributions over time and in sequential documents. In a will contest, numerous documents must then be invalidated to completely eradicate the clients wishes. In a legal malpractice matter, it is also harder to establish undue influence when the intent of the client is consistently evident over numerous years.
- Educating the client Finally, some attorneys and experts suggest educating the client as to the real possibility of a will challenge and/or a legal malpractice matter that would only serve to invalidate their wishes. Thereafter, the attorney may suggest that the client:
  a) discuss the estate plan in a transparent manner with all beneficiaries; and/or
  b) avoid completely disinheriting a member of the nuclear family and include a no-contest provision. While these provisions are no guarantee that a probate challenge or lawsuit will be avoided (and are impermissible in certain jurisdictions), it may decrease the odds, especially if the unhappy beneficiary was at least, in part, provided

for in the estate plan. The client may also consider a trust fund for a child who may not benefit from a large inheritance. Finally, if the client is committed to disinheriting a child, the decision should be clear and reflected plainly in the estate documents, such as in the sentence, "...for reasons known to me, I make no provision for [my son John Doe] and/or [John Doe's] lineal descendants".

Remember: An Ounce of Prevention...

In conclusion, lawyers who practice in the area of estate, probate and trust may be more at risk for legal liability claims than other practitioners. Good risk management may be effective in decreasing the severity or frequency, however, of such claims.

Files should reflect the client's understanding of the nature and ramifications of the estate plan. The scope of the attorney's role should be documented in writing if no tax services will be provided to the client. The attorney should also clearly define his or her client, and keep in mind that when beneficiaries of the estate become involved with the planning, conflict of interest or undue influence allegations may surface. Finally, sudden drastic changes to an estate plan almost certainly draw criticism, so attorneys should proceed with caution before agreeing to prepare such changes. Remember: even a careful lawyer may find himself or herself on the wrong side of a family dispute simply by following a client's unusual or last minute instructions. A well-documented file may be invaluable to confirm the wishes of the client, as well as confirming that the client was fully informed of the ramifications of his/her decisions.

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