



# Leimberg's Think About It

Think About It is written by Stephan R. Leimberg, JD, CLU

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## REVIEWING A CLIENT'S WILL AND TRUST

### A Checklist for the Non-Attorney Professional

Any licensed attorney can draft a will or trust. All that's necessary is to purchase a good form book (or better yet, a good software package), fill in the blanks, print it out, get the client back to sign it, and send a bill. What could be simpler?

What's much more difficult is for an attorney to do it right. Perhaps it's true that graduation from law school and passing a state bar exam is sufficient to confer the legal right to draft a will or trust. But that alone does not a good draftsman make. It is not enough merely to draft the "word-perfect" will or trust. There's much more to proper will and trust drafting than can be found on any CD Rom - or even the internet.

Nor is a "simple" will simple. What should appear to the client as a clear and concise "executor's mission statement" may in fact be quite difficult and time consuming to construct and require considerable technical knowledge, skill, and experience. And even the best and brightest attorney can make a drafting mistake or omit a key provision.

The questions and comments below are intended to highlight both the technical and human aspects of the process and place it in the larger context of the overall identification and achievement of a client's objectives. Simply put, the actual drafting is a small (but very important) part of the far larger and more important role in helping a client see and solve his or her problems. This is also why "do-it-yourself" will-drafting software sold directly to the public

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is both inadequate and dangerous (if for no other reason than it may fail to consider and address many of the issues discussed below).

A professional who is not a state licensed attorney is prohibited from drafting a will for a client. To do so would clearly constitute the unauthorized practice of law.

But there is good reason for non-attorney practitioners to monitor the “big picture” and keep the client and counsel informed if it appears there are tax “traps” or commonly made mistakes that may interfere with the client’s goals.

You will find below a checklist of the type of mistakes that, if identified, should be brought to the attention of the client and/or counsel.

## **FAILURE TO CO-ORDINATE**

At one time, since only ultra-wealthy clients used trusts, most assets passed through probate. So back then, the single most significant element of the estate plan was the will. Today, the will is just one (albeit a very important one) of a number of written instruments that may govern the disposition of property at death. But has the will been coordinated with, or taken into consideration, the cash flow and tax implications of other dispositive documents such as IRAs, 401(k) plans, pension and profit-sharing plans, group and individual life insurance, revocable and irrevocable trusts, and jointly-held property?

If not, there is no way to minimize overall death taxes, provide for a smooth and efficient administration, and assure that beneficiaries will receive neither more nor less than was intended by the client. For example, suppose a client provides in the will that she leaves her mutual funds to her children, but the fund contract itself is held as joint-tenants with rights of survivorship with the client’s brother.

Lack of coordination can take the form of inconsistency in the will itself: Do all the provisions in the will mesh - or are there mutually exclusive clauses? For example:

- ✓ Suppose the will leaves a particular asset to a son and later leaves the same asset to someone else?
- ✓ Does the will provide an outright disposition in one place and the naming of a trustee and the creation of a trust for that same property someplace else?
- ✓ Is the tax apportionment clause of the will properly coordinated with the tax clause in a revocable trust? For instance, suppose the will charged taxes to the estate’s residue and the trust charged taxes to the trust’s residue.

- ✓ Does the client have a special or general power of appointment over another person's trust and does the present will appropriately recognize that trust and the client's objectives concerning it?

Has there been intra-lawfirm coordination? For example, suppose a large law firm has exclusively represented the client for many years. The client is in the middle of a quite public divorce but still married, or maybe a long separation and drawn out divorce negotiation has not been made public. One of the firm's partners, a litigator, is handling the divorce. But because of a lack of communication, no one in the law firm connected the "landmine" will with the divorce proceedings. The client dies and the bulk of her estate passes to her (ex) husband who is still the major beneficiary.

Will statutory provisions revoke the interest of a fiduciary or beneficiary, against the wishes of the client? For example, suppose a client is divorced in a state in which that event automatically revokes the designation of the testator's former spouse as executor. Assume the client still respects, trusts, or perhaps even still loves that spouse and wants her to be his executor. The attorney must be sure that the client's will is prepared in spite of the state legislature's intentions.

## **FAILURE TO KEEP INFORMED**

When reviewing a will or other estate document, it is essential that the documents reflect recent changes in both the law and in the client's personal situation and objectives. Has the will been updated for the latest federal and state law changes? Is there a recently enacted tax provision that should have been incorporated into the will (important perhaps for no other reason than to alert the executor of its existence and remind counsel to consider the election) but wasn't?

Perhaps the attorney (the one the client refers to as "my attorney") has known the client for many years but has failed to keep track of the economic or other key events impacting the client, the client's family, and the client's business. These include changes in income, inheritances, newly acquired assets, health conditions, and business and personal relationships.

For example, suppose a client owns a small interest in a dental supply company that has little value. His will, drafted years ago, provides that the stock was to pass to his best friend. The balance of his estate was to pass in equal shares to his two children. Death taxes are payable from the residue of his estate. The attorney is now asked to add a codicil to the will giving his gold pocket watch to his son. The attorney complies but asks no questions and suggests no other changes. Of course, after an adhesive the client's company patented was found to work in computer chips, there were a series of mergers and then the dental supply company went public, the price of the stock skyrockets, and upon the client's death, his best friend (and not his family) becomes rich. Those same events result in a huge death tax on the stock that exhausts the residue and the client's children receive nothing.

Has the client moved from a community property state to a common law state or from common law to community property state? Does the client have a second residence in another state? If so, how do that state's laws impact the client's planning?

Was the will or trust drawn before or after the youngest child or grandchild was born? Has there been a divorce or estrangement that is not, but should have been, considered in the will or trust? Does the will provide for an outright distribution when a trust would have provided needed and helpful management and investment advice and oversight? Conversely, does a trust "overprotect" and "over control" with respect to assets passing to an informed and financially mature beneficiary? Is the trust perfectly valid and well drawn but unnecessary?

Are the right people named as personal representatives (executor(ix)), trustee, or guardian? Are they all stable and financially responsible? Do the documents name sufficient "back-ups" in case the parties named can't or will not serve or die after starting to serve? Has an individual been named for a position in which a corporate fiduciary should serve (or vice versa)?

## **FAILURE TO FULLY INFORM THE CLIENT AND THE CLIENT'S SPOUSE**

Perhaps the attorney impressed the client with the estate tax saving potential of a given concept but neglected to mention the costs or downsides of the suggested provision. This often leads to disappointment and false expectations. For instance, consider the surviving spouse's feelings when he or she discovers that a will that poured over into a QTIP trust is very different than a will that leaves property outright. Consider the reaction of adult children who discover that they must outlive their 29-year-old stepmother in order to receive the family business. A draftsman must be particularly candid when explaining the potential impact of a tax apportionment clause where the values of various estate assets can fluctuate differently or some unexpectedly go up and some down. Consideration of this potential flaw, caused not by the document itself but by the failure to match the forms with the circumstances and objectives of the parties, might indicate the need for life insurance so that the children are not forced to wait (or pray for) the death of a stepparent before they receive anything.

Few attorneys give clients an "alert checklist," a list of certain actions that should trigger a call, before the client takes action. Absent such an alert, clients, by purchasing new assets in joint names or with rights of survivorship provisions, can unintentionally wreak havoc on the best-drafted will. For instance, suppose the client had three assets, each worth the same as the others. The will specifies that each of the client's three children will receive an equal share in the client's estate. But over time, the client transfers each of the three assets and titles them in joint tenancies with rights of survivorship naming a different child as co-tenant for each asset.

Clients must be warned of potential problems and conflicts of interest caused by seemingly innocent and well-intended guardianship and fiduciary choices. A common mistake is for the client, who is married for the second time and recently became a proud parent, to name his or her (now much older) parents as guardians. Many times the client's parents don't have the economic resources, the strength, desire or the will to raise young children. Often, close friends, who are already having problems making ends meet and whose house is already over-crowded, are named guardians of the client's children.

Quite often, the client needs to be told about the potential conflict of interest that may be faced by the executor selected. Consider, for example, an executor who is also a beneficiary and who, as executor, is empowered to make certain tax elections (e.g. the power to decide if an expense should be taken as a deduction on the federal estate or the federal income tax return). If that person is a child, he or she could personally benefit from a deduction taken in one place as opposed to another, as it could increase the amount going into the family (credit equivalent bypass) trust. On the other hand, a surviving spouse, as executor, could chose an election that may increase the amount passing to the marital trust. Likewise, a considerable amount of conflict can be generated by the executor's involvement in the valuation of estate assets.

The point is that the client must be made aware of the various possible conflict of interest triggers (and pressure on that person) in selecting as fiduciary a person who is also a beneficiary.

Is the document so complex that the client can't (and perhaps never did) understand it?

## **FAILURE TO RECOGNIZE TAX TRAPS**

The most obvious and expensive litigation is often caused by tax traps the drafting attorney failed to see. For instance, almost every will gives an executor the power to distribute in kind, i.e., the right to distribute the property itself rather than being forced to sell it and distribute the proceeds. But if the power is used in a will that contains a pecuniary formula type marital deduction clause, the federal estate tax marital deduction can be lost if the executor could choose among the assets to use in funding the marital share. (See Revenue Procedure 64-19, 1964-1 C.B. 682).

Consider the even more common situation where the will begins with specific bequests and ends without having addressed the issue of who pays taxes and administration expenses. Assume a situation where a client leaves an undeveloped and relatively modest parcel of real estate to a distant relative and the residue of her estate to her children. Years later, when the client dies, it is discovered that the modest parcel has oil under the ground. But since there was no provision in the will that each specific gift bear its portion of any death taxes, the residue meant to pass to the client's children is exhausted from paying the estate tax to benefit the distant relative.

If a distribution is made that under state law could be considered to be “in relief of a person’s legal obligation of support,” all or a portion of that payment could be taxed to the person whose obligation has been deemed to have been satisfied.

The potential for errors is particularly acute in the case of the will of a client who owns property outside the U.S. Many attorneys are unaware that for federal gift, estate, and generation-skipping tax purposes, a U.S. resident is subject to those taxes. Essentially, anyone who lives in the U.S. - regardless of how briefly - with no intention of leaving, can be considered to be domiciled here and becomes a “resident” within the reach of those potentially onerous taxes.

Attorneys who do not practice in the estate-planning field may fail to see the tax importance of the specific bequests clause for tangible personal property, particularly where the same person will receive the entire estate. But absent such a specific bequest clause, continued use of an asset (e.g., a car recently purchased by the decedent and used by the family prior to the testator’s death) is considered a distribution that must be included in the individual’s tax return as income, up to the amount of the estate’s distributable net income.

Should each beneficiary bear their share of the overall tax bill, or should certain individuals also pay for taxes generated by property passing to someone else? For instance:

- Should a spouse who receives a 50 percent interest in an estate passed free of estate tax nevertheless pay half of the overall estate tax?
- Should the charity named in a client’s will pay a share of the tax - even though the estate will receive a deduction for the portion of the estate that went to charity? (Note that if the client’s answer is “YES” in the last two situations, the client should be aware of the “whirlpool” (interdependent variable) effect it creates; the share of tax taken from the marital or charitable share reduces the marital or charitable deduction. That, in turn, results in a higher total estate tax. More, therefore, must be taken from their shares.) Of course, the other result of either course of action is that requiring the surviving spouse or the charity to pay “more than his/her/its share” results in increasing the amounts that pass to the other non-charitable beneficiaries. Clearly, the planning team must be well aware of both federal and state apportionment laws and coordinate the client’s desires and these laws into the drafting process.

## **FAILURE TO FOLLOW THROUGH**

Even the best-drafted trust with totally appropriate provisions is worthless if the trust was never properly funded. Yet often, because of a lack of follow-through, the instrument does not govern the disposition of a substantial asset. For instance, the assets in a funded living trust avoid probate. But the key word is “in”; if those assets are never placed into the trust, they will not

only be subjected to probate and the consequent costs but also to the claims of creditors – perhaps needlessly – and may well end up in the hands of a party never intended by the testator.

Does the will leave property to a trust that does not exist? In a number of instances, individuals have signed wills but not the trusts designed as pour-over receptacles.

## **FAILURE TO SCHEDULE REVIEW MEETINGS**

Many of the problems discussed above can be uncovered and quickly solved if clients are taught the importance of bi- or tri-annual reviews. If reviews are done, a birth, death, marriage, divorce, serious change of health, or the legal emancipation of children can be incorporated into the appropriate will provisions.

## **CONCLUSION**

Even “simple wills” should never be considered simple tasks. The goal is to help clients see and solve wealth transfer problems by creating a document that appears to the client as a clear and concise "executor's mission statement."

But the proper creation of that seeming simplicity may in fact be quite difficult and time consuming to construct and may require considerable technical knowledge, skill, experience, and quality control. The solution to the most commonly made mistakes is for the entire planning team to continually monitor the “big picture,” to coordinate, keep each other informed, keep the client and the client's spouse fully informed, and be highly sensitive to tax traps.

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