

3 THINGS YOU NEED TO KNOW TO NOT GET SUED

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As estate planners, we are not helping our clients by simply asking: “Who do you want to leave your stuff to?” We need to dig deeper. We want to create a plan that has the best chance of succeeding now and in the future. Otherwise, the person getting dragged into court is you!

You are not your client’s scrivener. Your job is to be engaged in the planning process and advise your clients. Your job is to foresee things that, to your client, may not be apparent.

I. HELP CLIENTS SELECT THE PROPER TRUSTEES OR GET SUED

DO YOU COUNSEL YOUR CLIENTS ON HOW TO SELECT TRUSTEES?

Family Members

Independent Trustee

Corporate Trustee

Out of State Trustees

PROBLEMS WITH SELECTING FAMILY MEMBERS AS TRUSTEES

- A. They don't know what to do!
- B. They act emotionally
- C. They are not aware of the legal rules of fiduciary responsibility
- D. They are not sueable



CASE STUDY

The Family:

Wife has children from marriage #1

Wife has children from marriage #2

Substantial economic difference between Husband #1 and Husband #2

Wife names children from marriage #1 as trustees for children from marriage #2

Husband #1 leaves very modest estate to children from marriage #1

Husband #2 leaves millions to children from marriage #2, in trust

WHAT WENT WRONG HERE

After Wife's death, children from marriage #1 are left as trustees of multi-million trust for the benefit of children from marriage #2. Could that be the fox guarding the henhouse?

Children from marriage #1:

Do not know how to administer trust

Do not want to administer the trust

Use the trust to manipulate the children of marriage #2

REFUSE TO ADMINISTER THE TRUST

Could these problems have been foreseen by the estate planner?

WHAT COULD THE ATTORNEY HAVE DONE DIFFERENTLY

DISCUSS:

Potential pitfalls - what could possibly go wrong?

Removal provisions - allow kids from marriage #2 to remove ½ siblings for cause to avoid problems

Alternatives to unanimity - only majority action required

Family dynamics

Name a professional trustee - would have avoided all of the issues that ensued

HOW TO FIX THE PROBLEM AFTER IT HAS HAPPENED

Letter to trustee outlining duties

Demand letter

Petition for Removal, Sanctions, and Surcharge

Offer alternatives to trustee - resignation

If brokerage account, check with wealth managers as to whether internal policies will allow one trustee to act on behalf of both - eliminates unanimity requirement

II. DESIGNING THE PLAN

A. ADDRESS ALL FORESEEABLE ISSUES*

1. If you fail to foresee that the plan may lead to a lawsuit, you can be sued.

See, Temple Hoyne Buell v. Holland & Hart, 851 P.2d 192 (1992)

2. Attorney owes duties to client – knowledge, skill, and judgment ordinarily possessed by members of the legal profession carrying out services for a client. Part of that duty is anticipating reasonably foreseeable risks.

3. Research issues that are new to you
4. Consider the potential for dispute over each element of the plan
5. Document the file in detail
6. When client insists on proceeding contrary to your recommendations, get written waivers from client

7. Talk about the family

- i. What family dynamics are at play?
- ii. Is there family friction?
- iii. Do any family members have problems with drugs, alcohol, or gambling?

*Bernie and Greta's definition of foreseeability: "Whatever you can imagine can go wrong."

Black's Law Dictionary definition: "A reasonable or likely consequence of an act."

B. REASONS PEOPLE SUE

1. Pretermitted Child
2. Disinherited Spouse
3. Fail to provide for children of previous marriage
4. Undue Influence and Incapacity
5. Including provisions that are against the law or against public policy
6. Failure to advise that the disposition of non-probate assets should match the client's overall intent
7. Disappointed beneficiaries

III. PRESSURE TESTING THE PLAN

(HOW DO YOU MAKE SURE YOUR PLAN WILL WORK?)

- A. For non-attorneys, are you referring your clients to a specialist, or to a firm that has an experienced estate planning department?
- B. Does each aspect of the plan work in the future under foreseeable scenarios?
- C. Estate Plan Reviews: Do you encourage your clients to review their plan every few years to discuss changed circumstances or changes in the law?

D. Issues to Consider

1. Will each aspect of the plan work if your client died yesterday? If your client dies 15 years from now?
2. How does the client feel about each provision? How might the client's family react to the provisions in the future?
3. Have you discussed the problems with outright distribution to young adults?
4. Have you included successors in each document?
5. Have you addressed out of state property?
6. If a trust-based plan, have you dealt with titling and beneficiary designations?

QUESTIONS & ANSWERS