

OF MALPRACTICE, ETHICS, AND THE “SIMPLE” WILL

LET ME POSIT, FIRST, THAT THERE IS NO SUCH THING AS A “SIMPLE” WILL.

For the purposes of this article I am going to assume that lawyers and clients alike use the term simple to refer to a will where there is a non-taxable estate and the testator or testatrix is leaving all of his or her property to one beneficiary, and alternatively to a secondary beneficiary or class of beneficiaries. A simple will may also include a statement of guardianship, although if minor children are involved, a contingent trust for minors is normally needed which might elevate the will out of the simple category.

Most lawyers will charge the equivalent of one, maybe two, hours of legal time for the preparation of a simple will. This is hardly enough time to correctly perform the obligations a lawyer has in preparing this document, which I will demonstrate is not so simple.

The majority of simple wills are done between husband and wife. It is clear from any reading of our ethics rules that whenever any legal work is done for parties that could have a conflict of interest, a waiver of confidentiality between them and an agreement for the attorney's joint representation of parties with potential conflicts is necessary. I will dare say that this agreement is hardly ever obtained. Yet it is crystal clear from the ethics rules that failure to obtain such agreement is a violation. I think it should be clear to any lawyer that a

husband and a wife are parties with potential conflicts of interest. One need only look at the large number of marital problems to verify this assertion. I have attached, as an appendix to this article, the form that is used in our firm for the agreement of the husband and wife to allow our attorneys to represent them both in an estate planning matter.

The run-of-the-mill non-estate planning specialist who is not focused on this issue is likely to run afoul of it.

It does not take long, but every simple will engagement needs to include time for the lawyer to explain to clients the need for this conflict waiver. This time, although not necessarily lengthy, will eat into the one or two hours the lawyer allocates to prepare the document. The discussion will also frequently generate other discussions indicating that a simple will is not appropriate. Once clients are counseled on the true issues in estate planning, the original requested task of preparing a “simple” will becomes more complex.

Let's use the following example for the balance of this article: A typical simple will scenario would involve an individual who wants to leave half of his property to his wife and half of his property to adult children, perhaps from a prior marriage.

The typical general practitioner will treat this as a “simple” case and fail to undertake the necessary initial inquiry which we will now discuss.

The typical general practitioner will draft a will leaving half to the spouse and half to the adult children with provisions regarding who is to take if one of the designated beneficiaries is not survived by the testator or testatrix.

The inquiry that is missing at this point is what is actually owned by the testator/testatrix. Most commonly in this situation, the largest assets of the estate are bank accounts of all types, securities accounts, and retirement accounts. Typically in this situation, the bank accounts and securities accounts are owned jointly with rights of survivorship. This is because most brokers and banks do not clearly explain the forms of ownership of these assets. Therefore, our hypothetical client has set up his or her estate so that assets in these accounts pass to the surviving spouse automatically, and not under the will.

Retirement assets also do not pass under the will. These pass by beneficiary designation. Again, unless the client has made a beneficiary designation, the usual custodial document signed by the client upon opening the retirement account will default to a spouse as the beneficiary.

Therefore, our wary lawyer in the above situation would create a will that is totally ineffective to carry out the client's desires, because most of the property in the client's estate would not pass under the will.

The inquiry about how the property is owned should have been made first, and is most often not made at all. How are the accounts titled? To properly make this inquiry, the attorney will need to examine statements of accounts, signature cards, and beneficiary designations for the aforementioned assets. To obtain these documents and review them will eat into the allocated one or two hours the attorney has set aside for the project. This time is generally not accounted for because the attorney does not conduct this inquiry.

This brings us to malpractice. If a client comes to an attorney's office and asks to leave their property one way, and the document the attorney drafts leaves it another way, hasn't the attorney committed malpractice? I would suggest yes.

Texas has been a hold out state against the rights of will beneficiaries to challenge the work of the drafting lawyer. This will likely change over time.

In addition, given the recent attacks on attorney/client privilege as it relates to deceased individuals, we cannot assume that this privilege will protect the attorney's notes after the death of the will client. It would then be easy for the executor of the estate or other representative to demand access to these notes and compare them against the actual disposition of the estate under the will. The estate might assert a claim against the lawyer on behalf of the deceased.

Given the huge amount of money passing by way of individual retirement accounts, which do not pass under the will, and which have

large income tax ramifications as well as estate tax ramifications, this is an area of large potential malpractice liability for general practitioners. Will the standard practices of the community protect us from our failure to focus on this issue?

The alarm bell has gone off. It is time for Texas attorneys, indeed attorneys in every state of the country, to wake up and do their jobs properly when drafting even the simplest of testamentary documents for clients. It is only when attorneys as a group begin to offer the level of service in this area that the client should receive, and charge the appropriate fees for doing so, that we will be able to explain the difference between using an attorney to draft these important documents and using a

computer program to do so.

I predict that the lines demarcating the practice of law from accountancy, financial planning, insurance, and financial services will soon evaporate. It is only when attorneys start focusing on their proper role as counselors in this area that they will be able to distinguish themselves from those in the other areas who are not equipped to go beyond merely completing blanks in forms.

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APPENDIX

JOINT REPRESENTATION CONFIRMATION

It is commonplace for spouses to engage the same firm for estate planning. However, when a law firm represents both spouses with regard to common or related matters, certain conflicts of interest can arise within the ethical codes of the legal profession.

- We will not maintain confidentiality between the two of you; the information which we receive from either of you or from third parties will be shared with both of you.
- Each of you waive any objection to our representation of the other regarding potential conflicts of interest between you (such as involving spousal rights of election, property ownership and transfer matters, and trust as well as other asset arrangement matters).

Joint representation is appropriate in our experience. However, strict ethical requirements dictate that we thoroughly disclose the ethical ramifications.

Please sign below to indicate your acknowledgment of these terms.

Dated _____, 2000.

Husband

Wife