

AVOIDING THE ESTATE PLANNING “BLUE SCREEN OF DEATH”—COMMON NON-TAX ERRORS AND HOW TO PREVENT THEM

*by Gerry W. Beyer**

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I. INTRODUCTION

Have you ever been using your computer and unexplainably encountered the dreaded “Blue Screen of Death” where your work completely disappears and a blue screen replaces your work with white text, indicating that an unrecoverable system error has occurred and that you must restart your computer and lose all unsaved data?¹ If you have, then you know the frustration and anger that follows, especially because there was nothing you could do to prevent it. In the estate planning context, a malpractice action can be considered an equivalent to the blue screen of

1. Brien M. Posey, *Demystifying the ‘Blue Screen of Death,’* Microsoft TechNet (2008), <http://www.microsoft.com/technet/archive/winntas/tips/techrep/bsod.mspx?mfr=true>.

death. Fortunately, unlike the virtually unpreventable computer error, you have the ability to reduce tremendously the likelihood of estate planning “crashes.”

This article discusses estate planners’ potential liability for malpractice, the common non-tax related mistakes attorneys may make while preparing estate plans, and the risky, but commonly seen, practice of preparing estate plans for both spouses.

II. THE POTENTIAL OF MALPRACTICE LIABILITY FOR NEGLIGENT ESTATE PLANNING

A. *Disgruntled or Omitted Beneficiary as Plaintiff*²

1. *The Privity Wall Is Erected*

The potential malpractice liability of an attorney for negligence in estate planning is great because estate planning requires an especially high degree of competence.³ A thorough knowledge of many areas of the law is required—wills, probate, trusts, taxation, insurance, property, domestic relations, et cetera. As one commentator has stated, “[a]ny lawyer who is not aware of the pitfalls in probate practice has been leading a Rip Van Winkle existence for the last twenty years.”⁴

When errors with the will or the will execution ceremony are discovered during the testator’s lifetime, the testator’s only loss is the cost of having another will prepared and executed (unless, of course, the testator permanently loses tax benefits). This situation does not normally lead to malpractice liability because the attorney may avoid becoming a defendant by simply re-executing the will without cost to the client and providing appropriate apologies for the inconvenience.

The problem is that errors usually do not manifest themselves until after the client’s death. At this time, the testator’s estate probably could sue the negligent attorney. However, the only damages would be the attorney’s fees paid for drafting the will because the error did not cause other diminution of the estate. Accordingly, if there is a flaw in the will or the will execution ceremony causing the will to be ineffective and that flaw can be traced to the conduct of the attorney in charge, then the intended

2. Portions of this section are adapted from GERRY W. BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 53.1 & 53.10 (3d ed. 2002).

3. See David Becker, *Broad Perspective in the Development of a Flexible Estate Plan*, 63 IOWA L. REV. 751, 759 (1978) (“[C]omparatively few lawyers recognize the expertise and particular talents essential to estate planning”).

4. Robert E. Dahl, *An Ounce of Prevention—Knowing the Impact of Legal Malpractice in the Preparation and Probate of Wills*, DOCKET CALL, Vol. 26, No. 2, 1981, at 9.

beneficiaries who now find themselves short-changed are apt to bring a malpractice action.

Until recently, attorneys did not have to fear these injured beneficiaries' actions because the attorney could successfully raise the defense of lack of privity. The general rule was that the attorney did not owe a duty to an intended beneficiary because there was no privity between the attorney and the beneficiary. However, many jurisdictions are rapidly replacing the strict privity approach with the view that these beneficiaries may proceed with their actions against the drafting attorney despite the lack of privity.

2. *The Privity Wall Begins to Crack*

In 1958, the Supreme Court of California overruled the strict privity requirement in a case involving a notary public. In *Biakanja v. Irving*,⁵ the plaintiff received only a one-eighth intestate share of the decedent's estate rather than the entire estate because the attestation of the will was improper.⁶ The court rejected the body of common law requiring privity and determined that the imposition of a duty to a third person is a matter of policy and involves the balancing of six factors:

- the extent to which the transaction was intended to affect the plaintiff;
- the foreseeability of harm to the plaintiff;
- the degree of certainty that the plaintiff suffered injury;
- the closeness of the connection between the defendant's conduct and the injury suffered;
- the moral blame attached to the defendant's conduct; and
- the policy of preventing future harm.

The court concluded that the "[d]efendant must have been aware from the terms of the will itself that, if faulty solemnization caused the will to be invalid, [the] plaintiff would suffer the very loss which occurred."⁷ The court stated that "[s]uch conduct should be discouraged and not protected by immunity from civil liability, as would have been the case if this plaintiff, the only person who suffered a loss, were denied a right of action."⁸ Accordingly, the court held the notary liable for the difference

5. *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958).

6. *Id.* at 17.

7. *Id.*

8. *Id.*

between the intestate share and the amount that the intended beneficiary would have received if the will was valid.⁹

Less than four years later, the California Supreme Court repeated essentially the same principle in *Lucas v. Hamm*, where the court held that an attorney's liability for preparing a will could extend to the intended beneficiary.¹⁰ The court reasoned:

[O]ne of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired.¹¹

Most jurisdictions have followed these California cases and have held attorneys liable to the intended beneficiaries.¹² As a result, there are now fewer than ten states retaining the privity requirement in estate planning cases.¹³

3. *Texas Lower Courts Consistently Keep the Privity Wall in Good Repair*

The Fourth Court of Appeals became the first Texas court to address the issue in the case *Berry v. Dodson, Nunley & Taylor, P.C.*¹⁴ In this case, the decedent had a will that named his wife and his children from a former marriage as sole beneficiaries.¹⁵ While hospitalized with terminal cancer, the decedent hired the defendant attorney to prepare a new will that would add his wife's children as beneficiaries, change the trustees of the trusts for the benefit of the children, and leave his wife certain business interests.¹⁶

The decedent died about two months after the attorney's initial consultation in the hospital.¹⁷ The attorney had prepared a draft of a new

9. *Id.* at 17-19.

10. *Lucas v. Hamm*, 364 P.2d 685, 688-89 (Cal. 1961).

11. *Id.* at 688 (holding that the attorney was not negligent for failing to master a rule against perpetuities problem).

12. See Martin D. Begleiter, *Attorney Malpractice in Estate Planning—You've Got to Know When to Hold Up, Know When to Fold Up*, 38 U. KAN. L. REV. 192, 196-97 (1990).

13. See Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U. L. REV. 277, 281-82 (2003).

14. *Berry v. Dodson, Nunley & Taylor, P.C.*, 717 S.W.2d 716, 717 (Tex. App.—San Antonio 1986), writ *dism'd by agr.*, 729 S.W.2d 690 (Tex. 1987).

15. *Id.*

16. *Id.*

17. *Id.*

will but did not execute the will.¹⁸ Consequently, the executor probated the old will, making the decedent's wife and children angry; thus, they brought a malpractice action against the attorney.¹⁹

After examining the facts and concluding that no privity existed between the attorney and decedent's wife and her children, the court held that the intended beneficiaries' lack of privity precluded a negligence action.²⁰ The court recognized the growing trend in other jurisdictions to permit an intended beneficiary to recover in the absence of privity, but it refused to break with the general Texas privity requirement.²¹ The Supreme Court of Texas granted the intended beneficiaries a writ of error; however, the parties settled before the court reviewed the case.²²

A subsequent court of appeals case on the same issue is *Dickey v. Jansen*.²³ In *Dickey*, the intended beneficiaries alleged that the attorney negligently failed to draft an operable testamentary trust provision for certain testator's mineral interests under Louisiana law.²⁴ The majority followed *Berry* and did not allow the intended beneficiaries to recover.²⁵ However, Chief Justice Evans's dissenting opinion strongly argued that the intended beneficiaries had stated a cause of action.²⁶

In *Thomas v. Pryor*, an intended beneficiary sued an attorney who prepared decedent's will through a pro bono legal aid program.²⁷ The will was not admitted to probate because it was not witnessed.²⁸ The court, consistent with prior cases, held that the lack of privity between the attorney and the intended beneficiary barred the action.²⁹ The court decided that public policy supports the privity rule and that "disturbing consequences could occur if an attorney were held liable to third parties."³⁰ The court was concerned that liability to third parties "would inject undesirable self-protective reservations into the attorney's counselling [sic] role."³¹

The Supreme Court of Texas granted writ to decide whether it should lift the privity bar; however, as in *Berry*, the parties settled before the court

18. *Id.*

19. *Id.*

20. *Id.* at 718-19.

21. *Id.*

22. *Berry v. Dodson, Nunley & Taylor, P.C.*, 729 S.W.2d 690, 690 (Tex. 1987).

23. *Dickey v. Jansen*, 731 S.W.2d 581, 582 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

24. *Id.*

25. *Id.* at 582-83.

26. *Id.* at 583-84 (Evans, C.J., dissenting).

27. *Thomas v. Pryor*, 847 S.W.2d 303, 303-04 (Tex. App.—Dallas 1992), writ *dism'd by agr.*, 863 S.W.2d 462 (Tex. 1993).

28. *Id.* at 304.

29. *Id.* at 305.

30. *Id.*

31. *Id.* (quoting *Bell v. Manning*, 613 S.W.2d 335, 339 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.)).

heard the case.³² On the day set for oral argument, the court set aside the judgment of the appellate court without reference to the merits and remanded the case to the trial court for entry of judgment in accordance with the parties' settlement agreement.³³

In *Thompson v. Vinson & Elkins*, the residuary beneficiaries of the decedent's will brought suit against the law firm that the trustee hired to represent the decedent's estate and trust in distributing the trust's assets.³⁴ The court held that the beneficiaries did not have standing to bring a claim of professional negligence against the law firm because they were not in privity with the law firm.³⁵

4. The Supreme Court of Texas Buttresses the Privity Wall

In 1996, the Supreme Court of Texas finally decided the issue of whether privity exists between attorney and beneficiary in *Barcelo v. Elliott*, when the court held that beneficiaries do not have a claim against the drafting attorney.³⁶ In *Barcelo*, an attorney prepared an estate plan for a client.³⁷ After the client's death, a probate court held that an inter vivos trust included in the plan was invalid and unenforceable as a matter of law.³⁸ The beneficiaries sued the attorney for negligence and breach of contract.³⁹ Consistent with prior Texas cases, the lower courts and the Supreme Court of Texas dismissed the beneficiaries' claims because the beneficiaries were not in privity with the attorney.⁴⁰

The court rejected the trend in other states to relax the privity barrier in the estate planning context.⁴¹ The court held:

[Allowing disappointed will and trust beneficiaries to sue] would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries. . . . [T]he greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases

32. *Thomas v. Pryor*, 863 S.W.2d 462, 462 (Tex. 1993); see *Berry v. Dodson, Nunley & Taylor, P.C.*, 729 S.W.2d 690, 690 (Tex. 1987).

33. *Thomas*, 863 S.W.2d at 462.

34. *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 619-20 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

35. See *id.* at 621, 623.

36. *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996).

37. *Id.* at 576.

38. *Id.*

39. *Id.*

40. *Id.* at 577.

41. *Id.* at 578.

zealously represent their clients without the threat of suit from third parties compromising that representation.⁴²

The court provided the following example of this type of conflict:

Suppose . . . that a properly drafted will is simply not executed at the time of the testator's death. The document may express the testator's true intentions, lacking signatures solely because of the attorney's negligent delay. On the other hand, the testator may have postponed execution because of second thoughts regarding the distribution scheme. In the latter situation, the attorney's representation of the testator will likely be affected if he or she knows that the existence of an unexecuted will may create malpractice liability if the testator unexpectedly dies.⁴³

The court's opinion "insulates an entire class of negligent lawyers from the consequences of their wrongdoing."⁴⁴

5. *The Appellate Courts Respect the Wall*

In *Guest v. Cochran*, two parents hired an attorney who was a close friend of the preferred child to draft estate planning documents for the parents.⁴⁵ The slighted children alleged that the attorney conspired with the preferred child so that the preferred child would obtain a disproportionate amount of the parents' estates via an irrevocable inter vivos trust and other non-probate arrangements.⁴⁶ However, the parents never signed these instruments.⁴⁷ The wills did not contain bypass trusts to save estate taxes on the unified credit amount.⁴⁸ In addition, the attorney did not advise the surviving spouse or the executors of the deceased spouse's estate that the surviving spouse could disclaim a portion of the estate to reduce the size of her estate, which would be subject to the estate tax upon her death.⁴⁹ As a result, the estate of the second parent to die paid \$60,000 in estate taxes.⁵⁰ The trial court granted summary judgment in favor of the attorney.⁵¹

The appellate court affirmed the summary judgment against the slighted children's individual claims against the attorney for malpractice following *Barcelo*.⁵² The court rejected the slighted children's argument

42. *Id.* at 578-79.

43. *Id.*

44. *Id.* at 579 (Cornyn, J., dissenting).

45. *Guest v. Cochran*, 993 S.W.2d 397, 399 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

46. *Id.*

47. *Id.* at 400.

48. *Id.* at 399.

49. *Id.* at 400.

50. *Id.*

51. *Id.*

52. *Id.* at 406.

that *Barcelo* was bad law and that the lower court should decide differently because of the ever changing landscape of Texas law.⁵³

In *Longaker v. Evans*, the settlor terminated an inter vivos trust which resulted in certain assets passing to settlor's brother (brother) instead of her son (son).⁵⁴ Son asserted that brother, an attorney, violated his fiduciary duty to settlor by assisting her in terminating the trust.⁵⁵ The appellate court determined that this claim failed for a variety of reasons.⁵⁶ First, even if the termination was improper, it did not damage settlor because all of the trust's assets were in settlor's estate.⁵⁷ Second, brother did not owe son a duty because there was no attorney-client relationship between son and brother.⁵⁸ In addition, there was evidence showing settlor was acting upon her own wishes when she terminated the trust.⁵⁹

6. Attempts to Run Around the Wall

a. Create Attorney-Client Relationship with Beneficiary

The shield from liability attorneys acquired under *Barcelo*, however, does not provide absolute protection.⁶⁰ Beneficiaries and attorneys may act with regard to each other to such an extent that an attorney-client relationship actually exists, which consequently eliminates *Barcelo*'s extended protection.⁶¹

The case of *Vinson & Elkins v. Moran* is instructive.⁶² The beneficiaries of the will sued the law firm that the executors hired alleging malpractice on various grounds, including the failure to reveal conflicts of interest.⁶³ The law firm asserted that this lawsuit must fail because there was no privity of contract between the law firm and the beneficiaries and because the law firm represented the executors personally, not the beneficiaries.⁶⁴ The beneficiaries claimed, however, that the parties acted in such a way as to create an attorney-client relationship between the law firm

53. *Id.*

54. *Longaker v. Evans*, 32 S.W.3d 725, 730 (Tex. App.—San Antonio 2000, pet. withdrawn).

55. *Id.*

56. *Id.* at 733.

57. *Id.* at 734.

58. *Id.*

59. *Id.*

60. *See Vinson & Elkins v. Moran*, 946 S.W.2d 381, 401 (Tex. App.—Houston [14th Dist.] 1997, writ dismissed).

61. *See id.*

62. *Id.* at 381-414.

63. *Id.* at 387-88.

64. *Id.* at 401-02 (citing *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996) (discussing lack of privity); *Huie v. DeShazo*, 922 S.W.2d 920, 925 (Tex. 1996) (explaining that the trustee who hired the law firm was the firm's real client)).

and the beneficiaries, which then served as the basis for the suit.⁶⁵ The jury found that an attorney-client relationship existed between the law firm and the beneficiaries.⁶⁶ After a detailed review of the evidence, the appellate court held that there was sufficient evidence to support the jury's decision.⁶⁷ Thus, the law firm could be subject to liability for malpractice.⁶⁸

In *Estate of Arlitt v. Paterson*, a married man (Husband) with four children died leaving a 1983 will and a 1985 codicil that substantially reduced one of his daughter's share of the estate.⁶⁹ This daughter contested the will and codicil.⁷⁰ The contest dragged on for many years.⁷¹ Then, Husband's wife (Wife), individually and as the executor of her husband's will, along with the other children, sued the attorneys who drafted the will and codicil.⁷² They alleged that the attorneys negligently represented Husband and Wife while jointly preparing the estate plan.⁷³ The attorneys responded that they were not liable for a variety of reasons, including lack of privity, expiration of the period of limitations, and lack of subject matter jurisdiction.⁷⁴ The trial court granted the attorneys' motion for summary judgment without specifying a reason.⁷⁵ The appellate court reversed.⁷⁶

The appellate court began its malpractice discussion by holding that the two year statute of limitations for legal malpractice claims may not have expired because it did not begin to run until Wife and the other children discovered, or reasonably should have discovered, the wrongfully caused injury.⁷⁷ The attorneys failed to conclusively prove that Wife and her other children filed their malpractice claims more than two years after they discovered, or reasonably should have discovered, the wrongfully caused injury.⁷⁸ Thus, the appellate court reasoned that the trial court improperly granted the attorneys' motion for summary judgment.⁷⁹

The court then focused on privity.⁸⁰ The court recognized that when a testator retains an attorney to draft a will, the attorney owes no professional duty of care to persons named as beneficiaries under the will.⁸¹ The court

65. *Id.* at 404.

66. *Id.* at 403.

67. *Id.* at 405.

68. *Id.*

69. *See Estate of Arlitt v. Paterson*, 995 S.W.2d 713, 716-17 (Tex. App.—San Antonio 1999, pet. denied).

70. *Id.* at 717.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 722.

77. *Id.* at 719.

78. *Id.*

79. *Id.*

80. *See id.*

81. *Id.* at 720.

concluded that Wife and her other children must establish that they were in privity of contract with the attorneys to move forward with a malpractice claim.⁸² With regard to the other children, the court held that there was no evidence that Husband was acting as the other children's agent when he consulted with the attorney, and the court held that there was no evidence that the attorneys represented the other children.⁸³ Thus, the appellate court affirmed the summary judgment denying the children's claims.⁸⁴ Likewise, the summary judgment was proper against Wife in her capacity as Husband's executor.⁸⁵

The court next examined Wife's personal claim for malpractice.⁸⁶ Wife claimed that privity existed between herself and the attorneys because they jointly represented her and Husband in the estate planning process.⁸⁷ Conversely, the attorneys argued that they represented only Husband; therefore, there was no privity.⁸⁸ The court determined that *Barcelo* did not prevent Wife's personal claim because she could qualify as a represented beneficiary.⁸⁹ The court reasoned that "[t]he *Barcelo* rule thus does not deny a cause of action to one of two joint clients."⁹⁰ Accordingly, the trial court's summary judgment against Wife was improper because there was a material issue of fact as to whether the attorneys represented Wife as well as Husband.⁹¹

b. Assert Negligent Misrepresentation

Texas courts recognize the tort of negligent misrepresentation as described by section 552 of the Restatement (Second) of Torts.⁹² A cause of action for breach of duty under this section requires:

- (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 721.

90. *Id.*

91. *Id.*

92. See Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991); RESTATEMENT (SECOND) OF TORTS § 552 (1977).

obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.⁹³

In 1999, the Supreme Court of Texas held in the case of *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, that attorneys, just like other professionals, could incur liability for negligent misrepresentation.⁹⁴ The court explained:

[A] negligent misrepresentation claim is not equivalent to a legal malpractice claim. Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely. Therefore, an attorney can be subject to a negligent misrepresentation claim in a case in which she is not subject to a legal malpractice claim. The theory of negligent misrepresentation permits plaintiffs who are not parties to a contract for professional services to recover from the contracting professionals.⁹⁵

The case of *Estate of Arlitt v. Paterson* appears to be the first case discussing negligent misrepresentation in a will drafting context.⁹⁶ The appellate court recognized that a plaintiff must show privity to prevail on a legal malpractice claim.⁹⁷ However, no privity is needed to establish a duty not to negligently misrepresent.⁹⁸ The court explained that a negligent misrepresentation claim is not the same as a malpractice claim, and an attorney may be subject to a negligent misrepresentation claim without being subject to a malpractice claim.⁹⁹ The appellate court remanded these claims because the attorneys' motion did not address the negligent misrepresentation claims; therefore, the trial court erred in rendering judgment against Wife and the other children.¹⁰⁰

c. Sue Under the Deceptive Trade Practices Act

In *Vinson & Elkins v. Moran*, the beneficiaries sued the law firm Vinson & Elkins, L.L.P., under the Texas Deceptive Trade Practices Act

93. *Id.*

94. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999).

95. *Id.* at 792 (citations omitted).

96. *Estate of Arlitt*, 995 S.W.2d at 713.

97. *Id.* at 718.

98. *Id.*

99. *Id.*

100. *Id.*

(the DTPA).¹⁰¹ The law firm challenged the lower court's finding that the beneficiaries were consumers under the DTPA.¹⁰² To qualify as consumers, the beneficiaries must first "have sought or acquired the goods or services by purchase or lease, and second, the goods or services purchased must form the basis of the complaint."¹⁰³

The appellate court held that the beneficiaries were not consumers.¹⁰⁴ The court was "not persuaded that the Texas Legislature intended the [Deceptive Trade Practices] Act to apply to causes of action by will beneficiaries against the attorneys hired by the executors of the estate."¹⁰⁵ The beneficiaries were merely "incidental beneficiaries" of the contract between the law firm and the executors.¹⁰⁶ This type of benefit is not enough to give the beneficiaries consumer status.¹⁰⁷ The court supported its holding with public policy arguments:

If consumer status were conferred on estate beneficiaries, the existence of minor beneficiaries, residual beneficiaries, or others similarly situated could extend the period of time in which an action could be brought against attorneys hired by the executors for years after the representation ended and the estate was closed. We find the public interest in the finality of probate proceedings includes actions against attorneys who represent executors in the administration of the estate. A suit against an attorney would necessarily involve revisiting the original administration of the estate, and might very well affect the original distributions. Thus, public policy weighs against conferring consumer status on estate beneficiaries.¹⁰⁸

The court reached similar conclusions in *Wright v. Gundersen*, where the testator's will gave his IRAs to his children.¹⁰⁹ However, this bequest was ineffective because the testator designated his brother as the beneficiary of the IRAs.¹¹⁰ The daughter, both individually and as the executrix of the testator's estate, sued the attorney who drafted the will.¹¹¹ She sued for violations of the DTPA, breach of contract, and negligence for not advising

101. *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 386 (Tex. App.—Houston [14th Dist.] 1997, writ dismissed).

102. *Id.* at 406.

103. *Id.* at 406-07.

104. *Id.* at 408-09.

105. *Id.* at 407.

106. *Id.* at 408.

107. *Id.*

108. *Id.* at 408-09.

109. *See Wright v. Gundersen*, 956 S.W.2d 43, 45, 47-48 (Tex. App.—Houston [14th Dist.] 1996, no writ).

110. *Id.*

111. *Id.*

the testator to make the appropriate changes to the IRA beneficiary cards.¹¹² The trial court granted summary judgment in favor of the attorney.¹¹³

The appellate court affirmed the summary judgment against the daughter individually.¹¹⁴ There was no attorney-client relationship between the attorney and the daughter at the time of the alleged malpractice.¹¹⁵ In addition, the daughter could not claim that she had standing to bring the action as a third party beneficiary of the contract between the testator and the attorney.¹¹⁶ Even so, the court reversed the trial court's grant of summary judgment on the negligence claim against the daughter in her representative capacity because the attorney failed to address the claims against the daughter in her representative capacity.¹¹⁷

The appellate court affirmed the trial court's summary judgment against the daughter on the DTPA claim.¹¹⁸ In her representative capacity, the daughter did not present proof to defeat the attorney's summary judgment motion.¹¹⁹ The court also affirmed the summary judgment against the daughter in her individual capacity because she did not qualify as a "consumer."¹²⁰ The daughter did not hire the attorney to draft the relevant documents and did not pay the attorney.¹²¹

Following *Wright v. Gundersen*, the court in *Guest v. Cochran* affirmed the summary judgment on the slighted children's individual claims against the attorney for violations of DTPA.¹²² The slighted children were not consumers because they did not seek or acquire any goods or services from the attorney.¹²³

B. Personal Representative of the Estate as Plaintiff

When a personal representative brings an action against the drafting attorney for malpractice, the privity shield is not a defense because the client was in privity with the attorney and the personal representative is merely stepping into the client's position.¹²⁴ The leading case

112. *Id.*

113. *Id.*

114. *Id.* at 46.

115. *Id.* at 48.

116. *Id.*

117. *Id.* at 47.

118. *Id.* at 46.

119. *Id.*

120. *Id.* at 48.

121. *Id.* at 47-48.

122. *Guest v. Cochran*, 993 S.W.2d 397, 408 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

123. *See id.* at 407-08. (Note that effective September 1, 1995, the DTPA was amended to exempt most claims for damages based on the rendering of legal services in Texas Business & Commerce Code section 17.49, and the plaintiff brought these claims before the effective date of this amendment.)

124. *See, e.g., Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 789 (Tex. 2006).

demonstrating this principle is *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, in which the executors sued the attorneys who prepared the testator's will, asserting that the attorneys provided negligent advice and drafting services.¹²⁵ The executors believed that the testator's estate incurred over \$1.5 million in unnecessary federal estate taxes because of the malpractice.¹²⁶ The briefs revealed that the main problem was that the testator did not form a family limited partnership or take other steps that could have led to a lowering of the estate's value.¹²⁷

Both the trial and appellate courts agreed that the executors had no standing to pursue the claim because of lack of privity.¹²⁸ The appellate court explained that *Barcelo* mandated privity; therefore the court had no choice but to affirm the trial court's grant of a summary judgment in favor of the attorneys.¹²⁹

The Supreme Court of Texas reversed and held that "there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners."¹³⁰ The court did not express an opinion as to whether the attorneys' conduct actually amounted to malpractice.¹³¹

Below are some of the key points the court made:

- ***Barcelo* remains good law.** The court did not overturn *Barcelo*. The court explained that an attorney owes no duty to a non-client, such as a will beneficiary or an intended will beneficiary, even if the attorney's malpractice damages the individual.¹³² The court reiterated the policy considerations supporting *Barcelo*:

[T]he threat of suits by disappointed heirs after a client's death could create conflicts during the estate-planning process and divide the attorney's loyalty between the client and potential beneficiaries, generally compromising the quality of the attorney's representation [S]uits brought by bickering beneficiaries would necessarily require extrinsic evidence to prove how a decedent intended to distribute the estate, creating a "host of difficulties." . . . [B]arring a cause of action for

125. *Id.* at 782.

126. *Id.*

127. Brief of Petitioner-Plaintiff at 3-4, *Belt*, 192 S.W.3d 780 (Tex. 2006) (No. 04-0681).

128. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 141 S.W.3d 706, 706 (Tex. App.—San Antonio 2004), *rev'd*, 192 S.W.3d 780 (Tex. 2006).

129. *Id.* at 708-09.

130. *Belt*, 192 S.W.3d at 782.

131. *See id.* at 789 (remanding to trial court for further proceedings consistent with opinion).

132. *Id.* at 783.

estate-planning malpractice by beneficiaries would help ensure that estate planners “zealously represent[ed]” their clients.¹³³

- **Policies are different regarding suits by personal representatives.** The policy considerations discussed above do not apply to suits by personal representatives. The court explained that unlike cases “when disappointed heirs seek to dispute the size of their bequest or their omission from an estate plan,” these policy considerations do not apply “when an estate’s personal representative seeks to recover damages incurred by the estate itself.”¹³⁴ The court also pointed out “while the interests of the decedent and a potential beneficiary may conflict, a decedent’s interests should mirror those of his estate.”¹³⁵ The court wrapped up its opinion by concluding that “[l]imiting estate-planning malpractice suits to those brought by either the client or the client’s personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship.”¹³⁶
- **Possible “recasting” is possible.** The court recognized a problem, which may arise when a beneficiary is appointed as the estate’s personal representative.¹³⁷ The court’s holding creates “an opportunity for some disappointed beneficiaries to recast a malpractice claim for their own ‘lost’ inheritance, which would be barred by *Barcelo*, as a claim brought on behalf of the estate.”¹³⁸ The court minimized this possibility by stating that “[t]he temptation to bring such claims will likely be tempered, however, by the fact that a personal representative who mismanages the performance of his or her duties may be removed from the position.”¹³⁹ The court also pointed out that any recovery goes to the estate, not the beneficiary, unless recovery flows through to the beneficiary under the terms of the will.¹⁴⁰
- **The decedent’s personal representative has capacity and standing.** The court explained that it is well-accepted law that

133. *Id.* at 783.

134. *Id.* at 787.

135. *Id.*

136. *Id.* at 789.

137. *See id.* at 787.

138. *Id.* at 788.

139. *Id.*

140. *Id.*

a decedent's personal representative has the capacity to bring a survival action on behalf of the decedent's estate.¹⁴¹ The court then had to address an issue of first impression in Texas—does a legal malpractice claim in the estate-planning context survive a deceased client?¹⁴² The court explained that the common law allowed causes of action for acts affecting property rights to survive and that estate-planning negligence that results in “the improper depletion of a client's estate involves injury to the decedent's property.”¹⁴³ Thus, the court held that “legal malpractice claims alleging pure economic loss survive in favor of a deceased client's estate.”¹⁴⁴ Consequently, the executors had standing to bring the malpractice claim.¹⁴⁵

- **Malpractice claim accrues during the decedent's lifetime.**

The court explained that the alleged malpractice occurred during the testator's lifetime even though the alleged damage (increased estate tax liability) did not occur until after the decedent's death.¹⁴⁶ Thus, the court disapproved of a contrary holding in the lower court case of *Estate of Arlitt v. Paterson*.¹⁴⁷ The court pointed out that the testator could have brought the claim himself if he had discovered the malpractice prior to his death and recovered his attorney's fees and the costs incurred to restructure his estate plan.¹⁴⁸

- **Discovery rule applies running of statute of limitations.** In a footnote, the court addressed the issue of when the statute of limitations begins to run.¹⁴⁹ The court stated:

[W]hile an injury occurred during the decedent's lifetime for purposes of determining survival, the statute of limitations for such a malpractice action does not begin to run until the claimant “discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of [the] cause of action.” . . . In this case, the “claimant” may be

141. *Id.* at 784.

142. *Id.*

143. *Id.*

144. *Id.* at 785.

145. *See id.*

146. *Id.* at 786.

147. *Id.* at 785; *see Estate of Arlitt v. Paterson*, 995 S.W.2d 713, 720 (Tex. App.—San Antonio 1999, pet. denied).

148. *Belt*, 192 S.W.3d at 786.

149. *Id.* at 786 n.5.

either the decedent or the personal representative of the decedent's estate.¹⁵⁰

In *O'Donnell v. Smith*, one of the issues was "whether an estate's personal representative [could] sue the decedent's former attorneys for malpractice . . . in advising the decedent in his capacity as executor of his wife's estate."¹⁵¹ The lower court ruled in favor of the attorneys and based the judgment on the fact that the decedent's executor and the estate lacked privity of contract with the attorneys.¹⁵²

The Supreme Court of Texas granted a petition for review without reference to the merits, vacated the lower court's judgment, and remanded the case to allow the lower court to take into account the holding in *Belt*.¹⁵³

The Texas Supreme Court seems willing to apply the *Belt* holding retroactively to accrued causes of action and decisions rendered prior to the date of the court's decision.¹⁵⁴ Accordingly, the court appears to be saying that *Belt* is a statement of the way the law is and has always been, rather than a declaration of a new legal rule.¹⁵⁵

Under these cases, estate planners are subject to potential malpractice actions brought by the personal representative of their client's estate.¹⁵⁶ Whether a practitioner may achieve protection from this liability is problematic. For example, must an estate planner review a detailed checklist of all estate planning strategies (if such a list is even possible to create) with each client and have the client affirmatively indicate that he understands the potential benefits of each technique but does not wish to use it?

III. POOR CLIENT INTERACTIONS¹⁵⁷

A. Failure to Gather Sufficient Information

The attorney must conduct a very detailed client interview and compile a vast array of data before preparing the client's estate plan. The attorney must gather information concerning the client's assets, liabilities, family situation, disposition desires, and related matters. Failure to obtain relevant facts makes it difficult or impossible to draft an appropriate estate plan. A client may not reveal certain important information merely because the

150. *Id.*

151. *O'Donnell v. Smith*, 197 S.W.3d 394, 394 (Tex. 2006).

152. *Id.*

153. *Id.*

154. *See Belt*, 192 S.W.3d at 387-88.

155. *See id.* at 388-89.

156. *Id.* at 386.

157. Portions of this section are adapted from Jake Krocheski & Gerry Malone, *Keeping in Touch with Clients*, 56 Tex. B.J. 146 (1993).

attorney did not ask; the client may not realize the material's significance. Creating detailed client interview forms and checklists increase the likelihood of discovering relevant information.

B. Believing Client Without Independent Verification

A client unskilled in legal matters may inadvertently (or even intentionally) mislead the estate planner. To avoid unexpected surprises, the attorney should ask for supporting documentation whenever possible regarding (i) family matters—marriages, divorces, birth of children, adoptions; (ii) ownership of assets—deeds, stock certificates, bonds; (iii) employee benefits—retirement plans, bonus plans, annuities; (iv) bank accounts—statements, passbooks, certificates of deposit, account contracts, signature cards; (v) debts—promissory notes, deeds of trust, mortgages; (vi) life insurance—policies and beneficiary designations; (vii) and other relevant matters—powers of attorney, directives to physicians.

Clients frequently believe that documents reflect specific facts when in actuality they do not. A simple example is instructive: the client tells the attorney that he has a large certificate of deposit in his name and his best friend's name. The client explains that he wants this certificate to pass to his friend, rather than to his family under his will. He assures the attorney that the certificate is in survivorship form, but the attorney does not independently verify this assertion. When the client dies, the attorney discovers that the friend's name was either not on the certificate or that the certificate lacked survivorship language. The friend goes away empty-handed, and the client's intent is frustrated.

C. Neglecting Communications with Client

The attorney must be aware of the importance of maintaining communication with the client both during and after the preparation of the estate plan. During the estate planning process, the client may have questions or wish to make changes. This is often the case once a client begins thinking seriously about the disposition of family heirlooms. The attorney will create a better estate plan by promptly returning telephone calls and answering letters.

After the estate plan is complete, the attorney needs to maintain contact with the client unless the attorney makes it very clear that the attorney's representation of the client does not continue beyond document execution. The client should understand they need to update the will when circumstances change—birth, marriage, adoption, death, substantial increase or decrease in assets, change in state of domicile, or change in state or federal law.

D. Failure to Act Timely

The attorney should complete an estate plan in a timely fashion.¹⁵⁸ Obviously, this is imperative if the client is elderly or seriously ill. Prompt estate planning is also necessary even if a client is young and in perfect health at the time of the initial interview because the person could have a fatal automobile accident or heart attack on the way home. It may be wise to have the client execute a simple will, even a holographic one, at the time of the initial interview to accomplish at least a portion of the client's estate planning objectives. A one-page will leaving all the client's property to the surviving spouse and appointing the spouse as the independent executor is often a more desirable alternative.

E. Failure to Document Unusual Requests

If a client makes an estate planning decision that the attorney fears either may appear suspicious to others or may be viewed as evidence of the attorney's negligence, then special steps are necessary. For example, a married individual may want to leave the entire estate to the spouse or more than the applicable exclusion amount to a non-spouse, thus incurring federal estate tax liability that the attorney could have easily avoided. The attorney should explain the potential outcomes in writing to the client, and the attorney should then have the client sign a copy acknowledging that the client is aware of the ramifications of the decision.

F. Failure to Recognize Circumstances that Might Increase the Likelihood of a Will Contest

The attorney must always be on guard when drafting instruments that may supply incentive for someone to contest a will or other estate planning document. Anytime an individual would take more through intestacy or under a prior will, the potential for a will contest exists, especially if the estate is large. The prudent attorney must recognize situations that are likely to inspire a will contest and take steps to reduce the probability of a will contest and the chances of its success.¹⁵⁹

158. See generally Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 MEM. ST. U. L. REV. 521, 534-36 (1987) ("Procrastination may be an even greater problem in the trusts and estates field than it is in other areas.").

159. See Gerry W. Beyer, *Drafting in Contemplation of Will Contests*, PRAC. LAW., Jan. 1992, at 9.

IV. ERRORS IN WILL DRAFTING¹⁶⁰A. *Poor Proofreading of Documents*

Many mistakes in estate planning documents are the result of poor proofreading. In a fast-paced office, time pressure may appear to restrict the attorney's opportunity to carefully review the documents. A client should never sign an estate planning document before the attorney and the client carefully read and study the final draft. It may also be advisable for another attorney to review the documents. Major errors—a misplaced decimal point in a legacy or an important provision omitted—and seemingly minor errors—misspelling of beneficiary's name—may become the focus of later litigation.

B. *No Specific Provision Regarding Ademption*

Ademption—the failure of a gift—occurs when the item given in the will is no longer in the testator's estate at time of death.¹⁶¹ For example, if the will gives Blackacre to X and the testator sells or gifts Blackacre prior to death, then X takes nothing under this provision of the will. In addition, the intended beneficiary will normally not receive the equivalent value via proceed tracing or otherwise.¹⁶²

Accordingly, it is important for specific gifts to contain an express statement of the testator's intent if the item is not in the estate. The testator should either explain that ademption causes the intended beneficiary to go home empty-handed or provide a substitute gift—other specific property, money, or a greater share of the residuary.¹⁶³

C. *No Specific Provision Regarding Lapse*

Lapse occurs when a gift fails because the beneficiary predeceases the testator. Unless the anti-lapse statute applies, the subject matter of the gift will then pass under the will's residuary clause or via intestacy if the lapsed gift was the residuary.¹⁶⁴ The anti-lapse statute saves the gift for the beneficiary's descendants if the beneficiary was a descendant of the testator

160. Portions of this section are adapted from Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death"—Common Non-Tax Errors and How to Prevent Them*, ST. BAR OF TEX. EXPANDING HORIZONS CLE: PRACTICAL TOPICS FROM THE GIANT SIDE OF TEX., Nov. 2006, at 1.

161. See *Rogers v. Carter*, 385 S.W.2d 563, 565 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.).

162. See *Shriner's Hosp. for Crippled Children of Tex. v. Stahl*, 610 S.W.2d 147, 152 (Tex. 1980); *Opperman v. Anderson*, 782 S.W.2d 8, 11 (Tex. App.—San Antonio 1989, writ denied).

163. See *Shriner's Hosp.*, 610 S.W.2d at 149-51.

164. TEX. PROB. CODE ANN. § 68(a) (Vernon 2003).

—child or grandchild—or if the beneficiary was a descendant of the testator’s parent—brother, sister, niece, or nephew.¹⁶⁵

To prevent rules that may not comport with the testator’s intent from governing a lapse, each gift should expressly indicate who receives the property in the event of lapse. For example, the testator could make an express gift over to a contingent beneficiary, indicate that the gift passes to the descendants of a deceased beneficiary, or merely state that the gift passes via the residuary clause.

D. Including Payment of “Just Debts” Provision

The traditional, but inappropriate, direction to the executor to pay “just debts” should not be included in a will.¹⁶⁶ “A specific will clause requiring that the executor pay all of the testator’s ‘just debts’ raises the question whether the executor is required to pay debts barred by limitations, and whether the executor is required to pay installments on long-term indebtedness that are not yet due.”¹⁶⁷

E. Failure to Discuss Exoneration

Texas had long followed the doctrine of exoneration—requiring the estate’s assets to pay the debts on specifically gifted property; thus, the beneficiary receives the asset unencumbered rather than just the testator’s equity.¹⁶⁸

Texas abolished the exoneration doctrine for wills executed on or after September 1, 2005.¹⁶⁹ Currently, a specific gift passes subject to each debt that the property secured, which exists on the date of the death of the testator under Section 71A of the Texas Probate Code.¹⁷⁰ However, the testator may expressly provide in the will that the estate exonerate debts against a specific gift.¹⁷¹ Accordingly, the will should expressly indicate whether the estate should exonerate debts against specifically gifted property, and if so, from what property.

165. *Id.*

166. Bernard E. Jones, *10 Drafting Mistakes You Don’t Want to Make in Wills and Trusts (and How to Avoid Them)*, UNIV. TEX. CLE, 8TH ANNUAL ESTATE PLANNING, GUARDIANSHIP, AND ELDER LAW CONF., Tab B, at 5 (2006).

167. *Id.*

168. *See* Currie v. Scott, 144 Tex. 1, 5-7, 187 S.W.2d 551, 554 (1945).

169. TEX. PROB. CODE ANN. § 71A(a) (Vernon Supp. 2007).

170. *Id.* § 71A(b).

171. *Id.*

F. Failure to Extend Survival Period

Unless the will states otherwise, a beneficiary need only outlive the testator by 120 hours to take under the will.¹⁷² This length of time is typically too short. The purpose of requiring survival is to prevent multiple administrations of the same property within a short period of time, therefore saving on administration expenses and estate tax. This goal, however, is not effectuated by a 120 hour period because probate takes considerably longer than five days. Therefore, a testator should consider extending the survival period to a more realistic length of time—three, six, nine, or twelve months. However, it is important to note that a survival period of over six months will prevent a gift to a surviving spouse from qualifying for the marital deduction.¹⁷³

G. Failure to Address Abatement

The Texas Probate Code mandates the order in which gifts fail if the estate has insufficient property to satisfy all testamentary gifts.¹⁷⁴ This order may or may not be in accordance with the testator's intent.¹⁷⁵ Thus, the attorney must ascertain the relative strength of each gift and make certain the testator's primary beneficiaries receive preferential treatment either under the statute or by expressly altering the abatement order.

H. Failure to Address Tax Apportionment

Apportionment refers to whether the transfers that occur because of a person's death—gifts under a will, life insurance proceeds, survivorship bank accounts—will be reduced by the amount of estate tax attributable to the transfers.¹⁷⁶ The Texas Probate Code provides a detailed apportionment scheme.¹⁷⁷ This scheme may or may not reflect the testator's intent. As a result, the attorney must carefully question the testator's desires regarding tax apportionment where the estate may be large enough to incur estate tax liability.

172. *Id.* § 47(c) (Vernon 2003).

173. I.R.C. § 2056(b)(3) (1997).

174. TEX. PROB. CODE ANN. § 322B (Vernon 2003).

175. *See id.*

176. *See id.* § 322A.

177. *Id.*

I. Lack of Provision Regarding Pretermitted Children

Under certain circumstances, children born or adopted after will execution are entitled to a share of the testator's estate.¹⁷⁸ This automatic alteration of an established estate plan could have a devastating effect on the testator's disposition desires. For example, assume that a will is executed leaving the testator's entire estate to the American Red Cross. Thereafter, the testator has a child and then dies without changing the will. The testator's intent to leave property to the American Red Cross would be completely ignored, and the entire estate would pass to the child.

The attorney may use three methods to avoid the application of the pretermitted child statute. First, the will could expressly provide for the pretermitted heir—"I leave all my property to my children." Second, the will could mention the pretermitted child—"I intentionally make no provision for any child who may be hereafter born or adopted." Third, the testator may provide for the pretermitted child in some other manner, such as by naming the child as a beneficiary of a life insurance policy.

All wills should address the pretermitted child issue, even those of individuals beyond childbearing years. It is becoming increasingly common for parents to adopt grandchildren and older individuals to adopt disadvantaged children—situations that increase the likelihood of triggering the pretermitted child statute.

J. Failure to Address Adopted and Non-Marital Children Issues

The attorney must carefully question the testator to ascertain the testator's desires regarding children who may be adopted or born out-of-wedlock. The testator may or may not want these children to have a share in the estate in the same manner as biological children or children born during marriage. This issue is of particular importance when the testator makes class gifts.¹⁷⁹

K. Failure to Externally Integrate Testamentary Documents

External integration is the process of establishing the testator's will by interpreting and construing various testamentary instruments that the testator leaves. The documents are pieced together to give effect to the latest statement of the testator's intent. Thus, a new will should be accurately dated and all prior wills and codicils revoked to clarify the testator's most recent desires. Unless special circumstances exist, an

178. *Id.* § 67.

179. See Begleiter, *supra* note 12, at 232.

attorney should avoid the use of codicils because codicils increase the chance of external integration problems.

L. Inadequate Incorporation by Reference

If the testator intends to incorporate an extraneous document by reference, then the attorney must take great care to make certain that the document is in existence at the time of incorporation and sufficiently identified so that only that specific document matches the description.¹⁸⁰ To avoid potential problems, especially if the document is short, the attorney should consider including the material within the body of the will, rather than relying on an incorporation. When a pour-over provision is included, the Texas Probate Code requirements should be satisfied.¹⁸¹

M. Referencing a Tangible Personal Property Memo

A limited number of states and Section 2-513 of the Uniform Probate Code authorize a testator to use a separate writing to dispose of tangible personal property even though that writing (i) does not meet the requirements of a will and could not be probated as a testamentary instrument; (ii) was not in existence at the date of will execution and consequently could not be incorporated by reference; and (iii) exists for no reason other than to dispose of property at death and could not be a fact of independent significance.¹⁸² Texas is *not* one of these states; therefore, a will should not use this technique.

N. Improper Internal Integration

The will should fit neatly together as a unified document. The attorney should ensure that (i) all pages are typed or printed on the same kind of paper; (ii) all pages are the same size (iii) the type style is consistent throughout the will; (iv) the entire will is typed or printed with the same ribbon or toner cartridge; (v) each page is numbered *ex toto* (e.g., page 3 of 5); (vi) and blank spaces are avoided. In addition, the attorney should securely fasten all pages of the will together. These precautions help reduce the chance that the testator or third parties will insert or remove pages. Moreover, these steps make it easier to show that the pages present at the time of the will execution ceremony are the same pages offered for probate.

180. See *Allday v. Cage*, 148 S.W. 838, 839 (Tex. Civ. App.—Fort Worth 1912, no writ).

181. TEX. PROB. CODE ANN. § 58a.

182. See UNIF. PROBATE CODE § 2-513, 8 U.L.A. 158 (1998).

O. Use of Ambiguous Language

Ambiguity is one of the most frequent causes of will litigation. The attorney should take care to phrase the will clearly and precisely. The attorney must also carefully select words to avoid doubt as to their intended meaning. If potentially ambiguous words are used, then unambiguous definitions should be included. An attorney should be especially leery of using the following words and phrases: cash, money, funds, personal property, issue, and heirs.¹⁸³

The descriptions of specific gifts and designations of beneficiaries should be precise, especially in light of the Supreme Court of Texas opinion in *San Antonio Area Foundation v. Lang*, which held that “extrinsic evidence is not admissible to construe an unambiguous will provision.”¹⁸⁴

P. Inadvertent Creation of Election Will

“The principle of election is, that he who accepts a benefit under a will, must adopt the whole contents of the instrument, so far as it concerns him; conforming to its provisions, and renouncing every right inconsistent with it.”¹⁸⁵ An attorney occasionally places an election provision in wills when one spouse wants to dispose of the entire interest in some or all of the community property. The surviving spouse may consent to the disposition of the surviving spouse’s share of the community assets because the will gives the spouse a significant interest in the deceased spouse’s community property or separate property. An attorney must be careful, however, not to inadvertently create an election situation. Although there is a presumption that an election will be imposed only if the will is open to no other construction, an attorney may unintentionally create an election scenario.¹⁸⁶ Thus, the attorney should include a provision in the will expressly stating the testator’s intent regarding election.

183. *Stewart v. Selder*, 473 S.W.2d 3, 9 (Tex. 1971) (discussing the word “cash”); *Gilkey v. Chambers*, 146 Tex. 355, 360-61, 207 S.W.2d 70, 72-73 (1947) (discussing the phrase “personal property”); *Fed. Land Bank of Houston v. Little*, 130 Tex. 173, 178-79, 107 S.W.2d 374, 377-78 (1937) (discussing the word “heirs”); *W. Tex. Rehab. Ctr. v. Allen*, 810 S.W.2d 870, 873-74 (Tex. App.—Austin 1991, no writ) (discussing the words “money” and “funds”); *Munger v. Munger*, 298 SW 470, 475 (Tex. Civ. App.—Dallas 1927, writ ref’d) (discussing the word “issue”).

184. *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 637 (Tex. 2000); *In re Estate of Cohorn*, 622 S.W.2d 486, 488 (Tex. App.—Eastland 1981, writ ref’d n.r.e.) (describing specific gifts); *Hultquist v. Ring*, 301 S.W.2d 303, 305-06 (Tex. Civ. App.—Galveston 1957, writ ref’d n.r.e.) (discussing beneficiaries).

185. *Philleo v. Holliday*, 24 Tex. 38, 45 (1859).

186. *Wright v. Wright*, 154 Tex. 138, 145, 274 S.W.2d 670, 675 (1955).

Q. Use of Precatory Language

To be enforceable, instructions in a will regarding the disposition of property must be mandatory. Courts normally consider that precatory language, such as “I wish,” “I would like,” and “I recommend,” is suggestive in nature and not binding on the beneficiary.¹⁸⁷ Precatory language has no place in a will. If the testator wishes to express non-mandatory desires, then the attorney should use a separate non-testamentary document. If the testator insists on placing such language in the will, then the attorney should add language indicating that the suggestions are merely precatory and have no binding effect.

R. Violation of Rule Against Perpetuities

The Texas Constitution provides that “[p]erpetuities . . . are contrary to the genius of a free government, and shall never be allowed.”¹⁸⁸ Under the Rule Against Perpetuities, “an interest is not good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation.”¹⁸⁹ An attorney must take great care when drafting a will to make certain the will’s provisions do not violate the Rule Against Perpetuities.¹⁹⁰ If the Rule Against Perpetuities is violated, then the Texas courts must reform or construe the interest to effect the ascertainable general intent of the testator.¹⁹¹

S. Inadequate Tax Planning

An attorney, even one who infrequently prepares estates with tax consequences, must be able to recognize situations requiring tax planning and make certain that the testator obtains proper advice. A commonly cited excuse for inadequate tax planning is a false belief that the estate is too small to incur estate tax. Just because property is not in a decedent’s probate estate does not mean it will escape taxation. Life insurance proceeds, trusts, retirement plans, and other assets may be included in the decedent’s estate for tax purposes. Thus, the attorney must be certain to inquire about all types of assets and determine if it is likely that the client will obtain significant additional assets, e.g. via an inheritance from a wealthy parent. The areas posing the greatest danger of error are “[s]pecial

187. See *Najvar v. Vasek*, 564 S.W.2d 202, 209 (Tex. Civ. App.—Corpus Christi 1978, writ ref’d n.r.e.); *Wattenburger v. Morris*, 436 S.W.2d 234, 240 (Tex. Civ. App.—Fort Worth 1968, writ ref’d n.r.e.).

188. TEX. CONST. art. I, § 26.

189. TEX. PROP. CODE ANN. § 112.036 (Vernon 2007).

190. *Lucas v. Hamm*, 364 P.2d 685, 690 (Cal. 1961).

191. TEX. PROP. CODE ANN. § 5.043(a).

use valuation, the generation-skipping tax, and the marital deduction.”¹⁹² It is, however, beyond the scope of this article to review the potential errors in tax planning.¹⁹³

T. Failure to Provide for Independent Administration

If the testator wishes to obtain the benefits of independent administration, then the attorney must insert the appropriate language in the testator’s will.¹⁹⁴ Failure to include this language leads to additional delay, either because a full dependent administration is needed or because more time is needed to obtain consent of all beneficiaries and court approval of an independent administration. To avoid these problems, the attorney should document the testator’s desires regarding administration in the will.

U. Failure to Indicate Alternate or Successor Executor

A will should indicate at least one executor who would serve if the named executor is unwilling or unable to serve. This will happen if the executor dies, resigns, is or becomes incompetent, or does not want to assume fiduciary responsibilities. Naming an alternate or successor executor will save the time and expense of locating a successor and will have the estate managed by a person selected by the testator rather than by the court or the beneficiaries.¹⁹⁵

V. Lack of Provision Regarding Bond

The personal representative must post bond unless the testator’s will waives bond, the personal representative is a corporate fiduciary, or the court waives bond in an independent administration.¹⁹⁶ Although bond does provide some protection to beneficiaries from evil personal representatives, bond is expensive and reduces the amount of property available to the beneficiaries. The attorney must ascertain the client’s desires regarding bond and make those wishes clear in the will.

W. Lack of Compensation Provision

Section 241 of the Texas Probate Code provides the method for determining a personal representative’s compensation.¹⁹⁷ The testator may

192. See Begleiter, *supra* note 12, at 238.

193. See *id.* at 233-42.

194. TEX. PROB. CODE ANN. § 145 (Vernon 2003).

195. *Id.* §§ 154A, 223-27.

196. *Id.* §§ 145(p), 195(a)-(b).

197. *Id.* § 241.

have a different intent, either that the personal representative is to serve without compensation or that a different method be used to compute compensation.¹⁹⁸ Thus, the will should contain an express statement of the testator's intent regarding compensation for the personal representative.¹⁹⁹

X. Naming Drafting Attorney, Attorney's Relative, or Attorney's Employee as a Beneficiary

Family members, friends, and employees often ask an attorney to prepare wills, trusts, and other documents involved with the gratuitous transfer of property. These same individuals may also want the attorney to name himself as one of the beneficiaries of the gift. This common occurrence is fraught with legal and ethical problems—the attorney may not be able to claim the gift and may be subject to professional discipline.

1. Effect on Validity of Gift

Under Roman law, the drafter of a will could take no benefit under the will.²⁰⁰ The common law of Texas did not follow this strict approach.²⁰¹ Instead, these circumstances gave rise to an inference of undue influence, which the attorney could rebut by showing either (i) that the testator was related to the attorney by blood or marriage or (ii) that the testator actually desired the attorney to be a beneficiary.²⁰² For example, in *Oglesby v. Harris*, the court permitted the attorney to receive the property because “the estate was of practically nominal value, and the beneficiary [attorney] was an old friend and benefactor of the deceased, to whom the deceased was largely indebted if not in fact legally, at least morally, for assistance rendered in his dire extremity.”²⁰³

In 1997, the Texas legislature removed all discretion from the court to decide the propriety of a testamentary gift from a client to the drafting attorney when it added Section 58b to the Texas Probate Code.²⁰⁴ The Texas legislature designed this section to reduce overreaching by attorneys when attorneys prepare wills in which they name themselves or closely connected individuals as beneficiaries. The Texas legislature has amended the statute several times to fine-tune which gifts to deem void and to determine when a close family relationship between the testator and the

198. See, e.g., *Stanley v. Henderson*, 139 Tex. 160, 163-64, 162 S.W.2d 95, 97 (1942).

199. See *id.*

200. See Elmo Schwab, *The Lawyer As Beneficiary*, 45 TEX. B.J. 1422, 1422 (1982) (discussing the ancient doctrine of “qui se scrip sit heredem”).

201. See, e.g., *Oglesby v. Harris*, 130 S.W.2d 449, 451 (Tex. Civ. App.—Austin 1939, writ dism'd judgm't cor.).

202. See *id.*

203. *Id.*

204. See TEX. PROB. CODE ANN. § 58b (Vernon 2003).

beneficiary will permit a gift to take effect despite the self-serving nature of the transaction.²⁰⁵ Here is a brief explanation of the operation of the statute as of the conclusion of the 2005 Texas legislature.

a. Presumption of Void Gift

A gift to the drafting attorney or a person closely related to attorney is void.²⁰⁶

b. Beneficiaries Within Scope of Void Presumption

Gifts to the following individuals are presumed void:

- Attorney who prepares the will;
- Attorney who supervises the preparation of the will;
- Parent of the attorney;
- Descendent of the attorney's parent—child, grandchild, brother, sister, niece, nephew, et cetera;
- Employee of the attorney; and
- Spouse of any of the above individuals.²⁰⁷

Note how many closely related beneficiaries—grandparents, aunts, uncles, and cousins—are not within the scope of the void presumption.

c. The Jones v. Krown Case

In *Jones v. Krown*, an attorney drafted a will for a testator which named his paralegal as both a beneficiary and as the executrix.²⁰⁸ After the testator died, his sister filed a motion for a declaratory judgment to set aside the gift to the paralegal under Probate Code § 58b which states that a testamentary gift to “employee of the attorney who prepares or supervises the preparation of the will is void.” Both the trial and appellate courts agreed that Paralegal’s gift was void and that the property passed via intestacy to his sister.

The court was unimpressed with the paralegal’s arguments that § 58b did not apply to her. The court found it irrelevant that the paralegal was not involved with the drafting of the testator’s will and that she was not present when the testator executed the will. In addition, her technical status as an “independent contractor” did not keep her from falling within the purview of the term “employee” as used in the statute. Because § 58b does not

205. *Id.*

206. *Id.*

207. *Id.*

208. *Jones v. Krown*, 218 S.W.3d 746, 747 (Tex. App.—Fort Worth 2007, pet. denied),

define the term, the court relied on the “plain and common meaning” of the word, that is, someone who works for someone else and receives payment for that work. Because the paralegal worked for the attorney and was paid for her work, she qualified as an employee. The court also explained that the application of § 58b to void the paralegal’s gift “is consistent with the Legislature’s intent . . . which was to avoid having an interested person use his position of trust to benefit himself.”²⁰⁹

d. Exceptions to Void Presumption

Gifts to the following individuals are permitted:

- Beneficiary is the testator’s spouse (attorney may write self-beneficiary will for his spouse);
- Beneficiary is the testator’s ancestor or descendant (attorney may write self-beneficiary will for parent, grandparent, child, grandchild, et cetera); and
- Beneficiary is related to the testator “within the third degree by consanguinity or affinity” (attorney may write self-beneficiary will for brother, sister, aunt, uncle, et cetera).²¹⁰

Note that a bona fide purchaser is protected if the purchaser buys property for value from a beneficiary with a void gift.

2. Effect on Ethical Duties

Rule 1.08(b) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from preparing a will not only if the attorney is a beneficiary, but also if the beneficiary is the attorney’s parent, child, sibling, or spouse.²¹¹ There are two exceptions to the general admonition.²¹²

The first exception is when the client is related to the donee.²¹³ Although permitted, the prudent attorney should avoid drafting for relatives unless the disposition in the will is substantially similar to that which would occur under intestacy. Note also that it is uncertain how “related” should be defined—by blood, marriage, or both—and how close of a relationship is sufficient.

209. *Id.* at 749.

210. *Id.*

211. TEX. STATE BAR R. art. X, § 9, R. 1.08(b), *reprinted in* TEX. GOV’T CODE ANN. tit. 2, subtit. G app. A (Vernon 2005).

212. *See id.*

213. *Id.*

The second exception is if the gift is not substantial.²¹⁴ It is uncertain what “substantial” means. Does it depend on size of the testator’s estate or the size of beneficiary’s estate? For example, seventy-five percent of a small estate may be a very small amount whereas one percent of a large estate may be huge vis-à-vis the attorney’s own holdings. Accordingly, a prudent attorney should not rely on this exception to excuse a self-beneficiary will.

Y. Naming Drafting Attorney as Executor

The former Ethical Considerations in the Code of Professional Responsibility provided that “[a] lawyer should not consciously influence a client to name him as executor [in a will] In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.”²¹⁵ This rule was interpreted to mean that a lawyer may be named as the executor for an estate “provided no pressure is brought to bear on the client, and the appointments represent the client’s desire.”²¹⁶ Despite the authority to do so, the attorney must exercise great care to avoid potential claims of overreaching or conflict of interest.²¹⁷ It is wise to have the client sign a plain language disclosure statement that explains the ramifications of the attorney serving as the executor.²¹⁸

V. IMPROPER WILL EXECUTION²¹⁹

The will execution ceremony provides a fertile field for error. “The majority of estate planning malpractice cases have involved execution errors.”²²⁰ The importance of the ceremony is manifest: without a proper execution, the will has no effect regardless of the testator’s intent. A careless, hurried, or casual ceremony increases the likelihood that an error will occur. The best way to increase the chances that the ceremony

214. *See id.*

215. TEX. STATE BAR R., EC 5-6 (Tex. Code of Prof’l Resp.), *reprinted in* 23 BAYLOR L. REV. 697, 763 (1971).

216. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 71 (1953), *reprinted in* 18 BAYLOR L. REV. 195, 226-27 (1966).

217. *See* Howard M. McCue III, *Flat-Out Out of the Will Business—A Recent Malpractice Case Results in an Expensive Settlement for Both Lawyer and Executor*, TR. & EST., Sept. 1988, at 66 (discussing a San Antonio lawsuit which settled when a law firm agreed to pay over \$4 million to the plaintiff; the attorney, who drafted the will, had named attorneys, who were firm employees, as executors).

218. *See* Larry W. Gibbs, *The Lawyer’s Professional Responsibility in Estate Planning and Probate—Common Solutions and Practical Problems*, in STATE BAR OF TEX., PRACTICAL WILL DRAFTING AND REPRESENTING THE ESTATE AND BENEFICIARIES IN HARD TIMES, Mar./Apr. 1987, ch. F, at F-2-F-6, F-24-F-26 (including sample disclosure form).

219. *See* Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 413-444 (1988).

220. Begleiter, *supra* note 12, at 218.

encompasses all of the required formalities is to have a detailed form or checklist of elements and follow it closely for every ceremony.²²¹

A. Ceremony Conducted by Non-Attorney

The attorney, rather than the client or the attorney's staff, should conduct the will execution ceremony. There are reports of attorneys mailing or hand-delivering unsigned wills to clients along with will execution instructions.²²² Even if the instructions are correct, there is little assurance that the client will correctly follow them.²²³

Some attorneys may allow law clerks or paralegals to supervise the ceremony. This practice is questionable not only because it increases the probability of error, but also because the delegation of responsibility may be considered a violation of professional conduct rules proscribing the aiding of a non-lawyer in the practice of law.²²⁴

B. Beneficiary Present During Ceremony

The testator, the disinterested witnesses, the notary, and the supervising attorney are the key players in the will execution ceremony. In the normal situation, no one else should be present. It is especially important to make certain no beneficiary under the will attends the ceremony as a precaution against claims of overreaching and undue influence.

C. No Testator Signature

The will must contain the testator's signature.²²⁵ An unsigned will is of no effect, regardless of other evidence proving the testator's intent, unless the testator's signature appears on the self-proving affidavit, in which case the affidavit's signature is sufficient.²²⁶ If a testator is using a proxy signatory, then the attorney must appropriately document why the testator is not personally signing the will and provide evidence that the proxy signed at the testator's direction and in the testator's presence.

221. See Beyer, *supra* note 219, at 427-28.

222. See *Hamlin v. Bryant*, 399 S.W.2d 572, 575 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.); see generally Johnston, *supra* note 158, at 529 n.43 (describing a "loss leader" approach).

223. See Begleiter, *supra* note 12, at 221 n.160.

224. See *Palmer v. Unauthorized Practice Comm. of the State Bar*, 438 S.W.2d 374, 376 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ); Gerry W. Beyer, *The Role of Legal Assistants in the Estate Planning Practice*, EST. PLAN. DEV. FOR TEX. PROF., Apr. 1989, at 1, 2-3; see generally Gail E. Cohen, *Using Legal Assistants in Estate Planning*, PRAC. LAW., Oct. 15, 1984, at 73; Robert S. Muckelstone, *The Legal Assistant in Estate Planning*, 10 REAL PROP., PROB. & TR. J. 263, 266-67 (1975).

225. TEX. PROB. CODE ANN. § 59 (Vernon 2003).

226. *Id.*

D. Testator Signs Wrong Will

When the attorney executes wills for several people simultaneously—a husband and wife—the possibility exists that they will sign the wrong wills.²²⁷ If this occurs, then neither will is valid because the signing testator lacked intent for the signed document to be their will, and the other document lacks the testator's signature. To avoid this possibility, the attorney should execute only one will at a time and inspect each will closely to ascertain that no one inadvertently switched them.

E. Lack of Sufficient Number of Witnesses

A non-holographic will requires a minimum of two competent witnesses.²²⁸ Failure to have at least two witnesses is fatal to a will's validity. If the witnesses sign the self-proving affidavit rather than the will, then the attestation is sufficient though the self-proving affidavit fails.²²⁹

F. Witnesses Fail to Attest in Testator's Presence

Although the testator is not required to actually see the witnesses sign the will, the attestation must take place in the testator's presence.²³⁰ The term presence means a conscious presence—"the attestation must occur where testator, unless blind, is able to see it from his actual position at the time, or at most, from such position as slightly altered, where he has the power readily to make the alteration without assistance."²³¹

G. Using Beneficiary as Witness

A will beneficiary should not serve as one of the two required witnesses to a non-holographic will. Under Texas law, a gift to an attesting beneficiary is generally void.²³² If the beneficiary is an heir who would have inherited had there been no will, then the beneficiary takes the smaller of the gift between the will and the beneficiary's intestate share.²³³

227. See, e.g., *In re Estate of Pavlinko*, 148 A.2d 528, 528 (Pa. 1959).

228. § 59.

229. *Id.*

230. *Id.*

231. *Nichols v. Rowen*, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); see also *Morris v. Estate of West*, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (noting that the attestation was outside of the testator's presence because the testator could not have seen the witnesses sign without walking four feet to office door and fourteen feet down a hallway).

232. § 61.

233. *Id.*

Alternatively, one or more disinterested and credible persons may save the gift via corroboration.²³⁴

H. Improperly Completed Self-Proving Affidavit

A self-proving affidavit may be invalid for many reasons.²³⁵ The notary might fail to swear the testator or witnesses.²³⁶ The testator and both witnesses might not sign the affidavit. Although the testator or witnesses sign the affidavit, one or more may not have signed the will. In this case, the signatures on the affidavit may be used to bootstrap the will, but the self-proving affidavit would then be ineffective.²³⁷ Although not a condition to the affidavit's validity, the notary should record the ceremony in the notary's record book.²³⁸ This record may provide helpful evidence if a will contest ensues.

I. Execution of Duplicate Originals

A testator should never execute duplicate originals. Problems arise when, at time of death, not all of the duplicate originals can be located. The general presumption is that the destruction of one duplicate original by the testator, with the intent to revoke, operates to revoke all copies.²³⁹ However, this presumption may be rebutted by evidence that to avoid confusion resulting from having multiple last wills, the testator destroyed one of them intending to strengthen the validity of the other.²⁴⁰

VI. ERRORS IN TRUST DRAFTING²⁴¹

Special opportunities for error exist in trust drafting. Many of the errors discussed in the will drafting section are applicable to trust drafting section. These problems include the following: (i) no specific provision regarding ademption; (ii) no specific provision regarding lapse; (iii) failure to discuss exoneration; (iv) inadequate incorporation by reference; (v) trust not properly internally integrated; (vi) use of ambiguous language; (vii) use of precatory language; (viii) inadequate tax planning; (ix) poor proofreading

234. § 62.

235. § 59.

236. *See* Broach v. Bradley, 800 S.W.2d 677, 678 (Tex. App.—Eastland 1990, writ denied) (noting that a self-proving affidavit was invalid because the notary had not properly sworn the witnesses).

237. § 59.

238. TEX. GOV'T CODE ANN. § 406.014 (Vernon 2005).

239. *See* Combs v. Howard, 131 S.W.2d 206, 209 (Tex. Civ. App.—Fort Worth 1939, no writ).

240. *See id.* at 210.

241. Portions of this section are adapted from Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death"—Common Non-Tax Errors and How to Prevent Them*, ST. BAR OF TEX. EXPANDING HORIZONS CLE: PRACTICAL TOPICS FROM THE GIANT SIDE OF TEX., Nov. 2006, at 1.

of trust documents; (x) failure to indicate alternate trustee or method to select a successor; (xi) lack of provision regarding bond; (xii) lack of compensation provision; (xiii) naming the drafting attorney as a beneficiary, trustee, or both; and (xvi) representation of both spouses.

A. Failure to Address Principal and Income Issues

The Texas Property Code contains extensive provisions regarding the method of crediting a receipt or charging an expenditure to the principal or income of the trust.²⁴² Depending on the circumstances, this practice may or may not be in accordance with the settlor's intent. Thus, the trust instrument should contain an express provision addressing how allocation of principal and income should be done—specific rules, follow the Trust Code rules, or left to the trustee's discretion.

B. Omission of Spendthrift Provision

If the trust is silent on the issue, then the beneficiary has tremendous control over the beneficiary's trust interest because the beneficiary may sell it or give it away. In addition, the beneficiary's creditors may reach the beneficiary's interest to satisfy their claims. The vast majority of settlors, however, want to prevent the beneficiary from transferring the trust interest either voluntarily or involuntarily. Thus, a spendthrift provision is appropriate in almost all trusts.²⁴³

C. Misstating Ability to Revoke

The settlor must decide on the revocability of the trust. If the settlor desires flexibility, then retention of the ability to revoke is paramount. However, if the settlor seeks tax benefits, then the trust usually must be irrevocable. Texas law presumes that a trust is revocable unless the trust instrument expressly makes the trust irrevocable.²⁴⁴ Thus, if the settlor creates a trust for tax reasons and the trust lacks an express irrevocability provision, then the tax advantages may be lost. Likewise, if the settlor actually intends a revocable arrangement, then inclusion of an irrevocability clause would defeat that intent.

242. See generally TEX. PROP. CODE ANN. § 116 (Vernon 2007) (explaining uniform principal and income of trusts).

243. *Id.* § 112.035(b) (“A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a ‘spendthrift trust’ is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by [the Texas Trust Code].”).

244. *Id.* § 112.051(a).

VII. OTHER TROUBLESOME MISTAKES²⁴⁵

A. *Improper Document Preservation*

Estate planning documents must be stored in appropriate locations. If the documents are not available to the appropriate person when needed, then the client may lose the benefits of executing the documents. The disposition of an executed document is simple in some cases: for example, a medical power of attorney should be delivered to the agent. In other cases, however, the proper receptacle for the document is less easily ascertained.

The proper disposition of a will is often a controversial issue. The original will should normally be stored in a secure location where people may readily find the will after the testator's death. Thus, some testators keep the will at home or in a safe deposit box, while others prefer for the drafting attorney to retain the will. The attorney should not suggest retaining the original will because the original is then less accessible to the testator. When the drafting attorney retains a will, the testator may feel pressured to hire that same attorney to update the will, and the executor or beneficiaries may feel compelled to hire that attorney to probate the will. Some courts in other jurisdictions hold that an attorney may retain the original will only "upon specific unsolicited request of the client."²⁴⁶

If a will contest is likely, then the attorney must inform the client of the dangers of retaining the will—it increases the opportunity for unhappy heirs to locate and then alter or destroy the will. While making certain not to suggest that the attorney retain the will, the attorney needs to urge the testator to find a safe storage place that will not be accessible to the heirs, either now or after death, but yet a location where the will is likely to be found and probated.

B. *Failure to Provide Client with Sufficient Post-Estate Plan Instructions*

After the attorney has executed the will and other estate planning documents, the attorney should inform the client of several important matters. The client needs to realize that he must reconsider the plan if his or her life or circumstances change: for example, births or adoptions; deaths; divorces; marriages; change in feelings toward beneficiaries and heirs; a significant change in size or composition of estate; change in state of domicile; or change in state or federal law. The attorney must also inform the client that mark-outs, interlineations, and other informal changes to estate planning documents, especially attested wills, are usually of no

245. Portions of this section are adapted from Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death"—Common Non-Tax Errors and How to Prevent Them*, ST. BAR OF TEX. EXPANDING HORIZONS CLE: PRAC. TOPICS FROM THE GIANT SIDE OF TEX., Nov. 2006, at 1.

246. *State v. Gulbankian*, 196 N.W.2d 733, 736 (Wis. 1972).

effect.²⁴⁷ The attorney should discuss these and other matters with the client not only in person but also in written form.

C. Failure to Use Disclaimers When Appropriate

Texas law permits the beneficiary or heir of a will, trust, insurance policy, or like arrangement to disclaim property.²⁴⁸ A proper disclaimer has many potential benefits including tax savings under Section 2518 of the Internal Revenue Code, liability avoidance—property has potential liability connected with it such as buried hazardous waste, and protecting assets from the disclaimant's creditors.²⁴⁹ The attorney must be aware of these and other reasons to disclaim property and give advice accordingly.²⁵⁰

D. Failure to Plan for Disability and Death

Research demonstrates that approximately one-half of the population of the United States will be disabled for ninety days or more.²⁵¹ A person sixty or younger is more likely to become disabled within the next year than die. Nonetheless, attorneys are often lax in planning for the possibility that their clients will suffer from a debilitating disease, accident, or general deterioration of mental function due to senility or other disabling cause. Attorneys must recognize that disability planning is at least as important as death planning, and they should make appropriate arrangements. The techniques which the attorney and client should evaluate include the following: stand-by trust; wage replacement insurance; long-term care insurance; a durable power of attorney for property management; a medical power of attorney; a self-declaration of guardian; a directive to physicians; an anatomical gift statement; and a body disposition instrument.

VIII. ESTATE PLANNING FOR BOTH SPOUSES—GOOD IDEA?²⁵²

Today you are meeting with a new estate planning client. During the initial telephone contact, the client indicated a need for a simple plan—"nothing too complex" were the exact words. As you enter your reception

247. See *Leatherwood v. Stephens*, 24 S.W.2d 819, 823 (Tex. Comm'n App. 1930, judgment adopted).

248. TEX. PROP. CODE ANN. § 112.010; TEX. PROB. CODE ANN. § 37A (Vernon 2003).

249. RONALD A. BRAND & WILLIAM P. LAPIANA, *DISCLAIMERS IN ESTATE PLANNING: A GUIDE TO THEIR EFFECTIVE USE* 23, 39 (1990).

250. See *id.*; Bruce D. Steiner, *Disclaimers: Post-Mortem Creativity*, PROB. & PROP., Nov./Dec. 1990, at 43.

251. See John L. Lombard, Jr., *10 Reasons Why You Should Be Recommending the Durable Power of Attorney to Clients*, PROB. & PROP., Jan./Feb. 1987, at 28.

252. Portions of this section are adapted from GERRY W. BEYER, *TEXAS PRACTICE: TEXAS LAW OF WILLS* §§ 53.4-53.7 (3d ed. 2002).

area to greet the client, you are surprised to see *two* people waiting—the client and the client’s spouse. The client explains that he wants you to prepare estate plans for both of them. Your mind immediately becomes flooded with thoughts of the potential horrors of representing both husband and wife. You remember stories from colleagues about their married clients who placed them in an awkward position when one spouse confided sensitive information that would be relevant to the estate plan with the admonition to “not tell my spouse.” You also recall the professional ethics rules that prohibit representing clients with conflicting interests. What do you do? What is the best way to protect the interests and desires of the client and the client’s spouse and still avoid ethical questions as well as potential liability?

This scenario occurs many times each day in law offices across Texas and the United States. The joint representation of a husband and wife in drafting wills and establishing a coordinated estate plan can have considerable benefits for all of the participants involved. However, depending on the circumstances, joint representation may result in substantial disadvantages to either or both spouses and may subject the drafting attorney to liability. The attorney’s duties of loyalty and confidentiality in joint representations, the attorney’s responsibility in handling conflict situations, and the attorney’s duty to recognize a conflict either initially or as it arises can all be gleaned from the Texas Disciplinary Rules of Professional Conduct.

A. Models of Representation for Married Couples

When a married couple comes to an attorney’s office for estate planning advice, the chances are that the couple is unaware of the different forms of representation that are available or the specific factors the couple must consider to determine which form of representation is appropriate. The attorney has the burden to use the attorney’s skills of observation and information gathering while applying the relevant professional conduct rules to help the couple make a choice that best fits their situation.

1. Family Representation

Under the concept of family representation, the attorney represents the family as an entity rather than its individual members. This approach attempts to achieve a common good for all of the participants; thus, the attorney’s duty is to the family interest rather than the desires of one or both of the spouses. However, representation of the family does not end the potential for conflict between the spouses; instead, it broadens the potential basis of conflict by adding other family members to the equation. Further, even where there is no conflict of desires between both spouses, the

attorney may feel an obligation to the family to discourage or even prevent each spouse from effectuating the spouse's common desires where those desires do not benefit the family as a whole—where both spouses choose not to take advantage of tax saving tools, such as annual exclusion gifts, in favor of retaining the assets to benefit themselves. This type of representation, at least for spousal estate planning purposes, is unnecessarily complicated and may even frustrate the common desires of the spouses. Not many courts have recognized this model of representation.

2. Joint Representation

Joint representation is probably the most common form of representation estate planners use to develop a coordinated estate plan for spouses. Joint representation is based on the presumption that the husband, wife, and attorney will work together to achieve a coordinated estate plan. Situations in which the attorney does not discuss the specific representative capacity in which he will serve, joint representation serves as the default categorization. Despite its widespread acceptance, however, joint representation has its pitfalls.

An attorney who represents multiple parties faces a critical issue—the attorney's obligation to make sure that the representation complies with the Texas Rules of Professional Conduct. Most relevant in the joint representation of husband and wife is Rule 1.06 of the Texas Rules of Professional Conduct, which prohibits representation where it “involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer”²⁵³ Additionally, the rule provides that if in the course of multiple representations such a conflict becomes evident, the lawyer must withdraw from representing one or both of the parties.²⁵⁴

The rule does, however, contain a savings clause, which permits the attorney to accept or continue a representation where a conflict of interest exists if (i) the attorney believes that the representation will not be materially affected, and (ii) both of the parties consent to the representation after full disclosure of all of the potential disadvantages and advantages involved.²⁵⁵ Many attorneys, regardless of whether potential conflicts are apparent, take advantage of this part of the rule by routinely disclosing all advantages and disadvantages and then obtaining consent—oral, written, or both—to the representation. This approach exceeds the minimum requirements of the rule and helps protect all participants from unanticipated results. Of course, there are still situations that the attorney

253. TEX. STATE BAR R. art. X, § 9, R. 1.06(b)(1), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. A (Vernon 2005).

254. *See* TEX. STATE BAR R. art. X, § 9, R. 1.06.

255. TEX. STATE BAR R. art. X, § 9, R. 1.06(c).

cannot overcome by disclosure and consent, such as when the attorney gained relevant, yet confidential, information during the course of a previous representation of one of the parties. In this type of situation, the attorney has no choice but to withdraw from the joint representation and recommend separate counsel for each spouse. The dangers of joint representation are discussed in greater detail in section B below.

3. Separate Concurrent Representation of Both Spouses

The theory of separate concurrent representation in a spousal estate planning context is that a single attorney will undertake the representation of both the husband and the wife as separate clients. Confidentiality and evidentiality privileges protect all information that either party reveals to the attorney regardless of the information's pertinence to establishing a workable estate plan. Thus, one spouse may provide the attorney with confidential information that undoubtedly would be important for the other spouse to have in establishing the estate plan, but the attorney would not be able to share the information because the duty of confidentiality would be superior to the duty to act in the other spouse's best interest. Proponents of this approach claim that the parties' informed consent legitimizes this form of representation. However, due to the confusion this approach creates for the attorney regarding to whom he owes a duty of loyalty and whose best interest he serves, the reason why any truly informed person would consent to this kind of representation is hard to understand. The dual personality that this form of representation requires of the attorney has resulted in it being dubbed a "legal and ethical oxymoron."²⁵⁶

4. Separate Representation

A final option is for each spouse to seek his or her own separate counsel. Many estate planning attorneys embrace this approach as the best way to protect a client's confidences and ensure that another person does not compromise or influence the client's interests. By seeking independent representation, spouses forego the efficiency, in terms of money and time spent, that joint representation offers, but they gain confidence because their counsel will protect their individual priorities rather than the priorities of the other spouse. Additionally, separate representation substantially decreases the potential that the attorney will be trapped in an ethical morass because of unanticipated conflicts or unwanted confidences.

256. Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 13 (1994).

B. Dangers of Joint Representation

1. Creates Conflicts of Interest

Conflicts of interest between spouses or between both spouses and their attorney can arise for many reasons. These conflicts often do not become apparent until well into the representation. A skillful (or lucky) attorney may resolve these conflicts and continue the joint representation. In other cases, however, the conflict may force the attorney to withdraw from representing one or both spouses.

a. Accommodating Non-Traditional Families

With the frequency of remarriage and blended families in today's society, non-traditional families are a ripe source of conflict. A step-parent spouse may not desire to provide for children that biologically are not his own. This fact can come into direct conflict with the expectations of a parent spouse who feels that his children are entitled to support and that the other spouse is just being selfish. Alternatively, both spouses may be in conflict over how the estate plan should provide for "our" children, "your" children, and "my" children, and whether any of these classifications should receive preferential treatment.

b. Bias Toward Spouse if Past Relationship with Attorney Exists

Regardless of whether the relationship is personal or professional, when one spouse has a prior relationship with the drafting attorney, there is potential for conflict. The longer, closer, and more financially rewarding the relationship is between one of the spouses and the attorney, the less likely it is that the attorney will be impartial.²⁵⁷ Because both spouses rely on the attorney's independent judgment to assist them in effectuating their testamentary wishes, fairness demands that neither party has any actual or perceived disproportionate influence over the attorney.

c. Differing Testamentary Goals Between Spouses

Spouses may have different ideas and expectations regarding the forms and limitations of support provided by their estate plan to their survivors. By including need-based or other restrictions on property, one spouse may believe that the other spouse will be "protected"; however, the latter spouse may view the limitations as unjustifiable, punitive, or manipulative. If one

257. See James R. Wade, *When Can a Lawyer Represent Both Husband and Wife in Estate Planning?*, PROB. & PROP., Mar./Apr. 1987, at 13.

spouse has children from a prior relationship, then that spouse may wish to restrict the interest of the non-parent spouse via a QTIP trust or other arrangement to the great dismay of the other spouse who would prefer to be the recipient of an outright bequest. One distribution plan may not be capable of satisfying both spouses' desires.

d. Power Struggle Between Spouses

One spouse may dominate the client side of the attorney-client relationship. If one spouse is unfamiliar or uncomfortable with the prospect of working with an attorney or if one spouse is unable, for whatever reason, to make the spouse's desires known to the drafting attorney and defers to the other spouse, then the attorney's ability to fairly represent both parties becomes difficult.

e. Lack of Stability in the Marriage

If the attorney seriously questions the stability of the marriage, then he will find creating an estate plan, which contemplates the couple being separated only by death, impossible. As one commentator explained:

No court would permit a lawyer to go forward when such a situation involves partners in a partnership or the principals in a close corporation, or a trustee and beneficiary of a trust, or a corporation and its officers. The courts will not take a different view when the clients are husband and wife.²⁵⁸

The case of *In re Taylor* is instructive.²⁵⁹ In this case, a law firm represented both the husband and wife in the preparation of their estate plans, including wills, powers of attorney, and some business matters.²⁶⁰ Later, the law firm represented the husband in divorce proceedings against the wife.²⁶¹ The wife sought to have the law firm disqualified from representing the husband.²⁶² The trial court denied her motion and she appealed.²⁶³

The appellate court conditionally granted the wife's request for a writ of mandamus directing the trial court to vacate the order denying her motion to disqualify the law firm.²⁶⁴ The record showed that the law firm represented both the husband and wife with regard to the business and

258. Hazard, *supra* note 256, at 14.

259. *In re Taylor*, 67 S.W.3d 530, 530 (Tex. App.—Waco 2002, no pet.).

260. *Id.* at 531.

261. *Id.* at 532.

262. *Id.*

263. *Id.* at 531.

264. *Id.* at 534.

estate matters; thus, the law firm's representation of the husband in the divorce action created a conflict of interest.²⁶⁵ The wife did not consent to the law firm's representation of the husband in the divorce; thus, the law firm could not represent the husband.²⁶⁶ Consequently, the trial court's failure to grant the wife's motion was a clear abuse of discretion.²⁶⁷

f. Existence of Substantial Amount of Separate Property

Significant conflict may arise if one spouse has a separate estate that is of substantially greater value than that of the other spouse. Especially, if the wealthier spouse wants to make a distribution that differs from the traditional plan where each spouse leaves everything to the survivor and upon the survivor's death to their descendants. If the wealthy spouse dies first, then the attorney may generate a great deal of conflict among all of the parties if, acting in the best interest of the not-so-wealthy spouse, the attorney provides information regarding that spouse's financial standing under the contemplated distribution.

Conflict may also exist in situations where one spouse wants to make a gift of property that the other spouse believes is separate property and not an item that the first spouse is entitled to give. The potential for this type of conflict is especially great where the spouses have extensively commingled their separate and community property.

2. Forces Release of Confidentiality and Evidentiary Privileges

Joint representation may force spouses to forego their normal confidentiality and evidentiary privileges. Disclosure of all relevant information is the only way to work toward the common goal of developing an effective estate plan. In subsequent litigation between both spouses regarding the estate plan, the attorney may disclose all material the couple provided. When the attorney releases these privileges, it eliminates the potential conflict between the attorney's duty to inform and the duty of confidentiality.

3. Discourages Revelation of Pertinent Information

The fact that there is no confidentiality between both spouses in joint representation situations may not be a problem if both spouses have nothing to hide and have common estate planning goals. On the other hand, joint representation can place one or both of the spouses in the compromising

265. *Id.* at 533-34.

266. *Id.*

267. *Id.* at 534.

position of having to reveal long held secrets in each other's presence, for example the existence of a child born out-of-wedlock. Even worse is the scenario where the spouse withholds information. This leaves the other spouse vulnerable and unprotected from the undisclosed information, which, if known, could have resulted in a significantly different estate plan.

4. Increases Potential of Attorney Withdrawal

A potential conflict that becomes an actual conflict during the course of representation may not prevent the attorney from continuing the representation if both spouses previously consented. However, if the conflict materially and substantially affects one or both of the spouses, then the attorney must carefully consider the negative impact the conflict will have on the results of the representation and on the attorney's independent judgment. The prudent action may be withdrawal. A midstream withdrawal can be very disruptive to the estate planning process resulting in a substantial loss of time and money to both spouses and the attorney.

5. Creates Conflicts Determining When Representation Completed

There is some question as to whether a spouse who sought joint representation in the creation of the spouse's estate plan can return to the same attorney for representation as an individual later. The determination as to when the joint representation ends is well settled with respect to subsequent attempts to unilaterally revise the estate plan—it does not end. The attorney is obligated to share with the other spouse/client any subsequent representation of either spouse that relates to estate planning matters. Regarding other legal matters, representation “should be undertaken by separate agreement, maintaining a clear line between those matters that are joint and those matters that are individual to each client.”²⁶⁸

C. Recommendations

The attorney may independently make decisions regarding the form of representation most appropriate for a husband and wife seeking estate planning assistance based on his or her past experiences, independent judgment, and skills of observing the potential for conflict between both spouses. The better course of action is for the attorney to explain the choices available to the spouses along with the related advantages and disadvantages. Then, the attorney can permit the couple to decide how it would like to proceed. The only two viable options are joint representation

268. Teresa Stanton Collett, *And the Two Shall Become One . . . Until the Lawyers are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 141 (1993).

and separate representation.²⁶⁹ As previously mentioned, representation of the family as an entity and separate concurrent representation by one attorney are appropriate forms of representation for a husband and wife only in extremely rare cases.

1. Representation of Only One Spouse

Representation of only one spouse allows each spouse to be fully autonomous in dealing with the spouse's attorney. The client/spouse reveals only the information that the client is comfortable sharing with the other spouse. As one commentator explained, separate representation for each spouse "is consistent with the present dominant cultural view of marriage as a consensual arrangement and is most consistent with the assumptions about the attorney-client relationship."²⁷⁰

When the attorney obviously knows that separate representation best serves the couple, the attorney is responsible for convincing the couple of this fact. Separate representation is probably the best choice in situations when the marriage was not the first for either or both of the parties, when the couple has children from previous relationships, when one party has substantially more assets than the other, and when one spouse is a former client or friend of the consulted attorney.

When recommending separate representation, the attorney should take care to point out that this suggestion is not an inference that the relationship is unstable or that one or both parties may have something to hide. Instead, this suggestion is merely a reflection that each spouse has his or her own responsibilities, concerns, and priorities, which might not be identical with those of the other spouse. Accordingly, the best way to achieve a win-win result and reduce family conflict is for each spouse to retain separate counsel.

2. Joint Representation of Both Spouses

Despite the potential dangers to clients and attorneys alike, joint representation is the most common form of representation of husband and wife for estate planning matters. With appropriate and routine use of waiver and consent agreements, the attorney may undertake this type of representation with minimum risk to the attorney and a maximum of efficiency for the clients. Unfortunately, however, use of disclosure and consent agreements is far from a standard procedure. One survey revealed that more than forty percent of the estate planning attorneys questioned do

269. See Malcolm A. Moore, *Representing Both Husband and Wife Ethically*, ALI-ABA EST. PLAN. COURSE MATERIAL J., Apr. 1996, at 5, 7.

270. Collett, *supra* note 268, at 128.

not, as a matter of practice, explain to the couple the potential for conflict that exists in such a representation, much less put such an explanation in writing. One attorney stated that he only felt the need to discuss potential conflicts when the representation involved a second (or more) marriage and that he only put the agreements in writing if he felt the first meeting indicated a real problem. Another respondent failed to disclose the potential for conflict because he was afraid a disclosure would appear as if he were issuing a disclaimer for any mistakes he might make. Finally, the denial of the existence of potential conflicts occurs on the part of the attorney and both spouses, as evidenced by one practitioner's statement, "I have a hard time believing that I should tell clients who have been married for a long time and who come in together to see me that there may be problems if they get a divorce."²⁷¹

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 05-434 (the Opinion), which addresses the conflicts that may arise when an attorney represents several members of the same family in estate planning matters.²⁷²

The Opinion validates the common practice of one lawyer representing several members of the same family.²⁷³ The basis of this authorization is that the interests of the parties may not be directly adverse and that more than conflicting economic interests are needed before the attorney may not represent both.²⁷⁴

The Opinion recognizes, however, that a current conflict of interest may result even without direct adversity if there is a significant risk that representation of one client will materially limit the representation of another.²⁷⁵

Despite the "permission" granted by the Opinion, I continue to believe that the representation of more than one family member in estate planning matters is problematic. A potential conflict may turn into a real conflict at a later time, leaving the attorney in an untenable position. This representation is simply not worth the risk. I believe a lawyer should owe one hundred percent of his duties to one, and only one, family member. By representing only one family member, there is no doubt as to whom the attorney represents or what actions the attorney should take if a real conflict arises. Although, practitioners may lose some business and some clients may have higher legal fees, I believe this is preferable to the alternative.

Many attorneys, nonetheless, will continue to represent both spouses jointly. I strongly recommend to attorneys who do so to: (i) provide both

271. Francis J. Collin, Jr., et al., *A Report on the Results of a Survey About Everyday Ethical Concerns in the Trust and Estate Practice*, 20 ACTEC NOTES 201, 219 (1994).

272. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-434 (2004).

273. *Id.*

274. *See id.*

275. *Id.*

spouses with full disclosure, and (ii) obtain both spouses' written informed consent, regardless of the perceived potential for conflict.

a. Full Disclosure

Informed consent is impossible without full disclosure. Because estate planning attorneys often meet one or both of the spouses for the first time on the day of the initial appointment, the attorney cannot know more about the couple than what the attorney sees and hears during the interview. An extremely important act of obtaining informed consent is for the attorney to discuss as many different potential conflicts with the couple as reasonably possible because there is no way to be sure which specific issues are relevant to each spouse. Even if the attorney has some familiarity with the couple, covering too many possibilities is better than too few.

The amount of disclosure the attorney must provide to each client varies because informed consent is different for each client. The attorney has the responsibility to seek information from both parties to be sure that they address all relevant conflicts and the effects of certain incidents, such as divorce or death of one of the spouses. Another good idea is for the attorney to include a discussion of the basic ground rules of the representation detailing exactly what is and is not confidential, the rights of both spouses to withdraw, and other procedural matters—attendance at meetings, responsibility for payment of fees, et cetera.

b. Oral Disclosure

An oral discussion of potential conflicts that exist or may arise between the couple will allow the attorney to gather information about the clients while disseminating information for them to use in making their decisions. Oral disclosure also permits a dialogue to begin, which may encourage the clients to ask questions and thereby create a more expansive description of the advantages and disadvantages of joint representation as they apply to the couple.

c. Written Disclosure

Though there is no rule or standard that requires the attorney to document the disclosures or each spouse's informed consent in a written document, the seriousness and legitimacy that go along with a signed agreement serve as additional protection for both spouses. By documenting the disclosure statement and each spouse's individual consent to the joint representation, the couple may reconsider the advantages and disadvantages of joint representation and may feel more committed to the agreement. Additionally, if there are any issues that the couple does not feel were

addressed in the document, then they may be more likely to express them and have the attorney include those issues in the agreement. Finally, reducing the agreement to written form helps protect the attorney should any future dispute arise regarding the propriety or parameters of the representation.

IX. CONCLUSION

Just like the release of the Vista version of Windows reduced blue screen errors, using common sense and being aware of the issues discussed in this article should reduce the likelihood of an estate plan crashing. I hope that by pointing out potentially troublesome areas, the reader will avoid the ramifications of drafting a flawed estate plan, including frustration of the client's intent, financial loss to the client or the beneficiaries, personal embarrassment, and claims of malpractice or breach of fiduciary duty. The list of errors in this article is not exclusive. The possibility for error exists everywhere and at any time. An estate planner must be ever vigilant and by "making a list . . . checking it twice" will increase the likelihood of preparing a legally sound estate plan.²⁷⁶

276. J. FRED COOTS & HAVEN GILLESPIE, *Santa Claus is Coming to Town* (1934).