Top Mistakes of Estate Planners in Potential Will/Trust Contest Scenarios

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Jim Hartnett, Jr.
Jay David Hartnett
Fred Hartnett
Melinda J. Hartnett
The Hartnett Law Firm
2920 N. Pearl Street
Dallas, Texas 75201

TOP MISTAKES OF ESTATE PLANNERS
IN POTENTIAL WILL/TRUST CONTEST SCENARIOS

1. Missing the Obvious Will/Trust Contest Situations.

a. Not recognizing the obvious land mines, e.g. disinheritance of a child; radical beneficiary changes; mixed families; all to charity, etc.

b. Failing to look at the prior estate plan. You may be implementing a huge change and not know it. A review of earlier plans may allow you to identify those with standing to contest, and consider how to best address potential issues. This review may also alert you to the presence of undue influence.

i. If a child is being cut out, why? And does the testator intend that children of the out-of-favor child (the grandchildren) be punished for the sins of the parent?

ii. Don't assume that juries will just rubber-stamp large charitable bequests.

c. Recognizing potential problems but ignoring them or, worse, tossing kerosene on the fire with inflammatory language in the will.

d. Failing to warn clients of the potential for their estate plan to trigger litigation and failing to advise them of ways to mitigate the likelihood of litigation.

e. Does your client have any idea that a will or trust contest may make his or her private life a public spectacle?

2. Including Beneficiaries in the Drafting Process.

a. Taking marching orders from a beneficiary.

Estate of Seale – Mother tells lawyer she wants one of her sons involved in the estate planning, which will disinherit the other son (Gary). Son takes the lead in recommending changes, though lawyer is careful to always inform Mother of changes in writing. But lawyer writes a note after a phone call with favored son: "Make sure Gary gets zero".

b. Meeting with client with a beneficiary present or, worse, meeting with the beneficiary outside the client's presence.

Estate of Obenchain – Prodigal son inherits everything under new will. Lawyer's time records showed extensive meetings between lawyer and son, sometimes with, but mostly without, the testator. The jury invalidated the last will based upon undue influence, finding that it reflected the son's wishes instead of the testator's.

c. Having the beneficiary at the execution ceremony. Really?

3. <u>Ignoring the Significance of Heirlooms and Memorabilia.</u>

a. If all property is left to charity/stepmom/caregiver, family heirlooms are effectively abandoned. The family may not even get an opportunity to obtain a memento from the house and Grandma's prized silver may be sold and lost to the family.

Estate of Johnson – The San Antonio Court of Appeals noted the significance of King Ranch family heirlooms in this opinion: 3rd wife "(Laura) also retained the family scrapbooks and photo albums, claiming that B (Decedent) did not want Ceci and Sarah (daughters) to have them until after Patsy (daughters' mom) died; however, the evidence established that Laura did not return the family scrapbooks and photo albums even after Patsy died, but kept possession of them for the duration of the trial. Evidence also was presented that Laura refused to give B's granddaughter, Alice, a silver spoon set that B wanted her to have. Although Laura testified that the attorneys had told her not to give away any of the estate assets because of the pending litigation, evidence established that she gave items belonging to the estate to other non-family members." *In Re Estate of Johnson*, 240 S.W.3d 769, 781-782 (Tex.App.-San Antonio 2011, pet. filed).

Estate of Foster – Testator's estate was worth approximately $2 million. Cousin was the primary beneficiary under a 1986 will and sole beneficiary under a 1991 will. 1995 Will left nothing to cousin and all to a couple who recently befriended Testator. Testator then executed a will in 1997 leaving $100,000 in trust for her cats and everything else to charity, and named attorney as executor and trustee. Jury found that Testator lacked capacity on the 1995 and 1997 Wills, was unduly influenced on the 1995 Will, and upheld the 1991 Will to cousin. Jurors reported that one of the most important facts to them was that Testator had for decades promised that certain jewelry would be given to cousin's daughter. Under the 1997 will, the jewelry would have gone to charity.

4. <u>Writing Yourself into the Document.</u>

a. As we all know, rarely can you write yourself into a will as a beneficiary.

Probate Code §58b: Devises and Bequests that are void
(a) A devise or bequest of property in a will is void if the devise or bequest is made to: (1) an attorney who prepares or supervises the preparation of the will; (2) a parent, descendant of a parent, or employee of the attorney described by Subdivision (1) of this subsection; or (3) a spouse of an individual described by Subdivision (1) or (2) of this subsection. . . .

b. Writing yourself in as an executor/trustee/advisor/mandated attorney is almost always a bad idea, especially if a contest is anticipated.

i. This is ethically permissible provided the draftsman has done nothing to influence the client.

ii. But it makes exculpatory language for the fiduciary or advisor look even worse.

iii. Exculpatory language protecting a draftsman who serves as executor or trustee is probably unethical, unless the client has been advised by an independent attorney.

iv. In the jury's eyes, this makes it more believable that the attorney participated in undue influence.

v. Remember *Wiliford v. Foster, Lewis.* B. R. Wiliford had been represented in multiple matters by the Foster, Lewis firm. His will, drafted by Foster, Lewis, named his attorney and his accountant as executors and co-trustees. Foster, Lewis also represented the real estate development partnerships in which Wiliford was primarily invested. Mrs. Wiliford ultimately sued the lawyer and the firm. The jury found in favor of the widow and the court entered a $16.7 million judgment against Foster, Lewis. The judge ultimately granted a new trial, which erased the malpractice verdict, but Foster, Lewis settled for $4.3 million.

5. <u>Failing to Review or Tailor Your Boilerplate Language.</u>

a. "Boilerplate" often creates conflicting provisions.

i. No contest provision when there are no beneficiaries of the document who would contest.

Estate of Childs – Testator cut out his only daughter, from whom he was estranged, and left entire estate to his stockbroker. Will contained a no-contest provision, but it could only apply to the stockbroker who received everything; unless testator thought he had made provisions for daughter.

ii. No contest provisions which effectively reward a contest.

Example – Will cuts out one child entirely but no contest clause provides that anyone who contests receives $1,000.00. In that situation, child actually inherits only if she contests.

iii. Nonsensical Definitions

Estate of Childs – The Will included statement that "all references in this will to my 'child or children' include any child or children born to adopted [sic] by me after date the date of execution of this will" but the will, which effectively disinherited his only child, had no other references to children.

iv. Trustee provisions when there is no trust (or a very remote trust), or boilerplate relating to children when the children have been cut out.

Estate of Bishop – Testator dying of cancer was remarried, but had 3 kids from previous marriage. 2 oldest kids were in their 20s and had a poor relationship with Testator, but Testator had a great relationship with his 15 year old daughter. Will provision stated that oldest 2 kids were disinherited in favor of their stepmother, but the reality was that all 3 kids were disinherited. 9 pages (the majority) of the Will were devoted to a trust for the 15 year old, but the trust had virtually no chance of funding, since it only funded if 40 year old stepmother suddenly predeceased dying husband. The feeble testator could have easily believed he was providing a trust for his minor daughter.

v. Disinheriting a child or other relative but having an unintended contingency in the boilerplate that restores the child or relative as a recipient.

Example – Testatrix is adamant that she wants her Daughter to get the estate and her Son to get nothing. Will gives most of estate to Daughter but does not mention son. But Will contains clause that if bequests fail, estate passes to the heirs at law. Son remains a potential beneficiary in spite of the Testatrix's instruction.

vi. Exculpatory and forfeiture clauses should never be boilerplate.

b. All of these may be argued as evidence of incapacity or undue influence, e.g., Why didn't testator catch it? Did testator understand? Did testator know?

6. Dangerous Use of Exculpating Clauses.

a. Often overly broad or misused.

b. Ignoring the conflict if you are (or represent) the fiduciary being exculpated.

c. Why would anyone ever exculpate a paid professional fiduciary?

7. What's in Your File? Too Little? Too Much?

a. Not recognizing that your file is likely to become "Exhibit A" in a contest.

b. Failing to maintain a file at all.

c. Failing to have documentation that shows who you are communicating with; if it is anyone other than the testator, failing to have a signed authorization or instruction; and failing to be able to show an innocent reason for dealing with someone else.

d. Documenting excessively derogatory comments about beneficiaries or parties, or contributing your own color commentary.

e. Getting too chummy with the testator or, worse, a beneficiary.

f. "Scheming" to undermine a contest versus planning for a potential contest, and writing it all down.

Estate of Robinson – Beneficiary of earlier wills was a charitable foundation. While formulating a radically different estate plan, one of the lawyers concluded that the only party with standing to contest the last will was the charitable foundation, which was in existence but barely funded (because it would be primarily funded on testatrix's death in the earlier will). Lawyer devised plan to terminate the foundation. A shrewd thought, but the jury was very troubled by the lawyer's note- "kill the foundation". It became clearer that this estate plan was probably the lawyer's and not the client's, and that the lawyer was worried that his plan would not stand up to scrutiny. In addition, the lawyer was plotting for the contest, including a memo that suggested avoiding a local jury by getting to a different county.

8. Becoming an Amateur Movie Producer or Screenwriter.

a. Poor planning – usually there seems to be no plan.

b. Poor execution – answering "yes" to every question is not very helpful to prove capacity and may be helpful in proving undue influence.

c. Poor quality – bad lighting, bad sound, inferior equipment, no attention to how the client appears on camera.

d. Allowing a beneficiary to be on camera or on tape.

e. Not thinking about the message you are sending by videotaping, audio taping, or deciding not to.

9. <u>Representing Both Husband and Wife, Especially When There Are Stepchildren.</u>

a. This situation is much more likely to present a conflict for the lawyer.

b. Creates great ammunition for an undue influence claim.

i. Who was the lawyer really representing?

ii. Does the lawyer have a fiduciary obligation to the beneficiary – spouse to protect their interest, e.g. to make sure he or she gets more from the testator?

c. This also opens a closed door to estate planning malpractice claims.

Estate of Arlitt v. Paterson, 995 S.W.2d 713 (Tex.App.-San Antonio 1999, review denied). Appellate court held that wife was in privity with and could maintain a malpractice action against the estate planning attorneys if she could show that she was a joint client with her now-deceased husband.

10. <u>Thinking that Forfeiture Clauses No Longer Work, or that the Forfeiture Clause Should be Excessively Broad.</u>

After the enactment of statutes relating to forfeiture clauses and the good faith/ just cause exception, (Texas Probate Code §64 and Texas Property Code §112.038), many lawyers concluded that forfeiture clauses were no longer useful. Other lawyers started looking for ways to wire around the statutes. The former is wrong and the latter will likely create more trouble.

a. Forfeiture clauses still work to the same degree they have always worked. Contestants can still forfeit. The common law has simply been confirmed – a good faith challenge, based upon just cause, will still avoid forfeiture, but if those facts are not proven, the losing contestant forfeits.

b. You have to have a good carrot. The primary reason that most forfeiture clauses do not work is that the will does not include a meaningful bequest (the carrot). The contestant has to have something substantial to lose; otherwise, there is no disincentive to a contest.

c. A good forfeiture clause is a simple one.

i. The more you add to these provisions, the more questionable they become.

ii. You run the risk of inflaming the disgruntled beneficiary even more.

iii. Complicated, convoluted forfeiture provisions beg the questions – Did the testator really understand? Why would the testator do that? Who is really behind it?

d. A good forfeiture clause is not one that results in forfeiture; it is one that successfully deters the contest in the first place.

11. <u>If Called as a Witness, Stick to the Facts to Maintain Credibility.</u>

a. Almost every successful will contest involves a scrivener who believes he or she did nothing wrong.

b. Never try to be difficult or clever, because that will only reinforce negative stereotypes some jury members will already have about lawyers.

c. Do not fill in the blanks in your memory. It rarely helps and almost always undermines the case.

d. Advocate without being an advocate.

12. <u>Deciding to be the Litigator After Drafting the Will.</u>

a. **Rule 3.08 Lawyer as Witness**

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as an advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Comment 4 to this Rule explains the difficulty with the scrivener serving as trial counsel:

4**.** In all other circumstances, the principal concern over allowing a lawyer to serve as both an advocate and witness for a client is the possible confusion that those dual roles could create for the finder of fact. Normally those dual roles are unlikely to create exceptional difficulties when the lawyer's testimony is limited to the areas set out in sub-paragraphs (a)(1)-(4) of this Rule. If, however, the lawyer's testimony concerns a controversial or contested matter, combining the roles of advocate and witness can unfairly prejudice the opposing party. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

However, courts have held that "this Rule should rarely be the basis for disqualification". *May v. Crofts,* 868 S.W.2d 397, 399 (Tex.App.-Texarkana 1993, no writ).

b. The scrivener's conduct will already be carefully scrutinized. Why give the jury more ammunition with which to question his or her credibility?

(a) When the scrivener testifies, is he or she being honest or is he/she being an advocate, saying whatever it takes to win?

(b) Doesn't the trial lawyer have an obligation to testify favorably for his/her client in the contest?

c. Why not just guarantee a successful result?

i. If your side loses, you are increasing the risk of getting sued, especially if some jurors report that they questioned your or your partner's credibility.