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Malpractice

Trust and Estate Claims: Complexity, Conflicts, and Lots and Lots of Cash

By Karen Stromeyer

With the aging of ''The Greatest Generation'' one of the largest transfers of wealth is upon us.

This results in an increase in the number of claims against trust and estate attorneys with ''lots and lots of zeros,'' according to Johannes S. Kingma of Carlock, Copeland & Stair LLP in Atlanta, who moderated a program on liability risks in trust and estate practice at the Spring 2015 National Legal Malpractice Conference in Washington D.C. The conference was presented April 8-10 by the ABA Standing Committee on Lawyers' Professional Liability.

The key to avoiding such claims, speakers said, is use of robust engagement letters and conflict letters, and for the lawyer to take particular care to clearly and explicitly document the intentions of the testator.

The panel discussed potential claims and risks that can arise in the uniquely challenging trust and estate realm, using this hypothetical:

A lawyer is asked to draft reciprocal wills for a husband and wife where each leaves his or her estate to the other. The lawyer recommends that certain assets be put in an LLC, and certain assets were put into a children's trust, of which the lawyer is the trustee. As the assets in the trust grew, the spouses had the lawyer make distributions from the trust, reducing the capital account to almost nothing. Many years later, the wife returns to the lawyer wishing to change her will and eliminate the husband as an heir, which the lawyer does.

As is common in the trust and estate context, this hypothetical highlights the numerous complexities that interject risk to the trust and estate lawyer: potential conflicts arise because duties may be owed to more than one party; separate fiduciary duties may be owed to an entity or the estate; the lawyer takes on a nonlegal financial planning role; the lawyer may face exposure from the intended beneficiaries; and the intent of the testator may be lost.

According to Kingma, the types of claims that arise most commonly from trust and estate engagements include:

- Garden variety negligence arising from, for example, advice given regarding the overall estate plan.
- Mistakes in the preparation of the wills, trusts, powers of attorney and other documents; faulty tax advice; and failure to timely file IRS elections or returns.
- Breach of fiduciary duty in the role as attorney, and/or in the role of trustee, financial planner, etc.
- Claims by third-party intended beneficiaries regarding management of the estate or trust.
- And, in some cases, aiding and abetting fraud or fraudulent conveyance.

Multiple Clients, Multiple Conflicts

Plaintiff's attorney Glenn Bergenfield of Glenn A. Bergenfield P.C. in Lambertville, N.J., discussed how he approaches a potential trust and estate case.

''Juries just don't like cases about rich people trying to avoid taxes,'' he told the audience. Instead, Bergenfield said, the case is framed in terms of trust. The lawyer's job is to help clients plan how to give their money to their family and children.

''People, juries, expect lawyers to be as loyal has humanly possible. People don't like lawyers, but they like their lawyer because they have to trust them,'' he said. Therefore, in any joint representation, when the lawyer does something that is perceived as siding with one side or spouse over another, this presents the appearance of a conflict and a violation of the trust that the parties put in their lawyer.

In this hypothetical, he said, we have a lawyer who seems to be actively choosing one spouse over another.

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Bergenfield said in this scenario he would focus on the claims of the husband against the attorney.

One of the difficulties highlighted by the hypothetical is that in the trust and estate context the lawyer often represents both spouses in creating an estate plan, but one spouse is more active in doing most of the planning. When one spouse makes material changes to the estate plan, does the lawyer have the obligation to inform the other spouse of those changes?

Bergenfield argued ''yes''; the lawyer's duty to inform each client of any material changes remains, even after the estate planning is complete.

Kingma disagreed. ''Lack of duty is a good defense in this situation. Once the will is complete, the lawyer's representation ends. You are not attorney for life, for all purposes,'' he stated.

William E. Wright Jr. of Deutsch, Kerrigan & Stiles LLP, New Orleans, concurred. ''In a perfect world, we would see detailed engagement letters and termination letters, which severed the duty to the client when the work was completed,'' he said. This would make it clear that the representation had ended and the attorney had no ongoing duty to keep the testators updated regarding material changes to the estate plan, and changes to the existing law that may affect the estate plan. Thereafter any request for a modification of the estate plan would constitute a new representation that would not necessarily implicate the duties owed to the other spouse.

Wright also urged the use of conflict waiver letters in any situation when the lawyer is representing more than one party regardless of how unified their interests appear at the time.

Don't Underestimate Family Dynamics

''Trust and estate claims are hard to resolve because the lawyer is often wearing multiple hats,'' said Shauna J. Reeder, an assistant vice president of CNA in New York. She said ''This is made even harder by the amount of money usually involved, and because of the family issues and emotions involved.''

The other panelists agreed that family dynamics make malpractice cases based on trust and estate work potentially unwieldy and difficult to resolve. Allegiances can shift throughout the litigation; a side of the family that was in favor of one result or beneficiary may shift and support another for any number of practical or emotionally driven reasons. There are disinherited children, jilted spouses and bitter family disputes.

Therefore, warned Kingma, it's important for the defense attorney not to focus too much on technical or legal defenses. ''The plaintiff gets to put on a case of betrayal—it's Macbeth on their side,'' he said.

Lawyer and . . .

Reeder noted that after the global economic meltdown, lawyers more often started taking on roles in addition to drafting the will or estate documents. Lawyers who take on these augmented roles are then subject to claims for not managing the trust assets properly or the tax burden imposed on the estate.

Reeder recommends that the lawyer carefully evaluate if she is competent to handle such matters or whether they should be assigned to independent professionals, and to memorialize in the retainer agreement whether the attorney will be rendering tax or financial planning advice, and the exact scope of that advice.

Intention Matters

The speakers also agreed that one of the key ways to avoid future claims in this area of law is for lawyers to clearly set forth the wishes of their clients.

Litigation arises often years after the legal work was performed in claims from disappointed beneficiaries or want-to-be beneficiaries. Even though the lawyer had kept the client fully informed and earned that person's trust, that client isn't there to help defend the lawyer in post-mortem controversies. Therefore, it is paramount to memorialize the intentions of the testator explicitly.

While the issue of whether third-party beneficiaries—the intended heirs (spouse, children siblings, etc.) of the testator—have standing to sue is an area under development in some states, many have resolved this issue in favor of finding that the lawyer owes a duty to a third-party beneficiary of the estate, will or trust.

One pitfall, Kingma said, is that to help the clients get the best possible tax advantage, lawyers will create long and complicated wills and trusts that obfuscate the intentions of the testator. All documents should be prepared keeping in mind that they will be read and interpreted, with the lawyer's work second-guessed by the intended beneficiaries of the will or trust.

Reeder agreed, stating that she sees claims from beneficiaries claiming that the estate plan failed to adequately minimize taxes so that there is nothing for the beneficiaries to take. That is why to protect the lawyer it is so important to document the goals of the testator, the advice given and why a particular course of action was chosen.

Damages

Wright discussed the potential exposure of damages that can arise in the trust and estate context. Damages arise where the attorney failed to adequately convey the assets to the intended individual, and can be massive.

When acting as a trustee, a lawyer is charged with managing the funds as a prudent investor. Any failure of the attorney to do so will make her liable for the difference.

Where the attorney gave tax advice, any tax liability the estate incurred that would not necessarily have been owed but for the attorney's negligent advice is another element of damages.

Interest paid to the IRS in some cases can be an element of damages, as can tax penalties and costs incurred to amend the returns. Furthermore, plaintiffs will often seek to recover the funds incurred to mitigate their damages through the hiring of subsequent attorneys or other professionals.

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