

Nightmare on Main Street: Estate Planning and Probate Pitfalls

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Estate planning and probate work, a staple in most general practices, presents malpractice risks for the unwary practitioner. In this column (Happy Halloween, by the way), we will examine some of the causes of legal malpractice claims in the estate planning and probate area.

1. Botched real estate conveyances. A significant percentage of the claims brought against estate planners involve the improper conveyance of real estate.

Sad story No. 1. Attorney Cadaver is hired by A. Frankenstein to prepare his will. Frankenstein instructs Cadaver to bequeath his country villa to his faithful butler, Igor. During their discussions, Frankenstein leads Cadaver to believe that Frankenstein possesses sole ownership of the villa. Based upon these representations, Attorney Cadaver drafts the will as instructed but never verifies the current title to the property.

Upon Frankenstein's death, it is discovered that the property is held in joint tenancy by Frankenstein and his sole child, Frankenstein Jr. When Junior finds out, he contests Igor's right to the villa. Igor then sues Attorney Cadaver under a third party beneficiary theory for Cadaver's failure to convey the property out of joint tenancy when she prepared Frankenstein's will.

Sad story No 2. Attorney Cadaver is retained by Gomez Addams to prepare an estate plan that will leave five valuable parcels of real estate to Gomez's two children, Wednesday and Pugsley, upon his death. Gomez's motivation is to keep the property out of the hands of his estranged wife, Morticia. To accomplish her client's intent, Attorney Cadaver prepares three documents: the Gomez Addams Trust, a pourover will,



*Here's how
to protect yourself
against those
scary malpractice
claims.*

and a quitclaim deed transferring the five parcels into the trust. Unfortunately, Attorney Cadaver doesn't obtain a current title report before drafting the deed. Therefore, Cadaver never learns that the property in question was transferred into a land trust several years earlier.

Gomez dies a few years later and a court holds that the quitclaim deed drafted by Cadaver is invalid because the grantor named in the deed was Gomez rather than the land trust. Consequently, the properties become part of Gomez' estate and a portion of the properties are inherited by Morticia. The Addams kids hire their lawyer-cousin Fester and sue Cadaver for failing to effectuate their father's intent.

Both of these claims could have been avoided if Attorney Cadaver had obtained a fresh title report on the properties in question. Some estate planners simply order a fresh title

report and then bill the client. Others inform new clients at the outset that the firm cannot insure a valid real estate transfer unless the *client* supplies the firm with : (1) a complete legal description from the last recorded deed or a current title policy; (2) a complete copy of the land trust agreement and all amendments, in the case of property held in land trust; (3) a recent real estate tax bill; and (4) the name, address, and telephone number of the mortgage holder, if applicable.

The bottom line is that estate planners and probate lawyers must handle the real estate aspects of the engagement as they would any other real estate matter that comes into their office. This includes keeping abreast of the nuances involved in conveying real estate and verifying title.

2. Blown deadlines. Missed deadlines, like the following example, are a frequent source of claims in the probate area.

Attorney Cadaver represents the Estate of B. Lugosi. Although Cadaver makes a timely estimated payment of estates taxes, she forgets to calendar the date on which the amended tax return is due. As a result, the statute of limitations runs on the time allowed for seeking a tax refund for the Lugosi Estate.

Other dates that probate attorneys tend to miss include the deadline for spouses to renounce wills and the IRS deadline for filing a disclaimer of beneficial interest. Practitioners can reduce the likelihood of missed deadlines by instituting two procedures: (1) a redundant calendaring system which requires every date to be logged into two different calendars by two different people; and (2) a mandatory file review system which requires each file to be pulled and reviewed every 30 to 60 days.

3. Drafting boo-boos. As the next example illustrates, there's no substitute for good old-fashioned proofreading.

B. Karloff engages Attorney Cadaver to draft his will. Karloff instructs Cadaver to include language that would permit Karloff's stepson to inherit under the will. Cadaver's secretary accidentally fails to add the crucial provision which defines stepchildren as children to Cadaver's standard will form. After Karloff's death, the stepson brings a legal malpractice complaint against Cadaver for omitting the requested language.

4. Disputes over the testator's intent. The dead can't talk. And they can't come back to testify at your malpractice trial either. That's why it is critical to document your client's intent at the time you are preparing his or her will or estate plan. Let's look at the following example:

Attorney Cadaver is hired by Lon and Lil Chaney to draft their wills. After meeting with the Chaney's and reviewing their assets, it appears that their combined assets may exceed \$600,000. Cadaver recommends to the Chaney's an estate plan that includes a pour-over will and marital/family trusts to minimize the estate tax upon their death. The Chaney's inform Cadaver that they don't want to spend

the money on a complicated estate plan. They are simple people and they want simple wills. Cadaver reluctantly carries out the Chaney's wishes.

After their parents' car careens off a mountain road during a full moon, the Chaney children sue Attorney Cadaver for malpractice. According to the complaint, Cadaver negligently failed to prepare an estate plan for the Chaney's that minimized the estate's tax exposure as allegedly requested by their parents. If only Cadaver had drafted a letter to the Chaney's memorializing their decision and the consequences of that decision!

5. Funding issues and the scope of representation. Attorney Cadaver is recommended to the Count and Countess Dracula for estate planning services. After meeting with the Draculas, Cadaver prepares the necessary wills and trust agreements to provide the Draculas' estate with the maximum tax savings. Count Dracula dies suddenly after being exposed to too much sun while vacationing in Palm Beach. Upon the death of Count Dracula, his estate does not receive the intended tax credits because the trusts established by Cadaver have never been funded. The estate sues Cadaver, alleging that it was Cadaver's responsibility to fund the trusts.

Attorney Cadaver's suffering could have been avoided if she had carefully spelled out the scope of her representation, including whether she was responsible for funding matters. Cadaver could have accomplished this goal with the "closing letter" that accompanied her final bill. In the closing letter, Cadaver could have informed the Draculas that their estates would not receive the intended tax benefits unless the trusts were funded by, for example, changing the beneficiaries under insurance policies and transferring real estate into the proper trusts. Most importantly, the letter should clearly indicate that funding the trust is the client's obligation unless the client requests the attorney's assistance. ("If you would like the assistance of the Cadaver Law Offices in transferring assets to the trust, please call so we can discuss the fees for such representation.")

By following loss prevention basics – obtaining current information, proofreading, proper calendaring techniques, and documenting your duties and the client's instructions – you can avoid the "horrors" of a legal malpractice claim.