

Estate Planning Errors and how to avoid them

PRESENTED BY:
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Introduction



Leah Del Percio, Esq. - Founder and CEO, Trustate

- Settled **hundreds** of estates, nationwide.
- Administered **over \$50B** via estate administrations.
- **15+ years** experience as estate attorney (JD & LLM) with multi-jurisdictional estate admin practice.



SCRIVENER'S COMMANDMENTS FOR PLANNING WITH ADMINISTRATION IN MIND

01

Handle with care.

02

Do not thoughtlessly draft.

03

Use modern resources.

04

Handle more estate administrations.

05

Counsel the Client!



A Great Plan is Only as Good as its Execution

A close-up, slightly blurred photograph of a family. A woman with dark curly hair is looking down at a photo album. A young child with curly hair is also looking at the album. Another child is partially visible on the left. The photo album is open, showing several photographs of people. A blue semi-transparent box is overlaid on the center of the image.

ONE

Handle with care.



Scrivener's Commandments for Planning with Administration in Mind



No matter the net worth of your client, this is **not elementary work.**

- **This is not to be taken lightly. Give this work the honor and attention it deserves.**

Wills and trusts are instruction sets for someone's **entire livelihood** and everything they worked for their whole life.

- **Apply your smart mind to the drafting itself.**

But make sure you are working from the right information.

- **No will is a "simple will."**





TWO

Never thoughtlessly draft.



You are not drafting in a vacuum.

- Draft with the idea in your head that your words will be scrutinized with a fine-tooth comb years down the road.

Someone (usually another lawyer) will review and judge your work. This could be done harshly, particularly if they don't have an understanding of what the tax laws were at the time.

- Malpractice Risk

PR usually has cause of action to sue scrivener.

Privity of contract with legal representative of estate of client. No one else. Some states have had cases that deviated.



Understand Your Documents!

- Don't thoughtlessly rely on drafting software

Understand what EVERY clause means in your wills/trusts.

NOTE - this is easier than it sounds.

- This will help you plan better.

Powers of appointment are a big one.



Commandment #2: Never thoughtlessly draft.



THREE

Use modern resources.



STOP DOING THIS

Do not draft on stone tablets anymore (i.e., don't "flip" old documents).

No matter how proud you are of the quality of your templates.

You will make errors.

You will end up with documents with old language.

AND START THIS

Make modern technology work for you to provide higher quality plans to clients.

Use drafting software and tools.
Make sure these tools are updated regularly.

Use synced client intake forms.



A man in a dark suit, white shirt, and dark tie is seated at a wooden desk. He is looking down at a stack of papers, with his right hand holding a pen over them. His left hand is near a calculator. A laptop is open to his left. The background is a blurred office setting with a window and some greenery.

FOUR

Handle more estate administrations.



Scrivener's Commandments for Planning with Administration in Mind



Handling estate administration makes you a **better estate planner**.

The administrative side of things (particularly when an estate planning client passes away), can seem scary and overwhelming for transactional lawyers like estate planners. **It is not scary.**

You can (and should) be doing the administrative side of things too. **It will make you a better draftsman.**

Helps you see the implementation of an estate plan (or lack thereof).

Seeing this firsthand can help you anticipate unforeseeable problems with your current estate plans.

Will provide you with the foresight to draft estate plans with such problems you've experienced in mind.



Commandment #4: Handle more estate administrations.



FIVE

COUNSEL THE CLIENT!



Clients are laypeople

- They know what they want...

...But they don't know how to get there!

They often will *think* they know how to get there and tell you their "HOW" rather than "WHY" (i.e. their actual objectives).

They've done thinking before talking to you and often already tried to figure it out in their head and might initially frame their objectives around that "theory."

- They DO NOT know what they are doing - that is why they HIRED YOU



A person is seen from behind, sitting at a desk and writing with a pen. A green desk lamp is on the left, casting a soft glow. The background is a simple, light-colored wall.

ESTATE PLANNING DONE WRONG

**And common complications in Estate
Administration that can arise from it**



A Great Plan is Only as Good as its Execution

UNFUNDED REVOCABLE TRUSTS:

You created a Revocable Trust for a client but **never ensured it was funded.**

Client's estate will still require probate - regular (and ancillary probate if property in multiple states).



More documentation
needed in administration.



More difficult for
client to handle.

01

PRO TIP

Do not rely on a client to properly fund their Revocable Trust during the planning process. Help them do it or give them **VERY** comprehensive instructions.



02

INCOMPLETE REVOCABLE TRUSTS

You created a revocable trust for a client, but
(1): they were not named as both grantor and trustee,
and (2): the third party who was named as Trustee
never signed the trust.

PRO TIP

An easy fix is to
make the
client/grantor
the sole trustee
during their
lifetime.

Canceled bequest of
residue - default to
state intestacy law.

Waste of estate
planning.

Potential
malpractice.



SPECIFIC BEQUESTS OF NONPROBATE ASSETS

Example

The Will states "I give my retirement account at Truist to Alexander," but the account lists Benjamin as the named TOD beneficiary.

PRO TIPS

Never bequeath an account in a Will or Trust.

Use "equivalent to the sum of" language when making cash gifts.

03



04

SPECIFIC BEQUESTS OF ASSETS THAT FLUCTUATE IN VALUE TO ONE BENEFICIARY OVER ANOTHER

EXAMPLE

The Will states: "I give my vacation home to Alexander" (worth approx. \$300K at time of Will signing), and the residue of my estate to Ben (FMV ~300K).

Then the housing market booms.

RESULT

The house is now worth \$600K. Ben is mad.

This is way too common now.



IMPROPER ALLOCATION OF ASSETS

Between Spouses in Estate Tax States

- Estate Tax States

Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont and Washington (also Washington, D.C.)

- Estate tax issues where no ability to port exemption at state level.

Maryland has this, but most other states do not.

- Cliff issues, like in New York State.



06

NOT DEALING WITH TAX-DEFERRED ASSETS PROPERLY

➤ If a client wishes to make charitable gifts from their estate plan of a dollar amount, then make **beneficiary designations** of the specific amounts from the **retirement account** (if large) rather than via the probate estate.

➤ No conduit trusts and estate named as beneficiary account. You need a see-through-trust.



07

NOT ACCOUNTING FOR SPOUSES DYING DURING A DIVORCE

Add language for this and do not rely on state default provisions.

It is easy. There is no harm in adding language to deal with this “gray area” of time between when a divorce action has been filed but no judgment rendered yet – literally only downside risk is not doing it.



07

Spouse. The term “spouse” of any person, or any similar term, and any pronouns referring to that term, shall refer only to a person then legally married to and not legally separated from such person pursuant to the terms of either a separation agreement or court decree; and, at the death of any person or at any particular time thereafter shall refer only to the last person to whom such deceased person shall have been legally married to and not legally separated from pursuant to the terms of either a separation agreement or court decree. In the event that divorce or legal separation proceedings between a person and their spouse are commenced, then (a) any and all benefits provided hereunder for such person’s spouse shall immediately cease, and for all purposes of the Trust Agreement (including the right to receive information about the trust), such person’s spouse shall be deemed to have died upon the date of the commencement of such divorce or legal separation proceedings; and (b) such person’s said spouse shall immediately cease to act as a Trustee or in any other fiduciary capacity with respect to the trust. With respect to any trust governed by the Trust Agreement, the Independent Trustee of such trust shall have the sole and absolute authority to determine whether at any particular time any person shall meet the definition of “spouse,” and any such determination by such Independent Trustee shall be final and legally binding upon all interested persons.



NO SELF-PROVING AFFIDAVIT ON THE WILL & NO WAIVER OF BOND

- ✓ It's best practice, just do it, even if your state doesn't require it.
- ✓ Double and triple check the language of the will to ensure that it waives any bonding requirement.

08



09

DISTRIBUTION TERMS ERRORS

- **Outright distributions from trusts.**
- **No clearly defined ascertainable standard (HEMS).**
 - Not HES, not HMS, not HEMSCW, not "Comfort and welfare."
- **Health, education, maintenance, and support.**
 - No more, no less.

What is HEMS?

See, e.g., IRC §§ 2041 and 2514, along with their related Regulations, i.e. Treas. Reg. § 20.2041-1(c)(2)



NOT FILING PORTABILITY RETURN WHEN THEORETICALLY NEEDED.

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What is DSUE? (Deceased Spousal Unused Exemption)

If the first spouse dies and has leftover estate tax exemption (meaning their estate was under the federal threshold amount of \$12.06mm), you can give their unused exemption to the surviving spouse by filing an informational estate tax return and electing to port the exemption to that spouse.

Return needed:
IRS Form 706



NOT PROVIDING WILL STORAGE

- Clients store EP documents in their underwear drawer.
- Clients write on EP documents to make “updates” (the clients who change their mind a lot = more likely to have litigious interested parties).
- Charge for storage if you need to!
- If they insist on storage, have them sign a waiver document stating they are aware of the risks.

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DO NOT do estate
planning in states where
you are not licensed.



Do not fall victim to thinking that because you know your state's adoption of the Uniform Trust Code, you have any understanding of another state's adoption of the UTC.

**UTC is adopted
differently in each state.**



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MISSING AN ASSET

Not properly handling
the work because you
don't know the size and
scope of the assets and
liabilities.



Creates tax
bombs later.



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