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You Never Give Me Your Money, You Only Give Me Your Funny Paper: Adventures in Will Drafting

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Concise Estate Planning Forms for Texas Lawyers
by Dianne Reis

Chapter One, Wills Without Tax Planning

1.01 Why Draft Concise Documents?

I believed in concise writing before I went to law school. An English teacher taught us that it takes more work to write something short than to write something long, but a good writer will make the effort. And that effort forces the writer to consider every word, and to make sure the text says precisely what the writer intends to say, with no extraneous words to confuse the reader. I can think of no better time for precise writing than when writing a will, where ambiguities are unlikely to be discovered until after the testator has died and the will cannot be fixed.

In law school, professor Stanley Johanson echoed my beliefs about drafting short documents. Short documents are easier for clients to read, and for the drafting attorney to proofread. They are also easier for other lawyers to read, and that will save money down the road by preventing errors and misunderstandings in the future. Lawyers are fallible, and it is easier to notice details in a 10-page will than a 50-page will.

Also, lawyers don't enjoy reading long documents. I worked on a case involving a 64-page trust and two 3-page amendments (all single-spaced). The family went through multiple lawyers, multiple successor trustees, and a comedy of errors created by the fact that none of their advisors really wanted to read this trust. The first corporate trustee spent nearly a year figuring out that they didn't want to serve. It took the family 3 years and a trust reformation to get access to the trust assets, in part because the trust was long and not proofread well.

When I draft wills, I include only those sections that are likely to be relevant to the client's estate. A million-dollar estate does not need lengthy instructions for the allocation and payment of GST taxes. A client without significant tax-deferred assets doesn't need conduit trust provisions. A client who doesn't own an S Corporation doesn't need a Qualified Subchapter S Trust.

Some lawyers believe that every client deserves a will that takes care of every possible eventuality, and sometimes that turns out to be the right decision. Client wealth can grow to the point where they do need tax planning. Beneficiaries can become disabled and need special needs planning. Ideally, the client would return to the estate planning attorney to address new situations, but client behavior does not always conform to the ideal.

And sometimes, very specific circumstances arise in which a particular provision would be handy to have. For example, I asked a colleague to review the will form included with this chapter. He noted that while I have a provision allowing trustees to resign upon 30 days notice to the beneficiaries, the provision doesn't expressly allow the beneficiaries to waive the 30-day requirement. I expressed surprise that anyone would ever need that, and he said that sometimes the relationship between the beneficiaries and the trustee gets so bad that the beneficiaries want the trustee gone immediately, and they get upset at having to wait 30 days. If you are the lawyer

for an angry beneficiary, you might rue the fact that the drafting attorney didn't add one little sentence that would be making your life easier now.

And yet, once you start adding sentences to deal with very rare situations that don't cause truly insurmountable problems, the extra text can really add up. This is how a lot of law firms acquire such long forms. Every time they encounter a problem that could have been addressed with another paragraph in the will, that paragraph gets added to their forms, and then every client gets that extra paragraph until the end of time, even if that problem is unlikely to arise again. (I am guilty of this, too.) Older law firms have some of the longest forms in the business, because they have had more time to encounter every possible thing that can go wrong.

And yet, are clients really better off with those long wills? It is true that they are prepared for more contingencies, and I will stipulate that on average they will have a nonzero reduction in problems at probate time. But long documents cause problems of their own. Can we really say for certain that one set of problems is better than the other set?

So I respect lawyers who use forms containing every possible provision. But each lawyer or firm has to make a decision on this issue, and the decision I've made is to draft short, concise forms that contain only what the client is likely to need for them to contain. This book is for the lawyers who want to make that same choice.

1.05 Tax Planning: To Do or Not To Do

One way to shorten and simplify a client's estate plan is to leave out the tax planning. Twenty-five years ago, the estate tax exemption was $600,000, and many middle-class clients needed bypass trusts. Today, the exemption is over $12 million. Even if the Tax Cuts and Jobs Act of 2017 is allowed to expire in 2025, the exemption will still be over $6 million. That's a 1000% increase, over a time period when average wealth increased by much less. In 2000, 108,322 estates filed federal estate returns. [https://www.irs.gov/pub/irs-soi/00esart.pdf, p. 163.] By 2019, that number had dropped to 6,409. [https://www.irs.gov/pub/irs-pdf/p5332.pdf.] That's a 94% decrease in taxable estates. Which means a huge percentage of the affluent no longer need bypass trusts.

Some lawyers point out the many non-tax benefits of trusts, or focus on the uncertainty of the estate and gift tax exemption remaining as high as it is now. But many non-lawyers are not as enamored with trusts as we lawyers are. It is not uncommon for a married client to agree with, or even ask for, estate tax planning, only to resist setting up the bypass trust after their spouse dies. And sometimes for good reason — administering a trust involves hassle and expense, which seems

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