PRESENTED AT

21ST Annual Changes and Trends Affecting
Special Needs Trusts Conference
February 6, 2025 – February 7, 2025
Austin, Texas

Let's Not Fight: Drafting to Avoid Litigation

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When a client comes in to discuss their estate plan, they may know exactly what they want to happen, what they want to avoid happening, or they may have no idea at all. They look to the estate planning attorney to guide them through the process and "make things easy for the family." For many, even if they do not know what they want, they know they do not want conflict. Clients often ask what can be done to prevent litigation in their estates. The answer is that there is no magic language that will definitively avoid conflict and litigation, and as drafting attorneys we cannot guarantee harmonious estate administration. What we can do is draft with litigation in mind and consider ways to discourage claims and minimize the time and expense if a claim is asserted. No client wants their legacy to be reduced and eaten up by extended court battles.

Drafting to avoid litigation is about being clear, educating the client, and creating safety nets to help make sure the client's intention is carried out. The following are some drafting considerations that could lessen the need for litigation or reduce the impact if litigation occurs.

1. Be Consistent.

When someone wants to challenge an estate plan the first avenue is to invalidate the documents due to a procedural defect. Finding a flaw in the process of creating and executing a Will or other legal document is often the easiest way a litigator can destroy a plan. A procedural defect such as improper witnessing, signing, notary execution and formalities, or lack of capacity of the signor, can effortlessly render a Will, trust, or any legal document invalid. By challenging the necessary legal steps that were followed when developing and memorializing your client's intentions, your plan can be dismantled quickly. The best way to support the legal documents you are drafting is to be consistent with your policies and procedures from the initial interaction with the client through the execution of the documents and conclusion of your representation.

Be aware of all client interactions and authority. Each interaction with the Client is an important part of the process. From the initial scheduling of the appointment through the final execution of the documents, be conscious and aware of who the client is, who you are getting direction from, and who you have approval to communicate and interact with through the process. With each interaction, consider the following:

- Who is the Client?
- Who called to make the initial appointment?

- Who was present during the consultation and all meetings?
- Who are you authorized to communicate with?
- Who will give you the information you need to develop the plan?
- Have you documented all Client communications and approvals in writing?

Keep good records. Your file is a gold mine of information that supports and protects the documents you are drafting. Be aware and conscious of every note in your file and consistent with your policies and procedures for documenting client information. Are you taking notes the same way in each meeting? Do you have Client intake forms? Who fills those out? Do you have forms you are completing during the meeting? Who provides the information to you? Who is in the meeting with you? Have you documented all client communications and approvals in your file? Do you save your emails? Always consider your client file being subpoenaed and the long-term effects of your notes if they are revealed. Be consistent and clear with your note taking and gathering of information.

Execute Documents the Same Way Every Time. Maintaining a standard procedure for executing documents can help reduce challenges to a document's validity in a future contest. Having a checklist for execution of documents can ensure that all required formalities have been followed. It creates record of the events that took place, the people involved, and the questions that were asked and answered. (See Appendix A for a sample checklist.) It is not fool proof, but it can help limit the damage done to an estate when the estate planning attorney keeps good records. Did the testator/grantor have the requisite capacity to sign the document and was it signed with all the formalities required by law? What would your witnesses say under oath in a deposition? Are you consistent with the execution ceremony so that no matter how many years pass or how many clients you have helped, you can always say, "I know I did this because I do it every time."

2. <u>Draft Clearly, Thoughtfully and Carefully.</u>

While we all hope that parties can administer your plan easily and peacefully, there may be legitimate disputes between a fiduciary and a beneficiary. A trustee may read a clause and interpret it one way, and a beneficiary may read the same clause in a different way, creating a "good faith" dispute in how your plan should be administered just by applying different meanings to the same words. Ambiguities, even though unintentional, create conflict between fiduciaries and beneficiaries. How we as drafters can assist in avoiding litigation is to be clear, thoughtful, and careful in our drafting.

Title search: Let’s Not Fight – Drafting to Avoid Litigation

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2025 Special Needs Trusts eConference

First appeared as part of the conference materials for the
21st Annual Changes and Trends Affecting Special Needs Trusts session
"Let’s Not Fight – Drafting to Avoid Litigation"