Avoiding Liability in Trust and Estate Planning and Administration

Presented at
UT Law 2017 Estate Planning, Guardianship and Elder Law Conference

August 3, 2017

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I. Introduction

According to the 2010 census, there were more people 65 years and over living in 2010 than in any previous census.[4] Between 2000 and 2010 the 65 years and over population increased at a faster rate (15.1%) than the U.S. population as a whole (9.7%).[5] The percentage increase in Texas was even greater. From 2000 to 2010 the number of people 65 years and over increased by 25.5%; the number of those 85 years and over increased by 28.3%.[6]

On July 1, 1995 Texas had 1,915,000 residents 65 years or older; by July 1, 2005, 2,297,000. The census estimates that the number of Texas residents 65 and over reached 3,089,000 by July 1, 2015 and will reach 4,364,000 by July 1, 2025.[7] Texas—in particular Central and South Texas—will likely continue to be a popular spot for retirees. A significant number of these seniors will have substantial wealth. (Or we can all hope that they do.)

People are living longer. And many are on their second or third marriages with children from earlier marriages. Current trusts and wills may or may not clearly provide for these children from earlier marriages.

Further, many of these seniors will have physical and mental disabilities and require care. Some children will be primary caregivers while others live elsewhere. Some will have powers of attorney; others will not.

All these factors combine to generate increased trust and estate litigation and increased risk for professionals working in the field. The expanded jurisdiction of statutory probate courts means that much of this litigation is now resolved in probate court before experienced judges who often have their own notions of what proper public policy should be. Often, the estate-planning attorney is an attractive target for any beneficiary unhappy with her parents' estate plan. For the years between 2012 and 2015, the American Bar Association found 12.05% of all legal malpractice claims arose in the estate, trust and probate field.[8] Based on our experience and anecdotal research[9] we discuss below the issues we believe are particularly likely to arise for estate planning professionals, and how to avoid those pitfalls.[10]

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[4] *See* The Older Population: 2010, 2010 Census Briefs at p. 1, available at http://www.census.gov/2010census/, under Census Briefs and Reports.

[5] *See id*.

[6] See id at p. 9.

[7] *See* http://www.census.gov/population/projections/state/stpjage.txt.

[8] American Bar Association, Standing Committee on Professional Liability, Profile of Legal Malpractice Claims: 2012-15 ("ABA Profile"), p. 11.

[9] That is, talking with colleagues over drinks.

[10] We attempted to make sure that the statements in this article are accurate, or at least have proper syntax. But we wrote this article during the NBA playoffs and haven't had time to pay attention to law. So, reader beware and read the cases and statutes yourself before relying on anything in this article.

II. Common Pitfalls for Estate Professionals

This Section identifies some common legal pitfalls awaiting the heedless (or merely busy) estate-planning professional.

A. Legal Malpractice

Probably the most common cause of action brought against lawyers is for professional negligence, or legal malpractice. A claim for legal malpractice requires a showing that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the breach proximately caused the plaintiff injury; and (4) damages occurred. *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989).

Between 2011 and 2015, the number of legal malpractice claims in the estate, trust and probate field grew to 12% of all reported malpractice claims.[11] The American Bar Association's Standing Committee on Professional Liability predicts that the number of claims will only continue to grow as the transfer of wealth from the baby boomer generation accelerates.[12]

1. Who Can Sue You?

Texas is among the minority of jurisdictions that still follows the privity rule, under which a beneficiary of a will or trust lacks an attorney-client relationship (or privity) with the estate planning attorney and thus cannot sue that attorney for malpractice. *Barcelo v. Elliot*, 923 S.W.2d 575, 578 (Tex. 1996). But two Texas Supreme Court cases have eroded that rule.

In *Belt v. Oppenheimer, Blend, Harrison & Tate*, 192 S.W.3d 780, 784 (Tex. 2006), the Texas Supreme Court held that the personal representative of an estate may sue the decedent's attorney for legal malpractice in the estate planning. And in *Smith v. O'Donnell*, 288 S.W.3d 417 (Tex. 2009), the Supreme Court expanded the *Belt* holding to allow a personal representative to assert malpractice claims based on legal services other than estate planning.

In *Smith*, Corwin Denny's second wife died in a car wreck in 1969. In administering her estate, Denny treated his stock in an aerospace corporation as his separate property and did not include it in a testamentary trust. *Id.* at 419−20. On Denny's death twenty-nine years later, the children sued the estate for the millions they allegedly lost because the trust was underfunded without the stock which had become quite valuable over time. The estate settled with the beneficiaries and then sued Denny's lawyers to recover the settlement. The Supreme Court held that an executor can sue the decedent's attorney, regardless of whether the legal representation was for estate planning. *Id.* at 422.

Belt and *Smith* made clear that an estate-planning lawyer does not escape liability for his or her malpractice once the client dies. And as both *Belt* and *Smith* demonstrate, it can be a long time from the moment an attorney advises a client, and the time he becomes the target of a

[11] ABA Profile, p. 11. This was the second largest increase after claims arising in the personal injury field and the highest percentage the field has claimed since the ABA began collecting statistics in 1985.
[12] ABA Profile, p. 12.

Title search: Avoiding Liability in Trust and Estate Planning and Administration

First appeared as part of the conference materials for the
19th Annual Estate Planning, Guardianship and Elder Law Conference session
"Drafting Wills and Trusts for Efficient Administration "