

## **The Bench's Perspective - Tips For Estate Planning Professionals**

by

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### **THE BENCH'S PERSPECTIVE - TIPS FOR ESTATE PLANNING PROFESSIONALS**

#### **Advice/Documentation Preparation**

1. Don't give advice or draft documents when you don't have the educational/professional credentials to do so - i.e. - don't attempt to practice law if you aren't a lawyer - if you are a lawyer who doesn't have expertise in estate planning - refer the client to an estate planning professional.
2. Lawyers - if you are going to engage in estate planning - know the applicable law. For example - in Alabama, trusts and business entities can't claim a homestead exemption. Trusts may be taxed at a different rate than individuals. Trusts may be required to file a tax return in situations where an individual owning an asset would not. If you have advised your client to place assets in a trust - make certain they understand the tax implications relating to the assets that will become assets of the trust. Follow up with your clients to ensure that they fully implement the estate plan you design for them. If they chose not to do so - consider amendments to the estate plan.
3. Know the execution formalities relating to last wills and testaments. Note that there are specific provisions that must be in a last will and testament in order for it to be considered a self-proving will. The Alabama Supreme Court has ruled that the self-proving statute is to be strictly construed: "substantial compliance" isn't sufficient.
4. Pay attention to the provisions of your documents - make certain they fit the client's circumstances and needs. Follow through to make certain client takes the necessary actions in order to facilitate the estate plan that has been prepared for them - conveyances of property, insurance policy documentation, etc.
5. Pay attention to insurance policies - retirement accounts. Make certain the stated beneficiaries properly fit into the client's estate plan.
6. Be care of over-delegation - some activities, while mundane to a lawyer, are important and shouldn't be delegated to a non-lawyer (such as the witnessing and execution of documents).

## **Court Matters**

7. If you are offering a will for probate - understand the jurisdiction of the court you are filing the will with.
  - A. Mobile County Probate Court has concurrent jurisdiction with the Mobile County Circuit Court in estate administration and trust matters.
  - B. Mobile County Probate Court has jurisdiction to conduct a will contest *after* a will has been admitted to probate.
  - C. Mobile County Probate Court's jury venires are the same as the Mobile County Circuit Court's jury venires
  - D. In Mobile County Probate Court from a practical standpoint the parties are able to choose when their contested matter is tried.
8. In will contests two witnesses to the will must testify as to the execution formalities being complied with - not one.
9. In will contest and you represent the proponent of the will - be cognizant of the proponent's burden of proof - only call the witnesses to the will - then rest. You have the right to offer rebuttal witnesses.
10. If witnesses to a will are not available - there are alternatives
11. If a will is lost - there is an alternative
12. Statutory requirements must be expressly waived in a will to avoid those requirements being enforced by the court.
13. Generally speaking, estate funds should not be maintained in lawyers trust accounts for any measurable period of time.
14. Be aware of public sentiment when it comes to inheritance. Many people believe children should inherit something from their parents if there is a second marriage or second relationship situation
15. Recall that Probate Court's notice requirements and the responsibility for perfecting notice to interested parties is different from litigation filed in Circuit Court.
16. As to matters pending in the Mobile County Probate Court - check the Court's web site to maintain status of your estate proceeding. Web site address:  
[www.probate.mobilecountyal.gov](http://www.probate.mobilecountyal.gov) .

## **Professional Fees**

17. All professionals' fees are subject to court approval. If requesting the allowance of a professional fee, the Alabama Supreme Court has held that an itemization of the time expended must be furnished to the trial court and there are certain factors the trial court should consider when setting/approving a professional's fee.

#### **Litigation Settlements in Intestate Cases - Sale of Assets**

18. In intestate cases (no last will and testament), all litigation settlements require prior court approval. Also, the personal representative must obtain the Court's approval to sell any property of the estate.

## ESTATE PLANNING LESSONS TO BE LEARNED

Decedent is a successful business man with a well-known, well-established wholesale nursery concern. Business enterprise utilized is “sole proprietorship.” Business has about 50 employees and substantial number of trucks and equipment. Business operates on land owned by various members of the Decedent’s family. Decedent is the only person authorized to sign checks for the business. Decedent is married and has several children born of the marriage. Decedent also has two known illegitimate children, one of whom the Decedent financially supported since birth and was paying college expenses at the time of the Decedent’s death. Decedent has last will and testament. Will makes no mention of the illegitimate children. Although the Decedent openly acknowledged that he had a Will - the Will could not be located at the time of the Decedent’s unexpected death of a heart attack.

- Issues: (1) Payment of employees’ salaries and business debts  
(2) Use of land for ongoing business purposes  
(3) Illegitimate children  
(4) Safeguarding Will  
(5) Special Administration - inventory, bond, accounting



Decedent is a successful CPA in Mobile. Decedent is married. The Decedent has two adult children who are not the children of the Decedent’s spouse. Decedent dies in a tragic natural disaster and his body is never found. It takes approximately 6 months for the U. S. Coast Guard to conclude an investigation in matter and make a determination that in all probability the Decedent died in the disaster.

- Issues: (1) Payment of household debts during interim - mortgage in foreclosure status  
(2) Ability to recover life insurance policy benefits  
(3) Ability of surviving spouse to obtain Social Security death benefits

Decedent has several children. One adult child has had a difficult life and has one child. The adult child and the minor grandchild live with the Decedent. Practically speaking, the Decedent is the mother of the minor grandchild. The Decedent has a last will and testament. The Decedent creates a testamentary trust for the benefit of the minor grandchild. The Decedent's home is the only asset of the trust. It has a value of approximately \$125K. The Will states that one of Decedent's male children (uncle of the minor grandchild) is to serve as trustee of the trust until the minor grandchild becomes 25 years old, at which time the trust shall terminate and the property be devised to the grandchild. There are no other instructions or directions to the trust regarding the trust or the house that is owned by the trust. There were no bond or accounting requirements for the trustee.

The Decedent's daughter (mother of the minor grandchild) dies after the Decedent. The daughter also has a last will and testament that leaves her entire estate to a testamentary trust for the benefit of her minor child during the child's minority. When the child becomes an adult the trust is to terminate with the assets being paid to the child. The daughter names a male sibling (not the same one serving as the trustee of the Decedent's testamentary trust) as trustee. The trust has approximately \$75K of liquid assets. There are no other instructions or directions to the trustee regarding the trust or the assets of the trust. There were no bond or accounting requirements for the trustee.

The same lawyer drafted both wills (Decedent and Decedent's daughter). After the Decedent and the Decedent's daughter die (relatively close in time), the trustee of the house trust occupies the house and moves his family into the house. The minor grandchild is not permitted to live in the house. The minor grandchild is sleeping in the homes of teachers and coaches at a Mobile County high school. The trustee of the second trust (that had liquid assets) lives out of state and has no contact with what's going on in Alabama or with the grandchild/nephew. The trustee loans trust assets to himself that are not documented. The trustee thought he was to simply keep the trust funds until the minor turned 19 years of age and deliver them to the minor. The funds were in a non-interest bearing account.



Decedent is a widow. Decedent owns substantial acreage and home in west Mobile County that is utilized by the family's farm enterprise. Living trust was created by Decedent. All of the land and the residence were placed in a revocable life trust. Various income producing accounts were also placed in the revocable life trust. This was done because it was believed the Decedent would require skilled nursing care at some point in the future. Title of land never vested in the trust. Land was not assessed in the name of the trust for ad valorem tax purposes. No trust tax returns were filed. Income reported on Decedent's individual tax returns. Decedent was placed in a skilled nursing care facility and was qualified for Medicaid benefits (based on representation that the Decedent had no assets). When Decedent died, Medicaid learned of the revocable trust and sought recovery of expended Medicaid benefits.