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**Wills: 15 Mistakes & Simple Solutions  
for a Future Smooth Probate**

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# 1. Ensure the Testator destroys his or her old Will once he or she has executed a new one.

## Problem: *Not destroying or revoking past Wills*

- Some states require all known original Wills to be given to the Court (even if revoked).
- Adversely-affected parties from old Wills must be placed on notice.
- Usually happens when:
  - Decedent holds onto old Will and doesn't discard of it
  - Multiple original copies of the Will are executed
  - Testator gives it to the Court to safeguard
  - Prior attorney acts as bailee of all clients' Wills
  - Old Will given to a prior-trusted party

## 2. Name and identify all distributees and legatees in the Will, and include their addresses.

Problem: *Not naming or including a Family Tree in the Will*

- Explain to client how jurisdiction is procured in Probate proceedings
  - Distributees / “Next of Kin” – often must agree by signing Waivers or by being served a Citation
  - Legatees – may require proof of being placed on notice
  
- Remember to review Intestacy Concept

## 2. Name and identify all distributees and legatees in the Will, and include their addresses.

### Intestacy & “Next of Kin” concept:

1. Spouse Only
2. Spouse & Children
3. Children (if absent, Grandchildren)
4. Parents
5. Siblings (if absent, Nieces and Nephews)
6. Grandparents
7. Aunts + Uncles (if absent, Cousins and sometimes Cousins once removed)

## 2. Name and identify all distributees and legatees in the Will, and include their addresses.

### Example

*“I am unmarried and have no children alive or deceased, naturally or adopted. My parents, **Robert Thorn** and **Mary Thorn**, are both deceased. My sister, **Margaret Thorn-Giacomi**, is alive and lives at 231 Acre Street, Wilmington, DE and has two children, **Mindy Giacomi** and **Nathan Giacomi**, who currently both reside with her. My brother, **Todd Thorn**, is deceased and had two children: **Mark Thorn**, who currently resides at 45 125<sup>th</sup> Avenue, Apt. 6, Queens, NY, and **Elizabeth Thorn**, who currently resides at 9 Maple Court, Seattle, WA. I have no other siblings alive or deceased.”*

## 2. Name and identify all distributees and legatees in the Will, and include their addresses.

### Why write out a Family Tree with Addresses?

1. Finding these heirs becomes much easier when the Testator passes away.
2. The court clerks can better identify the next of kin when comparing the Will to an heirship affidavit.
3. Ensuring the Petition has all relevant information regarding distributees.
4. Establishing proof of the Testator's knowledge of the "fruits of his bounty" (I.e. closest family members otherwise entitled to his estate under Intestacy).

### 3. If you come across a mistake in a Will you have already executed, re-execute the document with the client.

Problem: *Not having an identified mistake fixed after a Will has already been executed*

- Many drafting errors don't "go away": You either have to fix them at the time of Probate, or face a possible malpractice suit if an adversely-affected party suffers because of your error / omission.
- Suggestion: When you spot an error in a client's document, audit the entire file.

## 4. Keep Wills concise and to the point.

### Problem: *Making the Will too long*

- Overwhelms the client – they may not catch errors they are better suited to identify.
- Court clerk may find a contradiction at the time of Probate.
- Your boilerplate articles may not be consistent with the client's needs and desires.
- May lead to client resentment, or create an allusion of aloofness in the attorney / client relationship.



## 4. Keep Wills concise and to the point. **SIDE NOTE: Explain Documents to Client!**

SIDE NOTE: *Client doesn't understand documents or the process*

Many clients only update their estate plan a few times in their lives, and partake in even fewer Probates.

- Suggestion: Explain both planning and post-mortem matters using a visual format.
- Suggestion: Review each document in plain English.
- Suggestion: Establish flat-fee engagements to create client comfort in asking questions (if practical).

## 5. Discuss the financial impact of small bequests with the client, and propose alternative means to benefit these beneficiaries.

### Problem: *Making small general bequests*

Arguably, the costs of a \$1,000 bequest is the same as a \$20,000 bequest.

- More notice requirements to more parties
- More Executor releases required
- More mailing expenses and attorney fees
- More problems regarding survivorship

The expenses involved may be more than the actual bequest!

## 5. Discuss the financial impact of small bequests with the client, and propose alternative means to benefit these beneficiaries.

Solution: Use accounts with beneficiaries

- Transfer on Death [“TOD”]
- In Trust For [“ITF”]
- Payable on Death [“POD”]

Burden shifts from Probate process to beneficiaries

- Executor may still need to get involved, but the Court is removed from the equation.

## 6. Suggest the use of an inter vivos trust when there are several lost or foreign distributees and legatees involved with the estate.

Problem: *Leaving money to hard-to-identify parties or foreign individuals*

- Testator may:
  - Have mostly foreign family members
  - Not be close to Next of Kin
  
- Issues:
  - Procuring foreign jurisdiction may be tough
  - Finding Distributees may also be difficult
  - Court may appoint an attorney to represent unfound parties

## 6. Suggest the use of an inter vivos trust when there are several lost or foreign distributees and legatees involved with the estate.

- Know your state's notice requirements!
  - Does a foreign family member or beneficiary need a notarization from a US embassy or consulate?
  - An apostille?
  - Will regular mail suffice, or is return receipt or express mailing required?

## 6. Suggest the use of an inter vivos trust when there are several lost or foreign distributees and legatees involved with the estate.

Suggestion: Explains Operation of Law transfers v. Probate

- **Operation of Law**: We know who gets what at death:
  - ❑ Life Insurance
  - ❑ IRA, 401(k), pension plan, 403(b), TDA
  - ❑ Joint Property: your house, bank accounts, brokerage accounts
  - ❑ TOD / ITF ? POD
  - ❑ Inter Vivos Trusts
  - ❑ Contracts (e.g. pre-nuptial, partnership)
  
- **Probate**: We don't know who gets what at death (so we need to look at the Will)

## 6. Suggest the use of an inter vivos trust when there are several lost or foreign distributees and legatees involved with the estate.

- **Operation of Law:** Easy to collect
  - just need a Death Certificate and to be named the beneficiary
- **Probate:** Not easy to collect
  - a contract with the state in charge of the Probate proceeding
  - Need to procure jurisdiction
  - → Avoid Probate where procuring jurisdiction is too taxing

## 7. Keep the number of named executors to a reasonable number. If you do not want a party to serve as executor, make sure to say so in the Will.

### Problem: *Naming too many successor Executors*

- Some states require every named successor to be placed on notice
- Some people don't name enough executors
- Some people don't say who should not be named as Executor



## 7. Keep the number of named executors to a reasonable number. If you do not want a party to serve as executor, make sure to say so in the Will.

### Suggestions:

- Name a reasonable number of Executors, if possible at least one who is young and healthy.
- Have the ability to have an Executor name a Successor or Co-Executor him or herself.
- Create a mechanism whereby beneficiaries may name a Successor if no one is serving.
- Remember to say who cannot serve.
- Define who is an “interested” Executor (and whether he or she may still serve).

## 8. Include an UTMA clause in the Will. Where large sums are being left to a minor, create a testamentary trust in the Will.

Problem: *Neglecting to prepare for underage beneficiaries*

- Don't name minors as beneficiaries! Even as contingent beneficiaries
  - Minors cannot receive funds without oversight.
  - Court will either name an attorney as Guardian, hold a Conservatorship, or the child's guardian will need to commence a court proceeding.
- This can be avoided if a minor does not receive the funds outright

## 8. Include an UTMA clause in the Will. Where large sums are being left to a minor, create a testamentary trust in the Will.

### Suggestions:

- Include a provision in the Will allowing the Executor to create:
  - Uniform Transfer to Minors Act [“UTMA”] accounts for small bequests
  - Testamentary Trusts for larger accounts.
- Include / draft testamentary trust provisions in the Will if you know large sums are being bequeathed to minors.

**8. Where large sums are being left to a minor, create a testamentary trust in the Will.**

**SIDE NOTE: Get the Beneficiary Forms Right!!**

SIDE NOTE: Working on Beneficiary Designation Forms for Testamentary Trusts

→ For Life Insurance and Retirement Plans

- Example: *“To the Trustee of the Trust Created for my Children under Article VII of my Will dated March 17, 2016”*
- Caution!! Beneficiary Designation Forms are all different / not statutory in design
  - If needed, ask a Financial Planner or the financial institution for assistance.

**8. Where large sums are being left to a minor, create a testamentary trust in the Will.**

**SIDE NOTE: Get the Beneficiary Form Right!!**

SIDE NOTE: Working on Beneficiary Designation Forms for Testamentary Trusts

→ For Life Insurance and Retirement Plans

- Caution!! Do NOT name “My Estate” or “My Probate Estate” as a beneficiary!
  - This often ruins creditor protection of life insurance in retirement plans.
  - Ruins “Stretch IRA” rules for beneficiary IRAs, meaning all distributions (and associated income taxes) must be made in 5 years.

## 9. Include a Supplemental Needs Trust provision in the Will.

Problem: *Neglecting to prepare for disabled beneficiaries*

- Leaving money outright to beneficiaries on Medicaid, Supplemental Security Income, or other needs-base programs may nullify their benefits.
  - Both programs have income and asset limitations
  - Will likely lose benefits
  - May have to repay certain expenses

## 9. Include a Supplemental Needs Trust provision in the Will.

Special Needs Trusts help maintain benefits:

- A non-beneficiary Trustee uses funds for the benefit of the beneficiary
- Certain limitations apply
- Beneficiary tends not to be able to directly access cash in the trust or be able to gift trust funds
- Remember that exceptions, resource limits and eligibility are ALL State and County-based

## 10. Provide an absolute ending point of contingent beneficiaries under the Will that is both realistic and practical.

Problem: *Not considering the appropriate number of contingent beneficiaries to plan for*

Suggestion: What is a reasonable cut-off point for preparing contingencies?

1. What is likely to occur in the next 25 years?
2. Will you be able to change your documents if key players to your estate have all died in rapid succession?
3. Is it possible to name entire sides of a family instead of individual family members?



# 11. Discuss what bonding is with your client; know when it is not appropriate to waive bond.

Problem: *Automatically waiving Trustee and Executor bonding without explaining its purpose*

- Where there is even a slight chance of a fiduciary absconding with funds, don't reflexively waive bonding in your documents.

## 12. Make sure to include plain-English reasons why a future guardian for minor children may be an unsuitable candidate.

Problem: *Not warning the court as to improper Guardians of minor children*

- Different courts don't always communicate well, but all they want is what is "in the best interest of the child".
- The Family Court doesn't always listen to what a complaining parent is attempting to communicate:
  - Lack of child support or maintenance
  - Treatment toward minor or other parent
  - Prior legal issues, substance abuse, etc.
- Have client explain gripes with successor guardians.

# 13. Make sure your client's beneficiaries and the estate's obligations can afford to wait out the period of Survivorship in the Will.

Problem: *Requiring exceedingly long time periods for survivorship in the Will*

- Delays Probate from commencing
  - Executor is denied access to estate assets for a longer period of time
    - bills may fall into arrears and assess penalties
    - someone may have to advance funds for the estate
  - Needy beneficiaries are required to wait more time before receiving their bequests.

## 14. Consider leaving a TOD account containing initial estate administration funds to a trusted person or your future Executor for initial estate expenses

### Problem: *Not Providing Adequate Funds for Post-Mortem Expenses*

- Initial funds to administer your estate will not be available through Probate for several weeks (or much longer if there is a dispute).
- Suggestion: Fund an ITF or TOD account and leave it to your Executor or a trusted party.

# 15. Make sure you execute the Will (and all legal documents) properly as required by law.

## Problem: Improper (Bad) Will execution

- Make sure the Will is:
  1. signed by the Testator (or in the presence of the Testator by a representative)
  2. at the end of the Will
  3. and published by the Testator
  4. The actual acknowledgement must be made
  5. in front of two (2) disinterested witnesses
  6. who must attest to the Testator's mental capacity and execution of the document

# 15. Make sure you execute the Will (and all legal documents) properly as required by law.

## **SIDE NOTE: Improve Your Will Executions!!**

### Suggestions: Improve Your Will Executions

- Have the Will stapled PRIOR to the execution of the document, and do NOT unstaple the document.
- Have the Testator bring valid identification which you shall show to the witnesses.
- Look at your witnesses' identification at least once in your life: If you are the notary, you are notarizing their signature on the Self-Proving Affidavit, NOT the Testator's.
- Have the Testator:
  - (1) state his or her name,
  - (2) sign in front of the witnesses (if possible) and
  - (3) state the words "*I publish this to be my Will*", "*This is my Will*", or some other statement that demonstrate the Testator knows what he or she is signing.

# 15. Make sure you execute the Will (and all legal documents) properly as required by law.

## **SIDE NOTE: Improve Your Will Executions!!**

### Suggestions: Improve Your Will Executions (continued)

- You may ask the Testator whether he or she knows the document is his or her Will, and who their nearest family members are.
- Have the witnesses **NEATLY** print their names (as well as sign their names), and include their current residential address or some other address they can be found.
- Tell the witnesses to read and sign the Self-Proving Affidavit.
- Ask if anyone at the execution ceremony has any questions.
- **Make sure the Will is stapled!**
  - A Will that is unstapled, has had staples removed at some point, or has been re-stapled may require an Affidavit from parties stating they did not unstaple the Will, it was found unstapled, they did not insert any pages, or make a photocopy of the completed document.

**Bonus – 16: Make sure witnesses to the Will can be easily identifiable and found in the future, and have them sign the Self-Proving Affidavit at execution.**

*Problem: Not being able to identify witnesses to the Will at the time of Probate*

- A Probate Petition may require the names of witnesses to be included...and a Will Dispute almost always requires witness testimony.
  - *And 99.99% of the time you can't read their names!!!*
- Suggestion: Have Witnesses legibly:
  - Sign their names
  - Print their names
  - Include an address they reside or can be found at



## **Bonus – 17: Have a policy as to which client Wills to keep in your possession as a bailee.**

### Problem: *Holding onto all of your clients' Wills*

- Being a Wills bailee isn't always a good idea:
  - You risk the Wills being damaged or lost.
  - If the client updates their Will elsewhere, you now have a contradictory document.
  - If you retire you are supposed to make an effort to give the Will to your client (at your expense).
  - If you die your Executor needs to find the client (whom they never knew...and at your estate's expense).
  - Did your Engagement Letter lay out the terms of the bailment?
  - You are not guaranteed to do the Probate work!!

## **Bonus – 17: Have a policy as to which client Wills to keep in your possession as a bailee.**

Suggestions: Be smart, don't open yourself to liability.  
*Earn the client's family's trust by staying in contact*

- Yes to being a bailee
  - Aging and/or single clients
  - Clients with Wills leaving uneven bequests
  - Wills disinheriting certain necessary parties
  - Clients with distant beneficiaries, or who live outside a private residence
  
- No to being a bailee
  - Happily married clients
  - Clients with distributions same as Intestacy
  - Any client who would realistically outlive your practice

## **Bonus – 17: Have a policy as to which client Wills to keep in your possession as a bailee.**

Suggestions: Have an office process for being a bailee

1. Have an electronic list of the Wills that are in your Will Safe.
2. Add the fact that you are holding onto the Will in your Closing Letter.
3. Create a letter to all Agents and family members at the end of an engagement introducing yourself (have your client sign it).
  1. Tell them you have the original Will (send with the client's consent).
4. Send a reminder letter every 3 – 5 years.
5. Update your Will List when you give the Will back to the client, to a family member, or drop it off at a Court.
6. If you don't want to work with a client in the future or think you will not do the Probate work → give the original Will to the client!

**Simple Symbiosis: Pursuing the best interest of the client will be in your best interest.**

Thank You!

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