

Top Ten (or so) Mistakes (or Traps) for Estate and Trust Professionals

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I. INTRODUCTION

We are estate and trust professionals and mistakes happen. Sure, we work hard to avoid them. But make no mistake about it, mistakes happen. Similarly, traps exist. Some traps are obvious and to others we can be oblivious. These materials review some situations that can lead to mistakes and some traps that can be avoided. Some are common, perhaps, and some maybe not so common. All of these are avoidable, yet all of us will also likely make some mistakes and get caught in one or more traps some of the time.

But first, some important global concepts.

A. Don't Cover-Up

1. Make no mistake (get it...), the cover-up is always worse than the mistake.² So, you may be wondering, if you aren't supposed to practice your forgery skills, or get the administrator's credentials to erase emails, or revise memos, what are you to do if you (think you) have made a mistake?
 - a. Call a friend.
 - b. Re-calibrate.
 - c. Own up.

B. Stay on Top of Your (Substantive) Game

1. You may stop attending continuing education programs because you think that you know that material. So, why bother to spend your precious time going to a seminar. Or, you may decide to forego the live, in person seminar, in favor of listening to a podcast or signing on to the

² E. g. , *Gaslit*, Starz 2022.

zoom broadcast of a live seminar. Those might give you some exposure to the materials, but those are not a substitute for attending a seminar, in person, laptop closed, phone down, and actively listening.

2. Subscribe to, and timely read, the materials that will help you stay on your game. Action Line, of course. The Florida Bar Journal, particularly articles sponsored by relevant sections, such as RPPTL and Tax. The Probate Practice Reporter. Estate Planning Journal.
3. Keep your library current. Books are expensive. Buying them is not enough. Use them.

C. Engage (with Other Professionals)

1. Similar to staying on top of your game, the final global concept for avoiding mistakes and traps is to be engaged with other professionals.

2. Substantive committees at a national (ABA) or state (RPPTL or Tax Sections) provide great opportunities to be engaged.
3. Local study groups and estate planning councils provide local opportunities.

Now, to the mistakes and traps.

II. INTAKE-BASED MISTAKES AND TRAPS

Not all engagements are good engagements, at least not for you. When taking on, or considering taking on, a new matter, you can take steps *before* the first meeting to reduce the possibility of mistakes. These steps are part of the all important intake phase of an engagement. Many of these steps are not substantive. Yet, the process can be critical in order to avoid traps.

A. Mistake/Trap #1: Accepting a Sub-Optimal Representation

1. Talk with the prospective client on the telephone, before you meet.
 - a. For the needs

- b. For the personality
- 2. Caution: When someone else calls “on behalf of” the prospective client
- 3. Even More of a Caution: When the first question is “How much will this cost?”
- 4. How did the prospective client find you?
 - a. Google search - not so good
 - b. Existing client - much better
 - c. Other lawyer - can be really good, or might be a warning sign

B. Mistake/Trap #2: Accepting Representation of an Un-Engaged Prospective Client

- 1. Send the prospective client *something* before the first meeting
 - a. Be sure there is engagement by the prospective client.

- b. Mutual Representation issues if a married couple³

C. Mistake/Trap #3: Fails at First Meeting

1. Ask the right questions
 - a. Listening versus talking
 - (1) With both prospective clients
 - b. Note taking has its place but should not replace active listening
2. Who is interviewing?
 - a. You or the prospective client?
 - b. Both!
3. Address timing considerations
4. Describe expected timing of next steps
5. Deliver on or before stated dates
 - a. Or let the client know why
6. ALWAYS discuss fees
 - a. Written engagement agreements

³ See Appendices for sample Consent to Mutual Representation.

- b. Retainers
 - c. Other arrangements
 - d. Provide estimates - at the end of the meeting
 - (1) Stick to your number, or range of numbers.
 - (2) If variance expected, let client know immediately.
7. Don't feel overly invested
- a. Be willing to walk away from the engagement - the time to do so will *never* be better.

III. ESTATE PLANNING CENTRIC MISTAKES AND TRAPS

During the initial meeting, you collect information and make recommendations, giving your best advice and counsel. The client makes decisions. Of course, your bias, admitted or suppressed, will influence the decisions made by the client. Then the work begins.

Drafting an estate plans include a myriad of decision points. Some of the decisions are binary – either on or off. Others are not. In the end,

the plan you draft needs to be administered, and it needs to work. Ambiguity is your worst enemy. Be clear in your drafting.

Consider whether you want to be a scrivener or a counselor. At times, when a client insists on a provision, you may be tempted to pick up the scrivener quill. Remember, you are more than that, you are better than that.

A. Mistake/Trap #4: Not Taking Into Account Existing Documents

1. Existing documents
 - a. Obtain and review
 - (1) Before meeting
 - (2) During meeting
 - (3) After meeting
 - b. Revise or replace
2. Confirming asset ownership and beneficiary designations

B. Mistake/Trap #5: Titling and beneficiary designations

1. Degree of diligence
 - a. Accept representation from client

2. Financial accounts
 - a. Rely upon account statements
 - b. Obtain account documentation from financial institution
3. Real estate
 - a. Homestead
 - b. Non-Homestead Florida real estate
 - (1) 10% non-homestead cap
 - c. Non-Florida real estate
4. Life Insurance
 - a. Ownership
 - b. Beneficiary designation
5. Custodial accounts
 - a. Client as custodian

C. Mistake/Trap #6: Homestead - enough said

1. Address issues regarding restraint on devise promptly
 - a. Change of ownership

b. Homestead waiver⁴

D. Mistake/Trap #7: Missing Substantive Estate Planning Issues

1. Elective share

a. Conditional elective share trust provision.⁵

2. Community Property

3. Homestead

E. Mistake/Trap #8: Assuming the Law is Static

1. No Contest Clauses⁶

2. Qualification of Personal representative⁷

F. Mistake/Trap #9: Mistakes in Execution (of Powers of Appointment)

1. Identify source of the power

2. Consider scope of permissible appointees

⁴ See Appendices for sample Post-Marital Agreement Releasing Homestead Rights.

⁵ See Appendices for sample of provision for revocable trust instrument.

⁶ See Appendices for sample provision regarding challenges and allocation of expenses.

⁷ See Appendices for sample provision for appointment of personal representative.

G. Mistake/Trap #10: Failing to Obtain Declaration When Named as Fiduciary

- a. Declaration must be obtained.⁸
- b. Amendment to existing plan with you already named as a fiduciary.

IV. EXECUTION BASED MISTAKES AND TRAPS

The most careful intake and the most cautious drafting is all for naught if the documents are not properly executed. Ideally, the documents have been seen by the client before the client is asked to sign. Even if changes are made the day before the scheduled execution meeting, consider getting the revised documents to the client by email or hand delivery.

A. Mistake/Trap #11: Not Reviewing the Final Version

1. Residuary
2. Marital disposition, if estate tax issues
3. Fiduciary appointments
4. Signature pages

⁸ See Appendices for sample of Declaration Regarding Appointment of Attorney.

B. Mistake/Trap #12: Not Watching Page Breaks

1. Caution: Substituting changed pages
2. Unintended consequences

C. Mistake/Trap #13: Departing from Routine

1. Formalities, Formalities, Formalities
2. Develop a routine and follow it
3. Discourage/prohibit execution outside of your office

D. Mistake/Trap #14: Lack of Clarity regarding Disposition of Executed Documents

1. Retain
2. Return
 - a. Get a receipt

E. Mistake/Trap #15: Not Saying Goodbye Clearly⁹

1. You think you know the matter is concluded.
2. Does your client (or former client) know?

V. OTHER MISTAKES OR TRAPS

⁹ See Appendices for sample of two letters, one terminating estate planning representation and one terminating probate representation.

A. Mistake/Trap #16: Being Helpful Badly

1. You are not your client's filing cabinet.
2. When your office is requested for a copy of documents years after the engagement has concluded, resist the temptation to be helpful.
3. You could send the wrong version.
4. You could send the document that is requested, even if that is not the document that is needed.
5. Consider sending what you sent previously.
6. Don't be hesitant to decline the request.
7. Instruct your staff on how to respond.

B. Mistake/Trap #17: Missing statute-based deadlines

1. 30 days
2. 3 months (not 90 days)
3. 2 years
4. 6 months
5. 4 years

6. Before entry of Order of Discharge

VI. CONCLUSION

- A. Strive for Perfection
- B. Accept (or at least Acknowledge) Shortfalls
- C. Act Accordingly

Top Ten (or so) Mistakes (or Traps) for Estate and Trust Professionals

Appendix 1: Consent to Mutual Representation

Appendix 2: Post Marital Agreement Releasing Homestead Rights

Appendix 3: Elective Share Provisions

Appendix 4: Challenges and Allocation of Expenses

Appendix 5: Appointment of Personal Representative

Appendix 6: Declaration Regarding Appointment of Attorney

Appendix 7: Letters Terminating Representations

CONSENT TO MUTUAL REPRESENTATION

In connection with the law firm of
Laird A. Lile PLLC

(the "law firm") representing both of you in connection with your estate planning matters, you should understand the issues pertaining to this mutual representation and the alternatives available to you.

The two of you are requesting one firm to represent and advise you with respect to certain estate planning matters. The representation may include analysis of your existing property and any existing agreements, discussions about the manner in which you wish to dispose of your property, analysis of the tax impact of such dispositions, recommendations for alternative dispositions, and preparation of the documents necessary to carry out your instructions, including the drafting of wills, trusts, and other documents as may be appropriate.

During the course of the estate planning representation, conflicts may arise between you, such as regarding ownership of your property and the disposition that you desire for that property during your lifetimes and at your deaths. If conflicts occur and cannot be reconciled by the two of you, a single law firm cannot continue to represent both of you because of the possibility that its advice to one of you may be influenced by its simultaneous representation of the other.

Each of you have the right to obtain legal counsel independent from each other at the outset of this representation so that a change of counsel will not be necessary if an irreconcilable conflict occurs. Nevertheless, with a full understanding of the advantages of independent counsel, you have requested that this law firm represent both of you regarding your estate plans and related

matters. While the law firm will undertake to represent both of you in a fair and impartial manner, you are proceeding in this matter being fully aware of the possibility that these conflicts may arise.

In the event that any conflict of interest does arise between the two of you resulting in this law firm not being able to fulfill its obligations to each of you, it shall, at that time, withdraw from further representation of both of you in that matter and advise both of you of its withdrawal. Under those circumstances, the law firm will be entitled to compensation for services rendered, including services after the withdrawal, such as for any consultation with your new attorneys.

You each agree that there will be complete and free disclosure and exchange of all information that the law firm receives from you in the course of the representation and that such information shall not be confidential as between the two of you, regardless of whether this law firm obtains the information in conferences with both of you or in private conferences with only one of you, including any conferences that may have taken place before the execution of this consent. You also agree to discuss any issues that may arise with respect to the preparation and execution of any documents in good faith.

Any questions regarding the provisions in this Consent should be discussed by you with a member of this law firm or with any other counsel of your choice.

By signing below, you acknowledge receiving this Consent and indicate your agreement to the provisions of it.

Signature

Date: _____

Signature

Date: _____

POST-MARITAL AGREEMENT
(Releasing Homestead Rights)

THIS AGREEMENT is made by and between **[HUSBAND]** (hereinafter referred to as “Husband”) and **[WIFE]** (hereinafter referred to as “Wife”), both of **[COUNTY]** County, Florida.

WHEREAS, Husband and Wife each wish to relinquish the spousal homestead right of a deceased spouse as provided under Article X, Section 4 of the Florida Constitution, and instead Husband and Wife each wish to dispose of his or her respective homestead interests as provided under the provisions of his or her Will or other dispositive estate planning document.

NOW, THEREFORE, for and in consideration of the other party entering into this agreement, and for other good and valuable consideration, Husband and Wife each agrees as follows:

1. Husband hereby acknowledges that he has made complete financial disclosure of his assets to Wife, and Wife hereby acknowledges receipt of such disclosure, and acknowledges she has had an opportunity to inquire and investigate as to such financial disclosure and is fully satisfied that a full and complete disclosure has been made by Husband.
2. Wife hereby acknowledges that she has made complete financial disclosure of her assets to Husband, and Husband hereby acknowledges receipt of such disclosure, and acknowledges he has had an opportunity to inquire and investigate as to such financial disclosure and is fully satisfied that a full and complete disclosure has been made by Wife.
3. **As authorized by Section 732.702 of the Florida Statutes, each party hereby waives, renounces and relinquishes any and all rights, claims or demand in the homestead property, which, except for this Agreement, the marriage of Husband and Wife would confer upon the survivor of them.**
4. Husband and Wife each acknowledges that the release of the homestead rights described herein does not result in the release of any homestead rights that exist during the marriage, but only upon the death of a spouse. As a result of this release, Husband acknowledges that Wife, and Wife acknowledges that Husband, may transfer his or her respective interest in the homestead at death to such persons or entities as the deceased spouse so elects. While it is anticipated that each spouse will utilize his or her interest in the homestead property to accomplish certain mutual estate planning objectives of both parties, this intention is not binding on either party hereto.
5. Husband and Wife each acknowledge that by reason of the relinquishment of the

spousal homestead rights, his or her spouse can disinherit such party with respect to the homestead property and of being informed of this possibility.

6. Husband and Wife each acknowledge that they have been advised that they should seek independent counsel prior to entering into this Agreement. **Laird A. Lile, PLLC** hereby confirms to both parties that it is representing the two of them as joint clients, with respect to this planning and to the waiver of homestead rights and both have previously consented to this mutual representation. After having been advised to seek separate legal counsel, each hereby either waives such right, or has, in fact, discussed this situation with separate counsel, and after having done so, makes a knowing and voluntary waiver and release of such homestead rights.

EXECUTED this ____ day of June, 2023.

Signed and delivered as to both in our presence:

I HAVE READ THIS DOCUMENT AND UNDERSTAND I AM WAIVING IMPORTANT RIGHTS

[HUSBAND]

Type or print name of Witness No. 1

I HAVE READ THIS DOCUMENT AND UNDERSTAND I AM WAIVING IMPORTANT RIGHTS

[WIFE]

Type or print name of Witness No. 2

STATE OF FLORIDA
COUNTY OF COLLIER

The foregoing instrument was acknowledged before me, by means of physical presence or online notarization, this ____ day of June, 2023, by **[HUSBAND]** and **[WIFE]**, who __ are both personally known to me or __ have produced driver's licenses as identification..

NOTARY PUBLIC:

Sign _____

Print _____

State of Florida at Large
My Commission Expires:

ELECTIVE SHARE PROVISIONS. Although I am presently married, I do not anticipate an elective share will be claimed against my estate. [In fact, I believe pursuing an elective share would be in conflict with the agreement entered into with my WIFE/HUSBAND.] However, in the event that such an election is validly made, then I direct the trustee to establish a conditional “elective share trust,” as that term is defined in chapter 732, to be funded with the pecuniary amount, if any, necessary to fully satisfy the elective share amount taking into account all other assets or interests in assets that apply toward satisfaction of the elective share. The trustee shall hold that amount in trust, with my surviving spouse having the continuing right to withdraw all or any part of the income (including amounts accumulated from prior periods). Any income not withdrawn by the electing spouse will be accumulated at least annually and accounted for as a separate accumulated income account. The trustee shall spend any amounts of income or principal it determines necessary for the health, support, and maintenance of the electing spouse, after taking into account all other income and resources of the electing spouse. Upon the death of the electing spouse, the remaining assets of this trust shall be distributed under the provisions of this trust as if I had died immediately after the death of the electing spouse. The trustee shall pursue all reasonable grounds for contesting and disputing any election which may be made against my estate, including advancing attacks of this law on constitutional and other fundamental grounds. The trustee shall also take all reasonable positions regarding valuation and satisfaction of any elective share obligation which support the elimination of the need for this conditional elective share trust or the minimization of the amount otherwise passing to this conditional elective share trust.

CHALLENGES AND ALLOCATION OF EXPENSES. I understand statutory law in Florida presently treats a provision which would purport to penalize an interested person for contesting the validity of this document or otherwise instituting proceedings related to the trust as unenforceable. That statute may be repealed or modified by the legislature or limited by the courts as an inappropriate restriction of my constitutional rights. Accordingly, notwithstanding the statute as it exists as of the date of this instrument, I hereby provide that if any person challenges or contests this instrument, any action by a trustee, or any other aspect of my testamentary plan, then that person shall be treated for all purposes as having predeceased me or as having died as of the time of the challenge or contest. In addition, and whether or not the foregoing provision is determined to be effective, in the event any person believes that this instrument is not as I intended, that a trust under this instrument is not being administered properly or that, for any other reason, litigation or other adversarial action involving a trust under this instrument should be pursued, then that person should take whatever action that person believes is reasonable under the circumstances. However, if that person is unsuccessful, I do not want the other beneficiaries to bear any of that financial burden. Accordingly, I direct that the costs (including fiduciary and attorney fees) associated with that action are to be paid first from the interest that would otherwise pass to that person under this instrument.

PERSONAL REPRESENTATIVE. I nominate _____ as personal representative, or if he is not permitted under Florida law to serve as personal representative, then I grant to him the power to nominate a person to serve as personal representative.

Declaration Regarding Appointment of Attorney

I, **[CLIENT]**, declare that I have designated my attorney, an attorney employed in the same law firm as my attorney, or a person related to my attorney as a nominated personal representative in my will or codicil dated the same date as this Declaration.

Before executing the will or codicil, I was informed that:

1. Subject to certain statutory limitations, most family members, regardless of their residence, and any other individuals who are residents of Florida, including friends and corporate fiduciaries, are eligible to serve as a personal representative.
2. Any person, including an attorney, who serves as a personal representative is entitled to receive reasonable compensation for serving as a personal representative.
3. Compensation payable to the personal representative is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the personal representative.

[CLIENT]

Date: _____

I, **[CLIENT]**, declare that I have designated my attorney, an attorney employed in the same law firm as my attorney, or a person related to my attorney as a trustee in my trust instrument dated the same date as this Declaration.

Before executing the trust instrument, I was informed that:

1. Unless specifically disqualified by the terms of the trust instrument, any person, regardless of state of residence and including family members, friends, and corporate fiduciaries, is eligible to serve as a trustee.
2. Any person, including an attorney, who serves as a trustee is entitled to receive reasonable compensation for serving as trustee.
3. Compensation payable to the trustee is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the trustee.

[CLIENT]

Date: _____

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Allie@LairdALile.com

[Date]

[Inside Address]

Re: Estate Planning

Dear [Salutation]:

Enclosed is a booklet which includes photocopies of your recently signed estate planning documents. In the front of the booklet is a receipt showing that we are holding these documents for safekeeping, as we discussed. If, in the future, you would like these documents returned to you, just let me know.

A page is also with this letter that provides directions on ownership of assets and beneficiary designation. We understand you will proceed with contacting the appropriate institutions to implement any necessary changes. Please let us know if we can be of assistance.

You should review your estate plan from time to time in view of possible changes in your family and assets and in the applicable tax and probate laws. Please call if any questions arise with respect to your estate planning.

It is our understanding that we have completed all of the work requested at this time. Accordingly, we are taking this opportunity to present our statement for services rendered. Also enclosed for your convenience is a self-addressed return envelope. It has been a pleasure to work with you on this matter.

Very truly yours,

Laird A. Lile

Enclosures

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[Date]

[Inside Address]

Re: *Estate and Trust of [name]*

Dear [Salutation]:

We are pleased to report that the Order of Discharge has been entered in the referenced estate, indicating that the estate administration is now complete. Please find a copy enclosed of that Order with this letter for your records.

[The recorded Personal Representative's Release and Certificate of Distribution of Real Property and Trustee's Distributive Deed are recorded in the public record reflecting that [name] is now the record owner of that property. The originals of both of those documents, with recording information, are enclosed with this letter.]

As we have indicated, you should continue to work with [accountant name] to finalize any remaining income tax filings.

As this now concludes our representation in this matter, we are taking this opportunity to enclose our final statement. Thank you for the opportunity to be of assistance to you.

Very truly yours,

Laird A. Lile

Enclosures