AVOIDING MALPRACTICE TRAPS WHEN ADVISING CLIENTS ON MATTERS DEALING WITH WILLS AND ESTATES

Presented by

CAPT John P. Huggard, JAGC
Huggard, Obiol and Blake, PLLC
124 St. Mary's Street
Raleigh NC 27605
(919) 832-9650

[Updated October, 2004]

AVOIDING MALPRACTICE TRAPS WHEN ADVISING CLIENTS ON MATTERS DEALING WITH WILLS AND ESTATES

[Abstract: Legal assistance attorneys, both regular and reserve, are often called upon to render legal advice in the area of wills and estates. Over the years, this area of the law has become more complex. When incorrect advice is given regarding wills and estates, significant monetary losses may occur. When these losses arise, malpractice claims soon may follow. This article is designed to make legal assistance attorneys, whether regular or reserve, aware of the ten most common malpractice traps that arise when rendering legal advice to clients regarding wills and estates.]

MALPRACTICE TRAP #1
FAILURE TO UNDERSTAND ELECTIVE SHARE STATUTES

LAW: All states have statutes designed to protect surviving spouses from being left destitute if a deceased spouse leaves a debt ridden estate.

CASE: A navy chief petty officer died intestate (i.e. without a will) leaving as his only asset a house titled in his name which he purchased shortly after his marriage. At his death, the house was worth $150,000. The chief's mortgage balance and other debts amounted to $150,000. As the administrator of the estate and only surviving relative, the wife sought the advice of an active duty legal assistance attorney who advised the wife that the house would have to be sold to pay the husband's debts. The wife followed this advice and was left penniless.

RESULT: A malpractice claim. Had the wife been told of the elective share in effect in her jurisdiction, she would have been entitled to a mortgage-free life estate in her husband's house. By the time the wife learned of this right from another attorney, the deadline for claiming this statutory benefit had passed.

PREVENTIVE MEASURES: Nearly every state has an elective share statute. Legal assistance officers should take time to learn their jurisdiction's elective share statute.

MALPRACTICE TRAP #2:
FAILURE TO UNDERSTAND HOW ESTATE TAXES ARE APPLIED

LAW: Estate assets passing to a surviving spouse are not subject to estate taxes regardless of the value of such assets if the surviving spouse is a U.S. citizen.

CASE: A retired army colonel with a net estate of $2.0 million asked his local legal assistance attorney what the federal estate tax burden would be on his estate if he left everything outright to his wife. The colonel and his wife were told that the current unlimited marital deduction law would allow the Colonel to pass his entire estate to his wife free of federal estate taxes.

RESULT: A malpractice claim. The colonel died leaving his entire estate outright to his wife. The wife was not a U.S. citizen. The current unlimited marital deduction law allows one to pass any size estate outright to a spouse free of federal estate taxes *if the spouse is a U.S. citizen.* If the spouse is not a U.S. citizen, the unlimited marital deduction does not apply. Although the exemption amount (i.e. $1,500,000 for 2004) is available. Bad advice in this case will result in additional estate taxes in the amount of $125,000. In this case, had the correct information been given to the Colonel, he could have taken steps to obtain citizenship for his wife before his death or he could have taken advantage of post-mortem estate planning measures to protect his wife from estate taxation.

PREVENTIVE MEASURES: Legal assistance attorneys should take time to become familiar with basic federal estate tax laws. They should also consult with a legal assistance attorney who is familiar with such tax laws when advising clients who have potential net estates valued at more than the exemption amount (i.e. $1,500,000 for 2004).

MALPRACTICE TRAP #3:
FAILURE TO UNDERSTAND DISTRIBUTION BY INTESTACY

LAW: Each state provides statutes detailing exactly how an intestate estate (i.e. one where there is no will) is divided. These statutes, when applicable, must be precisely followed.

CASE: A retired air force first sergeant was the administrator of his grandmother's $900,000 estate. He was also one of three heirs to the estate. All three heirs were the grandchildren of the intestate. Two heirs were the children of the intestate's predeceasing son and the third heir (the sergeant) was the only child of the intestate's predeceasing daughter. The sergeant asked the local legal assistance attorney how he should distribute the $900,000 estate and was told that the sergeant was entitled to that one-half of the estate that his mother would have taken (i.e. $450,000) had she lived. The other two heirs would have to split the remaining $450,000 that their father would have taken had he lived.

RESULT: The sergeant was sued for breach of fiduciary duty because the $900,000 estate, by state law, should have been divided equally among the three heirs. Both the sergeant and the other two heirs filed claims against the Air Force for malpractice.

PREVENTIVE MEASURES: Legal assistance officers should avoid giving advice about intestate distribution unless they have reviewed the relevant intestacy statutes in their jurisdiction and understand them.

MALPRACTICE TRAP #4:
FAILURE TO UNDERSTAND TESTATE DISTRIBUTION

LAW: Children of a decedent who are not mentioned in the decedent's will may be entitled to a share of the estate by statute.

CASE: The two-year old holographic will (i.e. self-written) of a marine major left his entire net estate of $750,000 to his wife except for his officer's sword which he left to his son. Shortly before the major's death, his wife gave birth to the major's second child, a daughter. The wife sought the assistance of a legal assistance attorney as to what should be done with the proceeds of the estate. She was advised that after giving the sword to her son, she was entitled to the $750,000 estate. Two years later, the wife and her new husband had lost the $750,000 in a failed business venture. The parents of the deceased major qualified as guardians ad litem of their granddaughter and sued the major's wife because under state law the granddaughter was entitled to one-third of the major's $750,000 estate. This $250,000 should have been put in a guardianship account with the clerk of court for the benefit of the major's minor daughter.

RESULT: The major's parents were correct and the wife filed a claim for malpractice against the military because the legal assistance attorney failed to inform her that the major's daughter was statutorily entitled to one-third of her father's estate even though the child was not mentioned in his father's will.

PREVENTIVE MEASURES: Do not assume that the distribution stated by a testator in his will is absolute. Many statutes have the effect of modifying the express provisions of wills.

MALPRACTICE TRAP #5:
FAILURE TO UNDERSTAND DISSENT OR ELECTIVE SHARE STATUTES

LAW: By statute, surviving spouses must be left a certain portion of a deceased spouses' assets at death. When this does not occur, the surviving spouse can petition the court for a larger share of the deceased spouse's estate.

CASE: The wife of a retired navy commander was named as the executor of her deceased husband's will. The will provided that the husband's $750,000 net estate was to be divided equally among the surviving spouse, the local Lutheran Church and the husband's three brothers. The wife thought she had been treated unfairly and called the local reserve center who referred her to an active duty legal assistance attorney. The legal assistance attorney informed the wife that she was entitled only to the one-fifth share (i.e. $150,000) provided her in her husband's will. Later, the wife learned that had she filed a dissent form with the probate clerk, she would have been entitled to receive one-half her husband's estate (i.e., $375,000). By the time the wife learned of this, her deadline for filing a dissent had expired.

RESULT: The wife sued the military for malpractice claiming the incorrect advice she received caused her to lose $225,000.

PREVENTIVE MEASURES: Every state has dissent statutes designed to prevent intentional or unintentional disinheritance of a spouse. Legal assistance attorneys must familiarize themselves with these statutes. Whenever a surviving spouse receives a relatively small share of their deceased spouse's entire estate (probate and non-probate property), the legal advisor must consider the possibility filing a dissent.

MALPRACTICE TRAP #6:
FAILURE TO UNDERSTAND THE STATUTORY POWERS
GRANTED TO PERSONAL REPRESENTATIVES

LAW: State law provides personal representatives (i.e. executors and administrators) with certain powers and limitations. A common limitation found in such statutes requires personal representatives to avoid making certain investments with estate assets.

CASE: A reserve Air Force lieutenant was named executor of his uncle's estate. The estate had $400,000 in excess cash and the lieutenant sought advice from the base legal office on his obligation to make such excess cash productive. An active duty Air Force legal assistance attorney advised the lieutenant that such excess funds should be invested following the "prudent man" rule, the lieutenant asked if this included stock market investments and was told by the legal assistance attorney that stock market investments were considered prudent investments if the stocks were well-known blue chip stocks. The lieutenant invested the $400,000 in several stocks. Over the next year, the value of the stocks dropped 25%.

RESULT: Several heirs to the estate sued the lieutenant for breach of fiduciary duty citing the state statute that prohibited personal representatives from investing estate assets in any stocks regardless of quality. A claim was also filed against the Air Force.

PREVENTIVE MEASURES: Every state has a statutory list setting out what personal representatives can and cannot do. Don't give advice in this area unless you have reviewed this statutory list.

MALPRACTICE TRAP #7:
FAILURE TO UNDERSTAND THE RIGHT OF RENUNCIATION OR DISCLAIMER

LAW: One who is entitled to receive property due to the death of another has the right to renounce in part or all of such property.

CASE: The wife of a retired air force colonel had been involved in two failed businesses and personally owed nearly $300,000 to various creditors. Her husband recently died leaving his entire estate to his wife. In addition to the wife, the colonel was survived by three adult children. The colonel's net estate consisted mostly of real estate which was worth approximately $300,000. The real estate was titled in the colonel's name. The wife, who was the executor of her husband's estate, was concerned about how her inheritance would affect her situation with her creditors. The legal assistance attorney she consulted for advice told her that she became the titled owner of her husband's real estate at her husband's death and that when the estate was closed, her creditors could foreclose on the property. This is exactly what happened. The end result was that the wife lost her entire inheritance. Later, the wife found out that had she filed a renunciation form with the local probate clerk, the colonel's real estate would have passed to his three adult children. The creditors would not be able to get to the property and it would have remained in the family.

RESULT: The three children and the wife filed malpractice claims against the Air-Force.

PREVENTIVE MEASURES: Every state recognizes the right of heirs and beneficiaries to renounce property rights passing to them by statute, will or contract (i.e. insurance). These renunciation or disclaimer statutes can be used to avoid creditors, reduce taxes, etc. These statutes should be reviewed and understood before giving advice to heirs and beneficiaries.

MALPRACTICE TRAP #8:
FAILURE TO FOLLOW STATUTES
ADDRESSING THE EXECUTION OF WILLS

LAW: Most states have statutes that must be precisely complied with regarding the drafting, signing and witnessing of a will.

CASE: A retired arm sergeant major wanted a will written leaving his estate to his son and disinheriting his daughter. The local army legal assistance attorney drafted a will reflecting this desire. The will was mailed to the sergeant major with instructions to have the will signed and witnessed at the reserve center near where the sergeant major lived. The sergeant major went to the reserve center accompanied by his daughter-in-law (i.e. the wife of the sergeant major's son). The reserve center had only one legal assistance officer. He witnessed the sergeant major sign his will and indicated the daughter-in-law could be the second witness because she was not mentioned in the will. When the sergeant major died, his disinherited daughter challenged the will on the ground that a state law voided all benefits flowing under a will to anyone who witnessed the will or anyone whose spouse witnessed the will. Her contentions were correct and the sergeant major's $800,000 estate passed by intestacy giving the disinherited daughter one-half his estate.

RESULT: The surviving son, as executor, filed a malpractice claim against the military seeking $400,000

PREVENTIVE MEASURES: Every state has statutes dealing with the formal requirements for the execution of a will. Legal assistance officers should be familiar with these statutes before assisting clients with executing their wills.

MALPRACTICE TRAP #9:
FAILURE TO RECOGNIZE WHEN A WILL HAS OR HAS NOT BEEN REVOKED

LAW: Certain actions taken by a testator or beneficiary can revoke a will. In addition, the occurrence of certain events can cause a will to be revoked.

CASE: A reserve navy physician was appointed to be the personal representative of his deceased father's estate. The doctor located two wills executed by his deceased father. The first will was dated 1994 and the second was dated 2000. Both wills left large sums of money to a local college. Not knowing which will was valid, the doctor took both to the local Coast Guard station for review by a legal assistance attorney. The attorney read the first part of the 2000 will, which revoked all prior wills, and informed the doctor that the 1994 will was effectively revoked. After reading the remainder of the 2000 will, the legal assistance attorney noted the will was witnessed by only one witness which made it invalid under state law. The legal assistance attorney then advised the doctor that because the 2000 will was also a nullity, the estate should be distributed to family members pursuant to the laws of intestacy. After the estate was closed, the college named in the 1994 will correctly argued that the 2000 will, being witness by only one witness, was a nullity and therefore did not revoke the 1994 will which was proper in all regards.

RESULT: The college sued the doctor and the doctor filed a malpractice claim against the military.

PREVENTIVE MEASURES: Every state has statutes dealing with rules regarding how the revocation of a will might arise. These statutes should be understood before giving advice to clients in this area.

MALPRACTICE TRAP #10:
FAILURE TO UNDERSTAND SPECIAL STATUTES OF LIMITATION

LAW: Many states reduce normal statutes of limitation regarding personal injury, wrongful death, contracts, etc. where estates are involved. Many states commonly reduce lengthy (i.e. 2-3 years) statutes of limitation to a few months.

CASE: A retired navy senior chief was seriously injured in an auto accident because of the negligence of another driver. The driver at fault was killed in the accident. After recuperating from his injuries, the senior chief sought advice as to how he should proceed. The legal assistance attorney he talked with told the senior chief that he would have to sue the driver's estate and told him that the statute of limitations for personal injury suits was three years. A year later, the senior chief learned from another attorney that the statute of limitations for personal injury claims was three years *unless* the tortfeasor had died. In such a case, an personal injury suit would have to be filed within three *months* of the decease tortfeasor's death or a inured party's recovery would be limited to the decedent's auto insurance coverage. In this case, coverage was $25,000.

RESULT: A claim for malpractice was filed.

PREVENTIVE MEASURES: Nearly all states reduce standard two or three-year statutes of limitation for personal injury, breach of contract, etc. to as little as a few months when a claim is to be filed against an estate. A legal assistance attorney advising a client on these matters must be aware of these reduced statutes in his or her jurisdiction before giving advice in this area.

WHAT PROTECTION IS PROVIDED TO REGULAR AND RESERVE LEGAL ASSISTANCE ATTORNEYS WHO MIGHT COMMIT LEGAL MALPRACTICE?

A regular reserve or legal assistance attorney who commits malpractice will, in many cases, find that he or she is immune from personal liability suits for malpractice involving the practice of law due to the *Feres* doctrine.[1] The *Feres* doctrine, in part, holds that active duty service members who are the victims of negligence or malpractice committed by other service members such as legal assistance attorneys are barred from suing the negligent service member or the U.S. Government for such negligence. However, when the victim of malpractice is a civilian, dependent, or other person not on active duty with the military, *Feres* does not normally bar suits for damages resulting from malpractice. In those cases when a suit for malpractice can be filed, federal law requires that the suit be brought against the U.S. Government and not against the service member who was responsible for the alleged malpractice.[2] It is important to note that this federal law does not protect a legal assistance attorney from personal liability for malpractice unless the malpractice occurred while the legal assistance attorney was acting within the scope of his or her employment. For example, defective or incompetent legal advice on matters beyond those authorized by a command would not be within the scope of an attorney's employment and could expose the legal assistance attorney to personal liability.[3]

---

[1] *Feres v. U.S.,* 340 U.S. 135 (1950).

[2] 10 USC Sec. 1054. (a) The remedy against the United States for damages for injury or loss of property caused by the negligent or wrongful act or omission of any person who is an attorney, paralegal, or other member of a legal staff within the Department of Defense or within the Coast Guard, in connection with providing legal services while acting within the scope of the person's duties or employment, is exclusive of any other civil action or proceeding by reason of the same subject matter against the person (or the estate of the person) whose act or omission gave rise to such action or proceeding.

[3] JAGMAN, Chapter VII. For example, a legal assistance attorney who has not being authorized to provide legal assistance (Sec. 0704*),* or who gives incorrect advice to a dependent concerning a *business* matter has given advice outside the scope of his or her employment since the JAG Manual does not authorize legal assistance or advice concerning business matters (Sec. 0708 and 0709). For this reason the legal assistance attorney may be *personally* liable in the event of malpractice.