ESTATE LITIGATION

WARNING!

FAILURE TO READ THE WILL OR TRUST COULD BE HAZARDOUS TO YOUR CLIENT'S WEALTH©

By Gale Allison
The Allison Firm
Counselors and Attorneys at Law
Woodcreek Financial Building
5214 East 71st Street, Suite 1000
Tulsa, Oklahoma 74136
Telephone 918.492.4500
gallison@theallisonfirm.com
www.theallisonfirm.com

Gale Allison is the founder of *The Allison Firm* in Tulsa, Oklahoma a boutique law firm which practices exclusively in the areas of estate planning, complex postmortem, probate, pension distribution planning, business succession planning, all facets of charitable transactions, probate, estate litigation and estate, gift and generation skipping taxation compliance, audit defense and litigation. A significant part of the practice is "estate doctoring" and is devoted to creatively repairing things that have gone awry in these areas either through professional error, client inattention or failure to reveal important facts to the client's professional, client error, fiduciary error or simply the facts didn't work out as forecast.

Ms. Allison has over thirty years of legal and tax experience. She received a B.A. degree in English in 1973 from the University of Georgia, her Doctor of Jurisprudence degree from the University of Tennessee in 1975 and an L.L.M. degree in Taxation from Emory University in 1980. Ms. Allison was an Estate and Gift Tax Attorney for the IRS prior to entering private practice. She is a member of the Tulsa County Bar Association, the Oklahoma Bar Association, the State Bar of Georgia, the Tennessee Bar Association, and the American Bar Association. In addition, Ms. Allison is a member of the Estate Planning Forum of Tulsa and the Planned Giving Council of Oklahoma.

She is licensed to practice in Oklahoma, Tennessee, and Georgia. In addition to all the courts in each of these three states, Ms. Allison is licensed to practice before the U.S. Tax Court, the 4th, 5th, 6th, and 10th Circuit Courts of Appeal and the United States Supreme Court. Ms. Allison serves on the St. John Medical Center Foundation Community Liaison Board, the Advisory Board to Tulsa University Genave King Rogers Business Law Center, and the Planned Giving Advisory Committee for the Tulsa Library Trust.

She is a nationwide frequent speaker, lecturing both to continuing education professionals and lay groups and a published author in the area of state tax procedure.

One Lawyer's Experience

An unusually large number of people in my experience, including lawyers and other professionals who should know better, do not seem to understand that the most basic of all approaches to understanding any document is to read it. Yet this simple concept escapes many people - and not just the clients who are involved in the process.

In the beginning of my practice I thought the hardest part in dealing with people would be to make a difficult concept trip off the tongue in layman like language. Today I know better. The hardest part is getting the client to read what they are going to sign, administer or enforce. Many of the problems that give rise to our current very litigious atmosphere in the field of estates is directly related to someone not bothering to actually read what is on the printed page. How else can you explain the executed documents I review that still include blanks!

Every lawyer who has ever produced a will, trust or power of attorney has worried about an error. It is so easy to make an error of some sort when producing what would have been considered an absurd amount of paper fifty years ago, but today is just standard operating procedure due to the advent of computers.

Due to the extraordinary length of even the simplest document, everyone, including sadly, on occasion the draftsman, seems to have given up on actually reading what is printed. The pressure to produce an estate plan, complete with revocable trust, will, power of attorney for finance and power of attorney for health (along with often many ancillary documents) at a remotely reasonable fee has given rise to endless issues most often caused by the document's words, or lack thereof. Obviously the length of these documents means a considerable amount of time must be spent reading and rereading the documents; and sometimes, this just does not

seem to adequately take place, as apparently everyone in the process hopes that someone else has read the documents.

It is clearly the prevalence of computers and the resulting lengthy documents that has caused the lofty expectation of documents that "deal with it all"; and thus the occasional failure to "deal with it all" correctly or at all. This alone has changed forever the landscape of the practice in this area; and it affects all professionals who must assist their clients through the maze of documents that are commonly considered an estate plan.

Because this maze can be confusing, even for the draftsman; and despite the endless number of words appearing in the documents, it is amazingly common for the people who must deal with the ramifications of the documents to conduct themselves as though the words are not crucial. Even though a "not" in the wrong place or lack thereof is an obvious horror. Further, despite again the huge numbers of words, the failure to address simple things like the identity of all the heirs-at-law, can cause even an otherwise well crafted plan to end up in court.

Omitted Words Can Be Horrifying

So, you can just assume it is going to go better for those of us who have to administer a trust or will that the instrument take a stab at some sort of language to give us direction – the more specific the better. Anyone can make a good faith effort to follow a specific direction. My most hated directions are to do what is "reasonable". Like an individual trustee will be paid "reasonable fees." Obviously, if an attorney is trying to construe words of that nature, it is because there is a big problem with someone who is questioning every move and the word

"reasonable" is absolutely no help. Only the Judge knows what reasonable really is and then it might be the Supreme Court that has to weigh in on it.

Everything that is written into a will, trust or power of attorney, if it is to be successful in saving the heirs their rightful share of the estate, as opposed to cutting the attorneys in, should be as specific as possible. No one should ever count on a cozy family situation, because families and other loved ones have two distinct personalities; one when the maker of the instrument is alive and vibrant and one when the maker is incompetent or deceased. Being specific is always going to be better.

Leaving the specifics aside, mentioning at least the minimum is crucial and often leads to crisis if not – and that brings us to heirs-at-law. Heirs-at-law are those individuals who will inherit if the decedent has no estate plan in place. Obviously, heirs-at-law are children or other lineal descendants, if the child predeceases, and the surviving spouse. But, in the absence of children, the heirs-at-law can be the parents, siblings, uncles, aunts, cousins, etc. of the decedent. It is crucial in many cases to make very clear that the maker of the will or trust knew for a fact what he or she was doing at the time the instrument was signed. Failing to mention an heir-at-law should be viewed as a big mistake because the courts view it that way.

In the old days, if a decedent wanted to disinherit an heir-at-law, attorneys routinely advised leaving such people a dollar. Now, that is viewed as being flat out silly and may even give rights to accounting information that the maker of the instrument did not intend. The best way to handle it is to acknowledge the relationship kindly and then leave the person involved nothing, so there can be no doubt.

We have had a several cases of late with regard to "pretermitted heirs." Essentially, these are people who should have inherited, but were not mentioned in the instrument, will or trust, and therefore they pressed their claims in Court.

For example, consider last year's result in Livsey v. Wood, 2008 OK CIV APP 45, 183 P. 3d 1038. Louis T. Livsey, in his last will, did not mention five of six children and to add insult to injury, even said in his will that he had "one and only one child" and then expressly disinherited that one alone. That one child must have been really, really bad!

Basically, the pretermitted heir statute is strictly construed to add people in unless it is beyond question that the testator meant to have left them out, like the one child specifically mentioned. In the will, Mr. Livsey even mentions his siblings and disinherits them, and then leaves his whole estate to his friends, the Personal Representative ("PR") and the PR's spouse. The Court found that he obviously knew how to disinherit people because he did it so readily with respect to his siblings and one of his six children. So, the Court held that his failing to mention the other children had to be "unintentional".

Now you have to ask yourself about this man's intentions. If it was unintentional, it would have to mean he was crazy as a bedbug to have failed to let his lawyer know of five of his six children and one would wonder about whether the will should have been set aside altogether.

So, how might this have been better handled if the maker of the will didn't want to go so far as to name all the folks he wants to disinherit? Two cases in the past year had pretermitted heir issues. A child in one case and the children of a deceased child in another case – each sued to get a piece of the revocable trust. I would imagine the lawyers who represented them were encouraged, since the Supreme Court made it clear that a person cannot disinherit a surviving

spouse by taking all assets to a living trust and that the surviving spouse can come in against a living trust and get his or her elected share.

So, it would seem logical that you cannot disinherit others that way. Wrong. In both Benjamin v. Butler (Jackson Living Trust), 2008 OK 83, 194 P.3d 1269, which was handed down a year ago this month and Welch v. Crow (Betty J. Neighbors Revocable Trust), 2009 OK 20, 206 P.3d 599, which was handed down in March of this year, the Supreme Court stated that the situations are distinguishable because the statute, found in 84 O.S. §44, with respect to the spouse of a decedent, is to specifically prevent the decedent from disinheriting the spouse, whereas the statute on pretermitted heirs, found in 84 O.S. §132, is to insure that the decedent did not "forget" the heir by accident.

The whole problem with leaving assets subject to probate is that you have to notify all the heirs-at-law. It is one of the things that make the whole probate process so expensive because these people may not be inheriting anything, but if you notify them, they logically assume that they wouldn't be notified unless there was a reason and that it must mean they should be doing something to get something and thus the merry-go-round begins. This is a very strong reason why the decision to voluntarily probate something should be carefully reviewed with the client. Notifying twelve distant cousins or other family members, is rarely a good idea when someone passes away unless they are all getting a piece of the proverbial probate pie.

So, seriously, make sure your client not only comes clean with their attorney about the heirs-at-law but also takes it the step further and mentions them all by name and specifically notes no gifts at all.

Reading For Content—Better Check The Boilerplate

Many people think that the amendment of a trust is a quick and simple matter, never even thinking that the original trust might have some words about how to do it. The words *that might* deal with amending the primary document would be called, in a somewhat pejorative and dismissive way, *boilerplate*. But the true essence of a trust and the ease with which it administers is all about this otherwise ignored boilerplate.

The words that a draftsman might use with respect to how to amend a trust are all as varied as the lawyers who put together the instruments, and no client will sit still long enough to discuss such mundane matters. But a Court will talk about the client's intent on the matter as though the client directed their lawyer to do it in a certain way. That is the fiction of judicial word interpretation and client intent when it comes to dealing with any dispute. The words rule – if they exist.

A short trust might not even establish how to amend a trust which is a mistake in and of itself. I have seen a trust that was supposed to be a living trust. It was called a living trust and a living trust is subject to amendment. But the trust at issue was silent on the matter. Nothing may be assumed in any trust, on that you can rely. If you assume words not written in, you have no idea whether anyone else will agree with you, including the Court. However, if a trust addresses the issue, one MUST follow the words.

Now what could be less entertaining that the method of how a trust is amended? Consider the case of Baldwin v. McCoy (Mary Opal E. Reid Living Trust), 2002 OK CIV APP 49, 46 P.3d 188.

Mary Opal E. Reid created a trust that left the entire trust estate to her two adult children in further trust. The trust dictated that if a child predeceased Ms. Reid, that child's share would go to his or her children, Ms. Reid's grandchildren. This is a very common design.

Ms. Reid's son died first followed by Ms. Reid. Ms. Reid's daughter produced an amendment to the trust which indicated that the daughter was to receive the entire trust estate in an outright distribution. Ms. Reid's granddaughter objected.

The Court looked at the method of amendment contained in the trust. The Daughter's amendment did not comply with the method of amendment required in the original trust, because Ms. Reid did not deliver the amendment to the trustee as required by the trust.

While the daughter did deliver the trust amendment to the trustee just after Ms. Reid's death, the Court held that since an amendment was only allowed while Ms. Reid was alive, it followed that the amendment had to be delivered to the trustee while she was alive as well. The point is that by making this determination, the Court did not have to rule on whether or not the amendment was bogus. It's all about the words.

What If The Words Are...Less Than Clear?

If words are less than clear, obviously fix it while you can. However, great case law in this area never results from ambiguous language that has been fixed while everyone is alive. That said, what if the grantor, trustor, settlor, testator, principal etc—the maker of the document-- is incompetent or deceased? Start with the words and refuse to ever admit that there is anything ambiguous about them.

That position seems silly. But it is the reality of fighting about words in Oklahoma. If you insist that the words say only one thing, then the Court can easily find that essentially anyone who cannot understand them is just plain wrong. It is stated like this, "The courts strive to ascertain and effect the intent of the settlor, but parole evidence may not be considered, "[w]here there is no ambiguity and the language of the declaration of the trust is clear and plainly susceptible of only one construction[:] the plain provisions of the trust instrument...determine its construction." (See Baldwin, 46 P.3d at 190). One would think that if two sides are disputing what the words mean then they are ambiguous, but that is not the case.

Suppose everyone says the document is ambiguous. Well, you are stuck. Parole evidence in this type of case is not allowed to include anything the maker of the instrument may have said with regard to its construction. Essentially, you are most often left with little to show what the words mean. It is an impossible standard. Always stick with the idea that you know what the words mean from the four corners of the document as it stands.

One of the more interesting cases this year involved a power of attorney. Russell v. Chase Investment Services Corp., 2009 OK 22, 212 P.3d 1178. In that case, there was a guardianship in which the Step-mother (spouse) and Daughter were co-guardians. We don't know why there was a guardianship, because there was also a power of attorney that the Daughter held. There lies the problem.

A well drawn power of attorney should have negated the need of a guardianship in most cases, but nevertheless both existed. Using the power of attorney, the Daughter drew out over six figures from an IRA which was held by Chase bank and didn't bother to mention it to the Step-mother. As with any case, there is always more than meets the eye and this case is no

different. When Step-mother found out the resulting battle must have been awful, because Daughter committed suicide.

The Step-mother sued Chase to recover the money, but the Court pointed out that by statute, having a power of attorney is not inconsistent with guardianship; and if the guardian does not want the power with all the rights it confers to exist, the guardian just needs to revoke the power of attorney. The Court cited to 50 O.S. §174(A) which is really clear:

> "If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated."

The case was won just on whether or not the power of appointment was revoked by the mere existence of the guardianship and it is statutorily settled that having the guardianship did not affect the validity of the power of attorney, so Chase won.

Interestingly enough, some of the terms of the power of attorney were quoted in the case and the thing that was amazing was that the power of attorney never granted the specific power to deal with the IRA. Had the case been argued on whether the power of attorney granted that ability or not, the result may have been different.

The HUGE Problem with metadata—Affirming or Horrifying for Everyone Dealing With The Words

Supposedly, metadata was widely discussed and understood around 1998. Still, few lawyers, much less anyone else, began to understand what it was, or its ramifications, until two or three years ago. I commonly find many non-lawyers still blissfully ignorant of what is becoming crucial evidence in many types of situations - most particularly, regarding anything to

do with a client's estate plan. It is evidence that cannot be ignored in any case where there is an issue with the words.

Metadata is data about the words. Undisturbed metadata, referred to as unscrubbed metadata, will most often reveal who worked on a document, the name of the organization that created or worked on it, information about prior versions of the document, recent revisions, comments inserted in the document during the drafting and editing, the existence of hidden text which may reflect editorial comments, strategy considerations, issues raised by those who work on a document, and the order in which edits occur. Any of this evidence may save or undo a party to a suit.

But it is not just lawsuits that are affected. One of the most embarrassing uses of metadata involved a presentation Colin Powell made to the United Nations in 2003. He was provided with information from Tony Blair's office that involved rank plagiarism. The speech was sent to reporters who reviewed and reported on the metadata. The reporters were very entertained to discover the tangled web of cobbled together old information which was lifted from another individual's published work without knowledge of the author. If that were not awful enough, the information was presented as the most current and it was ten years old!

How lawyers are supposed to deal with metadata as professionals amongst themselves has covered the spectrum from simply make sure you don't send it, to pretend you don't see it, to just work it out, to ask a judge. But the one thing that has been well settled from the beginning is go after it through discovery, if it can reveal anything useful in any litigation.

The main thing that all the world needs to recognize, and most importantly, anyone in business, is MAKE A POLICY about it. What that policy is will depend totally on what your

business is and how much your business depends on drafted words. Regardless, do it now, when there is no issue on the horizon about it.

Personally, I am conflicted regarding the use of metadata. It has saved me when a client lied about what I knew and when. There was an allegation that I might have changed a record, but when I pointed out that the metadata would categorically prove that I did not change anything and that the client was lying...well, it brought a good result.

However, with the understanding of the existence of metadata and what information it contains, one must brook the possibility that your metadata may have to be turned over to someone who wants to use it against you. Last year, through court ordered discovery, I walked into a lawyer's office and walked out with all the hard drives to his network. Imagine if this happens to you.