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Five Killer Mistakes Trust Lawyers Make

Ways to avoid headaches when crafting a trust.

By [RICHARD NALLEY](#)

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Illustration: Dan Picasso for Barron's

When you pay a lawyer to craft a trust, you are ostensibly buying peace of mind, but the "experts" sometimes make mistakes or, with the best of intentions, steer their clients toward wrong choices. Benjamin Pruett, a principal and fiduciary counsel at Bessemer Trust in Washington, D.C.,

quips that clients' "requests make perfect sense to a logical, rational, normal human being. But lawyers, not being normal, logical, or rational human beings," can wind up creating a set of problems. Here are five of the most common mistakes that trust lawyers make:

PLAN UPSTREAM. "Too often what isn't asked is whether the client might inherit money from, say, a parent or aunt and uncle," says John Bergner, a partner with law firm Winstead in Dallas. Most estate planners plan "downward for the client, but not upstream. I always ask about this, because if a client says, 'Oh, yeah—my parents might leave me \$3 million,' I say, 'Wait a minute—we've done all this estate planning, and you've spent all these legal fees trying to minimize transfer taxes, but at your parents' death, you're going to add another \$3 million onto your stack, and the IRS will take 40% of it at your death. And by the way, it is also exposed to creditors and divorce.' "

COORDINATE PLANNERS. "The more pieces you put in place, the more possibilities there are for error," notes Bruce Stone, a partner at Goldman, Felcoski & Stone in Coral Gables, Fla., and the immediate past president of the American College of Trust and Estate Counsel. This is particularly true if you have different people drawing up independent documents.

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Stone recalls one such situation: "A lady here in Miami who had several million dollars' worth of real estate went to a lawyer who drew up a trust for her that specifically described the real estate, and the trust specifically said it was to go to her daughter and not to her son," he says. "But she also had a will, which for some unknown reason left her estate equally to her son and her daughter. Then she died without deeding the real estate into the trust—that lawyer had not followed through. We tried everything we could at the trial-court level and the appellate-court level [in representing the daughter]. We lost."

ONE SIZE DOES NOT FIT ALL. "No one should ever assume that their children are going to see eye-to-eye on everything for all times to come," says Pruett. A so-called Pot Trust—a common trust where all the beneficiaries are thrown in together—only makes sense when children are very young. "Once they get to be adults, they have their own lives and needs, and their trusts should be completely separate. Even if they get along well, that may change, especially when spouses get into the situation. If one beneficiary starts asking for significant distributions, that can cause tension because the others will say, 'You're depleting what's available for the rest of us.' " Investment decisions can also provoke discord: One beneficiary might urge more investment risk for more reward; others might want the trust to stay safely liquid. Says Pruett: "It's like cats in a burlap sack. If they are forced together, it can get ugly."

DECANTING ISSUES. "You really want to be sure you talk to your client about decanting statutes," warns Read Moore, a partner at McDermott, Will & Emery in Menlo Park, Calif., referring to the way outdated trusts can, with court approval, be "decanted" into a new trust in certain states. Some clients want their trustees and future benefactors to have flexibility to make trust changes, according to new needs, but "some clients are appalled to learn that their trusts can be rewritten."

If you are the type of client who doesn't want anyone messing with your decisions, "you need to find a state that won't let that happen, and you need to be sure that the lawyers who draft it understand that you don't want it to happen."

TERMINATION PERILS. Pruett notes that "many, many trusts are set up with a mandatory termination date. People are thinking, 'I'm setting up the trust to protect the beneficiary from their own imprudence when they are minors or young adults. But once they reach a certain age, they should have their act together.' " That can be a mistake, he says. Trusts also protect assets from creditors, especially spouses in the event of a divorce, and also, of course, from taxes, so abruptly ending a trust can create a whole slew of knock-on problems. Pruett's solution is to build flexibility into the original trust document, so that the beneficiary isn't totally at the mercy of the trustee and the trust's drop-dead termination.

E-mail: penta@barrons.com

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