Nassau Lawyer

DECEMBER 2009 | VOL. 59 | NO. 4 | WWW.NASSAUBAR.ORG

Till – planning for – death do us part

Trusts and estates practitioners often provide joint representation to married couples as they create their estate plans. In these situations, there exist ethical considerations that the attorney cannot ignore regardless of the clients' marriage. However, an additional significant issue may arise as a result of joint representation, namely, the potential for malpractice suits that may be commenced by the survivor upon the death of his or her spouse in the event that an estate plan is deemed less than satisfactory.

Jaclene D'Agostino

When jointly representing clients in the estate planning context, it is the attorney's duty to protect the interests of each client by creating a plan that maximizes benefits, minimizes tax consequences, and fully satisfies their individual wishes.[1] Indeed, although married couples often seek joint representation with the belief that their interests are aligned, they are sometimes mistaken;[2] this is often the case in situations of blended families, or possibly where one spouse has charitable intentions that are not shared by the other. Circumstances such as the foregoing demonstrate why joint representation of the estate planning client is at times discouraged.[3] In fact, at least one authority has ventured to say that the potential for harm in joint representation of estate planning clients is such that it "should only be undertaken in unusual cases."[4]

One way to eliminate a possible conflict is to maintain separate representation of the husband and wife, meeting with each spouse individually, and creating separate estate plans. Moreover, as demonstrated by a recent case, *Leff v. Fulbright & Jaworski, LLP, et. al.*,[5] such separate representation may incidentally serve as a method of protection from malpractice suits that could otherwise be instituted by the survivor.[6]

In *Leff*, husband and wife retained the same estate planning attorneys, but did not meet or communicate with counsel together; each spouse created his and her own separate estate plan. Upon the husband's death, the widow brought a legal malpractice action against the attorneys in the context of their actions as counsel to her husband. She contended that an attorney-client relationship existed based upon her own representation by the same counsel, the fact that her husband had discussed his estate plans with her, and that the same attorneys had represented the couple jointly in connection with non-estate related transactions.

Joel B. Leff ("Decedent") died in 2002. In 1974, the Decedent entered into a Separation Agreement as part of a divorce settlement with his first wife, with whom he had a son. Said Agreement provided that the Decedent would bequeath to his son by Will no less than one-half of his probate estate, assuming his first wife remarried. Years later, the Decedent retained an estate planning attorney, who had no involvement in the drafting of the Separation Agreement. A copy of the Separation Agreement was given to the attorney, and remained in his file throughout his representation of the Decedent.

In 1998, the Decedent married Plaintiff. Prior to their marriage, they entered into a prenuptial agreement providing that each spouse "would have the right to dispose of his or her property ... as each party sees fit," but further stated that the Decedent would bequeath the marital residence and devise a specific amount to Plaintiff.[7] Thereafter, the Decedent, represented by Defendants, executed a number of Wills and Codicils. At no time in the drafting of these instruments were the terms of the Separation Agreement considered by Decedent or his attorneys.

The Decedent's testamentary instruments were drafted without his wife's knowledge or involvement, with the exception of two instruments: (1) a codicil in anticipation of the couple's trip to Cambodia, which, by its terms, expired upon their return; and (2) an unsigned Will bequeathing to Plaintiff one-half of his adjusted gross estate, which the Decedent gave to Plaintiff as an anniversary present. At the time of this gift, the Decedent reassured Plaintiff, by letter, that she would be informed if he were to execute a new Will that reduced her interest in his estate. Throughout this period, Plaintiff was also represented by Defendants in connection with her own estate plans, and jointly with her husband in connection with the purchase of an apartment.

It was only after the Decedent's death that the Separation Agreement surfaced in Defendants' file, in response to a claim by his son for one-half of the probate estate. The estate settled with

the Decedent's son, as a creditor of the estate, for approximately $20 million. Plaintiff subsequently sued Defendants for legal malpractice, claiming a loss of approximately $9 million due to their failure to inform Decedent about the existence of the Separation Agreement; she alleged that the Agreement should have been considered, resulting in alternative planning options to allow the Decedent to fulfill his intent as expressed in his Will. Defendants moved to dismiss, contending that they owed no duty to Plaintiff with regard to Decedent's estate planning, as they never represented the couple jointly in this capacity. The Court agreed.

Despite Plaintiff's contentions that she and the Decedent were represented jointly by Defendants, the Court explained that "[a] party's 'subjective belief as to the existence of an attorney-client relationship is not dispositive.'"[8] Moreover, the Court rejected Plaintiff's reliance on *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*,[9] in which it was recognized that the concept of privity was expanded to encompass the relationship between an attorney and a third party. In distinguishing *Prudential*, the Court explained that Plaintiff could not overcome the law that "a beneficiary has no cause of action against the attorney who negligently drafted a will."[10]

In its decision, the Court relied upon *Mali v. De Forest & Duer*.[11] There, it was held that estate planning attorneys had no duty to a decedent's son, a beneficiary of his father's Will, despite the fact that the attorneys advised the son as to his own estate planning and were longtime advisors to the family.[12] The Court also rejected Plaintiff's arguments that "near privity" was created between her and Defendants with respect to the Decedent's estate planning because the Defendants explained to her the import of one of the Decedent's Wills, and occasionally updated her about the amount of her legacy upon her husband's death. This relationship with respect to the Decedent's estate plan was interpreted by the Court to be merely "fleeting contacts."[13]

Especially worth mentioning is that, in a footnote, the Court refused to embrace the discussions by the American College of Trust and Estate Counsel and the American Bar Association that "in the absence of an agreement to the contrary' a husband and wife represented by the same counsel be presumed as joint clients."[14] Thus, it was held that Defendants could not be liable to Plaintiff for any mistakes that they may have committed in their representation of the Decedent.[15]

Notwithstanding the lack of privity, the Court further determined that "[Plaintiff's] case falters inexorably on the issue of causation, simply because Plaintiff cannot prove that she would have received more money from [Decedent] 'but for' Defendants' failure to inform [Decedent] of the existence and import of the Separation Agreement."[16]

Query, if the Court had determined that an attorney-client relationship had existed, permitting Plaintiff's claim of legal malpractice, should the Court have so quickly dismissed her case on the issue of causation? It is possible that a hearing would have been beneficial prior to making such a determination. Plaintiff may have had adequate evidence to demonstrate alternative actions that could have been taken by Defendants, *i.e.*, writings demonstrating that lifetime gifts to the Decedent's son were advancements, or maybe the creation of trusts. It is a moot point here, but something to be considered.

Clearly, the *Leff* decision is particularly relevant to the estate planning attorney. It is the separate representation of husband and wife that precluded a malpractice claim by the widow on the basis of standing. While every attorney seeks to execute his or her duty to clients attentively and no one necessarily anticipates being the subject of a malpractice suit, it is in the attorney's best interests to take such possibilities into consideration. Perhaps a decision such as this may encourage more attorneys to recommend individual representation of each spouse for purposes of estate planning, as it may most beneficial to all involved.

Jaclene D'Agostino is an associate at Farrell Fritz, P.C., where she practices in the trusts and estates litigation department and is a frequent author on the New York Trusts and Estates Litigation Blog.

1. Bassett, *Three's A Crowd: A Proposal to Abolish Joint Representation*, 32 RU L J 387 (2001).
2. *Id.*
3. *See* generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, note 2, Section 201.
4. Janet L. Dolgin, *The Morality of Choice: Estate Planning and the Client Who Chooses Not to Choose*, 22 SEA U. L. R. 31, 36, fn20 (Summer 1998).
5. 7/10/2009 NYLJ 32 (col 1) (Sup Ct, New York County).
6. *Cf. Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 259 A.D.2d 282 (1st Dept. 1999)
7. *Leff v. Fulbright & Jaworski, LLP, et. al.*
8. *Id.*, quoting *Weadick v. Herlihy*, 16 A.D.3d 223, 224 (1st Dept. 2005).
9. 80 N.Y.2d 377 (1992).
10. *Leff v. Fulbright & Jaworski, LLP, et. al.*, citing *Spivey v. Pulley,* 138 A.D.2d 563 (2nd Dept. 1988).
11. 160 AD2d 297 (1st Dept 1990).
12. *Leff v. Fulbright & Jaworski, LLP, et. al.*, citing *Mali v. De Forest & Duer*, 160 A.D.2d 297, 298.
13. *Id.* at 15.
14. *Id.* at 15, fn 2.
15. *Id.* at 15.
16. *Id.* at 16.

Farrell Fritz, P.C.
ATTORNEYS AT LAW

1320 RXR Plaza, Uniondale, NY 11556