Wills, Trusts, and Estates for Paralegals
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To Thomas, my love.
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This text was written with the intention of helping teach a paralegal the skills necessary to assist an elder law attorney, or an attorney who does a great deal of estate and trust work. It contains practical tips and skills, activities that will give real-life experience to a student in estate administration and trust administration, while also providing legal theory and examination of the law where necessary. It may initially appear that some of the material is too complex for a paralegal text, or goes beyond what the paralegal would be expected to do. I strongly suggest that the complex material be, at the very least, introduced to the students so that he or she may become familiar with the concepts involved. I have included a lot of background material beyond what may typically be included in such a text because it is material that my paralegal, Denise Lohnes, has learned while working with me and other attorneys in our firm. Denise always took the time to ask questions to try to understand why certain language was used, or the reason a pleading was filed. As a result, she has become an invaluable asset to our firm, and to my practice. There have been countless times that Denise’s questions about a pleading, procedure, or document have caused me to take a second look at something, thereby avoiding a mistake. My own practical experience has taught me that the more that a paralegal can understand about the legal theory behind a document, the more the paralegal can anticipate problems, identify deficiencies, and help the client. I have been blessed with a great paralegal, and I wrote this book with the intent of helping others become great paralegals.
I would like to thank Elizabeth Kenny, Developmental Editor, for her patience and help throughout the process of writing this text. I would also like to thank Cynthia Mussinan for all of her behind-the-scenes assistance in endless rewrites and revisions of page after page of handwritten edits, suggestions, motivation, and more rewrites. Cynthia, I think you will find some of the “characters” in the text both interesting and familiar. Your willingness to help, and your friendship, have been priceless. Finally, I would like to thank all of the following reviewers for their time and effort in reviewing the material and providing helpful, insightful comments and suggestions that greatly improved the text:

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Christine Simcox, Bucks County Community College
Kathy Smith, Community College of Philadelphia
Ann H. Still, Finger Lakes Community College
Janis Walter, University of Cincinnati
B. Identify Parties and Type of Trust

The first provision in the trust is the preamble, identifying the document as a trust created by John and Linda Jones, who are known as the grantors. The grantors of a trust are the people who are gifting, or granting, the assets that will be used to fund the trust. The grantor can also be known as the settlor or trustor depending on the terminology used in the state in which the trust is being formed. The preamble also includes the date on which the trust was created and identifies that the trust is being created in cooperation with the trustee who is named in the preamble. The sample language would be as follows:

We, John Jones and Linda Jones as Grantors, enter into this trust agreement this _________ day of ______________, 20________, with Robert Jones, as Trustee (hereinafter called the "Trustee").

The grantors usually fill in the date of the trust when it is signed. This date is referred to as the trust formation date. The language of the preamble indicates that this trust is going to be a trust agreement because it requires Robert to agree to serve as the trustee pursuant to the terms of the trust. A trust agreement requires that the trustee agree to abide by the terms of the trust. Unlike a will, where the testator chooses an executor but the executor does not have to sign the will, a trustee is required to sign a trust agreement indicating that he or she agrees to abide by the terms of the trust.

Practice Tip

The choice of trustee is important. Often clients find it difficult to choose a trustee and therefore may delay in finalizing the trust document. Create a follow-up system so that completed documents get signed and finalized by the clients.

Instead of a trust agreement, the trust could be a declaration of trust. A declaration of trust is one in which the grantor or grantors serve as the trustee. John and/or Linda were both the grantors and the trustees, then the trust is a declaration of trust because John and Linda are not asking a trustee to agree to abide by the terms of the trust. The sample language for a declaration of trust would be as follows:

This Declaration of Trust is made by John Jones and Linda Jones as Grantors and Trustees as set forth herein this _________ day of ______________, 20__________, 20_______.

Trusts in which the grantors also serve as the trustees are usually revocable trusts because the grantors are not giving up control over the use of the assets placed into the trust. If a grantor is going to act as a trustee for an irrevocable trust, there will most likely be a proviso in the trust that the grantor cannot act as the sole trustee.
Or the reverse can occur. If Katherine passes first, her assets, alone are those worth $150,000. Those assets can be placed into the credit shelter trust, but the majority of the unified credit that could be used by her estate is wasted. Trevor’s estate, consisting of the assets in his name and the joint assets, would then be worth $10,000,000. The estate would generate a tax of $4,000, ($10,000,000 / 40%), and the unified credit will cover only $2,081,800 of the estate taxes due, leaving an estate tax bill of $1,918,200. (See Figure 7-5.)

The estate tax in this example could have been avoided if the assets were equally split between the husband and wife. In many cases, it may be necessary to transfer the house and other assets from being jointly held by the husband and wife into just the wife’s name in order to equalize the amount of assets each holds. Reallocating assets among the spouses is often something that a client is reluctant to do, even if it would result in less estate tax being owed.

The same estate tax result happens if our wealthy couple owns all of their assets jointly, because when one spouse passes, the surviving spouse automatically owns all of the assets and there is no opportunity to place these assets into a trust. (See Figure 7-6.)

---

**Figure 7-5. Example: Unequal Assets**

1. Katherine passes first. Her assets, $150,000, go into the credit shelter trust.
2. The couple’s joint assets, $7 million, pass to Trevor tax free.
3. Trevor passes second. His assets, $3 million, and the joint assets, $7 million, go directly to the children, and a significant estate tax is incurred.
4. At Trevor’s death, the credit shelter trust terminates, and the trust assets, $150,000, go to the three children.

**Joint assets:**
- Home, estimated value: $2,500,000
- Various investment accounts: $4,000,000
- Vacation home: $500,000
- Investment property: $1,500,000
- **Total joint assets: $8,500,000**

The text contains helpful illustrations and diagrams useful in explaining complex issues such as Federal taxation of large estate, and the effects of tax planning. The illustrations provide a visual explanation of a concept that is easily remembered and can be applied to the facts.
In this example, the bulk of the couple’s assets are owned jointly. Those assets automatically pass to the surviving spouse and usually cannot be used to fund a credit shelter trust. Therefore, if Trevor passes first, Katherine inherits $8,500,000 of joint assets and can only use Trevor’s assets totaling $550,000 to fund a credit shelter trust. Most of the unified credit will be wasted. A similar result occurs if Katherine passes first, and Trevor inherits $8,500,000 of joint assets and can only use Katherine’s assets totaling $150,000 to fund the credit shelter trust. In order for the credit shelter trust within the will to work properly, it is imperative that the couple not only split their assets, but that the split be equal.

There are many occasions when the benefit of a credit shelter trust is explained to a couple, and the couple chooses not to use this type of complex will to reduce or eliminate their potential estate taxes. The use of a credit shelter trust is complex and requires the appointment of a trustee. The surviving spouse can serve as the sole trustee and cannot have complete control over the assets in the trust. If the surviving spouse were to have complete control over the assets in the trust, then those assets
**Figure 10-1. Application for the Appointment of an Administrator Ad Litem**

<table>
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<th>PART 2 PROBATE DIVISION</th>
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<td><strong>IN THE MATTER OF THE ESTATE OF</strong></td>
<td><strong>APPLICATION FOR APPOINTMENT OF ADMINISTRATOR AD LITEM FOR CAUSE OF ACTION ONLY</strong></td>
<td><strong>FILE NO.</strong></td>
</tr>
<tr>
<td><strong>ITEM 1. APPLICANT.</strong></td>
<td><strong>T.C.A. § 30-1-109</strong></td>
<td><strong>DECEDENT</strong></td>
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<td>requests the Court to appoint Applicant as Administrator <em>ad litem</em> of this estate for the limited purpose of a cause of action.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>ITEM 2. AVERMENTS.</strong></td>
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<tr>
<td>Applicant would show that Decedent died on _________________ at the age of ______ at ____________________________.</td>
<td>Date</td>
<td>City &amp; State</td>
</tr>
<tr>
<td>Decedent’s residence at time of death was:</td>
<td>Street and Number</td>
<td>City</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Applicant’s relationship to Decedent is</td>
<td></td>
<td></td>
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<tr>
<td>For legal action against</td>
<td></td>
<td></td>
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<tr>
<td>Applicant avers: these facts are true to the best knowledge, information, and belief of Applicant; no person is currently serving as administrator or executor for this estate; Applicant is aware of no person interested in the estate or willing to serve as administrator; Applicant is ready, willing, and qualified to serve as administrator <em>ad litem</em> according to law; the Administrator <em>ad litem</em>’s sole duty and function will be to provide a nominal party for a legal cause of action; and where it becomes necessary for Applicant to take control and custody of property or assets of this estate, Applicant shall execute a bond with good security before taking control and custody of such property or assets.</td>
<td></td>
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<tr>
<td><strong>ITEM 3. PREMISES CONSIDERED, APPLICANT PRAYS:</strong></td>
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<tr>
<td>1. That facts have been shown herein, or will be made known by the testimony or affidavit of an interested person, to support the appointment of a limited administrator.</td>
<td></td>
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</tr>
<tr>
<td>2. That Applicant be appointed administrator <em>ad litem</em> of this estate pursuant to T.C.A. § 30-1-109.</td>
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<td></td>
</tr>
<tr>
<td>3. That the CLERK &amp; MASTER qualify Applicant and issue Letters of Administration for Cause of Action Only.</td>
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<th>Applicant Signature</th>
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<th>STATE OF TENNESSEE</th>
<th>S. LEE AKERS, CLERK &amp; MASTER</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHANCERY COURT OF HAMILTON COUNTY</td>
<td>Sworn to and subscribed before me on _________________</td>
</tr>
</tbody>
</table>

*Attorneys for Applicant*  
BY ____________________________________________  
BPR# ____________________________________________  
Address ____________________________________________  
Telephone No. ____________________________________________  
Fax No. ____________________________________________  

(continued)
Glossary

A/B will: type of will that addresses estate tax issues, that contains two trusts: The first trust, or the “A” trust, is a marital trust, and the second trust is the “B” trust, which is known the credit shelter, or by-pass marital trust.

Account of convenience: a joint account designation done for an elderly person’s convenience.

Accounting: a report of income and expenditures in which the total balance remaining is determined for a certain period of time.

Activities of daily living: those things that a competent adult does for himself or herself on a daily basis.

Ademption by extinction: occurs when property is sold by the testator prior to death, and is therefore not owned by the testator as of the date of death.

Ademption by satisfaction: occurs when the testator has already given the beneficiary the asset prior to death.

Administrator: the person appointed as the representative of the estate when there is no will, or if the executor appointed in the will cannot serve or if there is some problem with the will.

Administrator ad litem: an administrator “during the litigation.” An administrator ad litem is appointed by the court when there is any court proceeding in which the estate of a deceased person must be represented and there is no executor or administrator for the estate.

Administrator ad prosequendum: an administrator appointed for the purposes of prosecuting a wrongful death.