

# *The* **Estate Analyst**<sup>®</sup>

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## **Updating The Will Review Checklist**

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“I hadn’t thought of that!” says the testator with concern. The estate planning professional looks up from the checklist of will-review items.

A long succession of inapplicable items on a checklist may make the process seem foolhardy at times, but when that key area of concern is identified, it represents a moment of success in the estate-planning process. You can’t always address issues until you identify them first.

When it comes to will review techniques, there are more ways than one to skin cat and every practitioner tends to develop their own personalized approach.

Talking about the testator's family relations, assets, and preferences can suffice in some estates, but by simply proceeding through the routine of asking questions and referring to a checklist, the estate planner can have more confidence that nothing has been overlooked.

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There are, of course, the traditional questions that populate will-review checklists and these all remain relevant today.

But estate planning has not remained one static exercise. The modern estate is faced with different tax laws and assets. The whole context of planning has changed, with greater emphasis on areas as diverse as Medicaid and dynastic trusts.

Here, we break down the traditional will-review checklist into several distinct checklists: the pre-checklist of preliminary concerns, the list of triggering events warranting a new will, the list of asset-related questions, and the remainder of the traditional checklist. We also propose a new section of items to be added to the exercise of a formal will review.

### ***Checklist Alternatives***

The estate-planning profession includes attorneys, accountants, financial planners, paralegals, insurance agents, funeral directors, and other specialists. However, some estate planning takes place piecemeal as opposed to having a sit-down meeting where a testator is escorted through a comprehensive list of planning areas.

For example, a testator's previous will that is being updated may be reviewed clause by clause as a means of verifying and clarifying the testator's current intent. For persons who have never had a will before, a general interview could begin with a review of family members, assets, and the major objectives, i.e., who will benefit from the estate, who will serve as executor. Then come the specifics.

An experienced draftsman may tend to collect information in the order that it arises in the standard will. This approach can be emulated simply by using a standard will, guiding the testator through it clause by clause, and collecting information along the way.

### ***Preliminary Considerations***

There are some preliminary considerations to review even before embarking on the list of questions. A formal checklist is, after all, merely one tool.

For a simple will, a client interview can clarify the critical information and there are some very useful templates on hand.

Here is a pre-checklist checklist, if you will:

#### **1. Which checklist should be used?**

Some circumstances call for a pre-interview collection of written information. If there are numerous beneficiaries, dozens of charitable bequests, vast portfolios of assets, and/or a family tree with numerous issues, it makes sense to collect information in writing even before a direct client interview.

**Example:** On the other hand, an 85-year old pensioner with \$300,000 in a brokerage account, a \$225,000 condo, and a 2001 Ford Taurus, doesn't need a 20-page form to inform you of his or her assets and intentions.

#### **2. Who is the client?**

**Example:** One of a testator's children calls an attorney to prepare his mother's will and provides the attorney with a written set of instructions on how to divide up assets after the mother is gone. But the list appears to be the product of the son's thinking with little input from the testator.

The approach to the checklist has to be cognizant of the need to elicit the testator's true intentions to confirm or modify the "plan" put forth by the son. The process has to be fair and well documented to satisfy the future inquiries of the testator's other heirs.

#### **3. Is there undue influence?**

**Example:** The testator is very old and/or frail and the daughter/caretaker is making all the arrangements and doing all the talking. There is clearly some influence...but has it become undue?

In such a setting there comes a time when the estate-planning professional needs to consult with the testator/client alone, one on one, and make sure the plan is the result of the testator's free will. Sending the caretaker/spokesperson out for a cup of coffee and repeating all the questions is a start, but it is useful to get the testator to relax, open up, and talk generally about how he or she feels about the various beneficiaries. The truth will surface with just a little patience and finesse and once that's established, the estate planning can proceed with full confidence.

#### **4. Is there testamentary capacity?**

**Example:** Same scenario as above only there are a) significant assets involved and b) indications of family strife that could lead to a will contest.

Establishing testamentary capacity becomes an issue whenever there is any indication that lack of testamentary capacity could be alleged, either due to

the health or age of the testator or merely because of contentious family relations. It makes sense to ask a series of questions to indicate that the testator has full awareness of what is going on, where he or she lives, how family members are related, and what who should benefit from the assets of the estate.

A contemporaneous memo to keep in the attorney's file can confirm that such an interview was conducted, or language to that effect can be included in the will. One caveat, however, is to avoid merely repeating the routine will-form language that the testator is an adult and signs voluntarily, etc., since that only conveys that a will-form was used.

### 5. Is it worth "rocking the boat"?

**Example:** Testatrix, a widow, age 92, has an estate worth \$400,000. She asks her attorney if she should change her will because her only child, a daughter, age 56, recently got married, changed her name, and moved to another part of the same town. The attorney looks at the will and observes that it lacks a self-proving section involving witnessing and notarization.

There is a classic ungrammatical maxim: "If it ain't broke, don't fix it." Here, the will is still valid, but has some flaws. Is it worth rocking this boat? Since the identity of the testatrix's daughter can easily be demonstrated despite her married surname or new address, a new will is not justified on those grounds.

However, the will could be updated to cover the circumstance of the daughter predeceasing the mother. Updating the will just to include a self-proving affidavit may make sense if, under applicable state law, the probate process is thereby facilitated. But this is not essential and has to be weighed against the current expense and potential for conflict. Adopting a codicil to reaffirm the original will, clarifying the new name and adding a self-proving affidavit might be a nice way to tie up these loose ends.

### *Events Triggering A Will Review*

There are classic life-changing events that go hand in hand with securing a new will:

**LAPSE OF TIME:** How much older are the beneficiaries since the time the will was executed or reviewed? Have objectives changed? How have income levels and needs changed?

**FAMILY TREE:** How has the family tree changed? Any new branches added or removed through marriage or divorce? Have there been any births or deaths in the family?

**BUSINESS:** Does the testator have a new job, contract, or business venture; change in company structure? Would any business or farm property qualify for special use valuation or any other special tax treatment? Have business associates changed? Is there a business plan of succession?

**ESTATE:** How has the estate grown in size, composition, and liquidity? Which major assets have been acquired or sold?

**LIABILITIES:** What potential liabilities are relevant? Is the testator engaged in litigation or exposed to any claims? Are any assets in the estate exposed to environmental liability?

**HEALTH CONCERNS:** Are there any new health concerns for the testator or any of the key beneficiaries or fiduciaries included in the will?

**CHANGE OF DOMICILE:** Has the testator changed domiciles or acquired realty in new jurisdictions? A different set of state rules may apply.

**INHERITANCE:** Are there any changes in the amount of inheritance the testator may receive?

**CAPITAL GAINS:** What is the capital-gains posture of each asset?

**PERSONAL GIFTS:** What personal belongings have already been acquired and distributed and which should be specifically included in the will?

**RETIREMENT ASSETS:** Has the testator retired or reached the mandatory distribution age? Are retirement assets subject to spousal claims?

**TAXATION:** What tax consequences would result if the existing will were probated today? What new tax laws have been enacted?

### *A Modern Checklist*

What should estate planners look for during a will review in the current context of the world? Here is a checklist for modern concerns:

**EASE OF PROBATE:** Would the current will be probated with ease? If there is no self-proving affidavit, testimony from the witnesses may be required...and the witnesses may be deceased or live far off if much time has passed.

**MEDICAID RULES:** Will the testator or a member of the testator's family need to qualify for Medicaid? The transition from a three-year look-back to a five-year look-back rule means careful direction of assets years in advance. Providing assets to support a beneficiary who should be divesting assets in

anticipation of qualifying for Medicaid may involve trust planning.

**LAYING REMAINS TO REST:** Every individual is entitled to choose how his or her remains shall be treated and there are more options than ever. Besides burial and cremation, remains may be cryogenically frozen, ashes may be stored in above-ground mausoleums or distributed in places ranging from the deepest ocean to outer space. Coffins may be personalized with sporting emblems. Headstones may have laser-etched photographic images in three dimensions.

**DYNASTIC TRUSTS:** Almost any estate worth planning can be improved by one or more trust arrangements. The modern estate should be made aware of these options. Trusts have long-term value for future generation of a family, and testators need to be assisted in discovering that yes, dynastic trusts can improve their estate.

**TRUST PROTECTORS:** In conjunction with long-term trusts, the use of trust protectors may be a seldom-used safeguard, yet it is reassuring to testators who have uncertainty about the long-term commitment of such an arrangement.

**OUTSIDE ESTATE:** More assets are flowing outside the traditional probate estate than ever before. This fact represents the greatest disconnect in a testator's perception of his or her estate. It is only normal for laypersons to add up all their assets and assume that their total estate of \$10 million is being distributed exactly as their will has specified. It is critical that they understand, for instance, if \$5 million of that amount is going to beneficiaries who are otherwise provided for in the will, thereby causing certain beneficiaries to receive a disproportionately high percentage of the estate.

**REPRODUCTIVE ISSUES:** Donation of genetic material, surrogate mothers, posthumous births, and other reproductive techniques may create the potential for unexpected heirs or claimants in certain estates.

**NON-MARITAL UNIONS:** Less than half of American households are now owned by married couples. Informal arrangements, civil unions, and same-sex marriages are part of the modern planning context. Combine those unions with modern reproductive techniques and even more potential issues arise. In the future, an increasing number of extended families may include members in unions other than a conventional marriages for a variety of financial, tax, insurance or business reasons as opposed to social relations.

**STATE ESTATE TAX:** With the elimination of federal estate tax for many estates, the imposition of state death taxes or income taxes may become the most significant tax burden that an estate faces. This opens the door to a possible change of domicile.

### *Practical Document Checklist*

**1. Burial Instructions:** Either included in the will or in a separate document. These take the guesswork out of emotional decisions on cremation versus burial and final disposition of remains.

**2. Location List:** Where are all assets located? Where are all important documents located? Where do all the beneficiaries live?

**3. Asset List:** Value, date of purchase, and purchase price help establish value for capital-gains decision making and tax returns. Personal loans should be documented as well.

**4. Investment List:** Many people have multiple investment accounts with brokerages, banks, and other financial institutions. A master list of these institutions and accounts numbers is useful.

**5. Insurance and Benefits:** Copies of life insurance policies and a list of all policies that are owned directly or through membership in various organizations, a recent list of them all simplifies and streamlines estate administration.

**6. Personal Bequests:** A list of bequests can eliminate conflicts over family memorabilia. Such a list may indicate how property is to be appraised, offered to beneficiaries, and/or disposed of.

**7. Power of Attorney:** A durable power to govern financial affairs if the testator is incapacitated.

**8. Living Will and Health-Care Proxy:** An advance medical directive instructs caregivers on the testator's preferences regarding mechanical respiration and nutrition and resuscitation in the event of brain death or permanent unconsciousness. A health-care proxy provides an agent to make health-related decisions if the grantor is incapacitated.

**9. Safe Deposit Box Inventory:** What assets and documents are held in safe deposit boxes?

**10. Outside Assets:** How are beneficiaries designated on IRAs, annuities, insurance policies, and contracts, deeds and joint bank accounts? Which assets are passing to designated beneficiaries outside the probate estate?