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**10 Drafting Mistakes**  
**You Don't Want to Make**  
**in Wills and Trusts**  
(And How to Avoid Them)

**TAB B**

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# 10 Drafting Mistakes You Don't Want to Make in Wills and Trusts

## (And How to Avoid Them)

Bernard E. Jones

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## 1. INTRODUCTION

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### 1.1. Purpose of this Presentation

I do not pretend in this outline to cover all the things that can be done wrong (or right) in Will and trust drafting. Instead, this outline is a selective discussion of non-tax drafting mistakes that I consider “common”; i.e.: mistakes that I have seen over and over again during my career as an estate planner, as well as mistakes that seem to be persistent topics among estate planners.

Non-tax mistakes, I believe, get judged harshly because of the unfair but common view that “any lawyer can draft a Will”, so long as no tax planning is involved. In my experience, it can be harder to avoid non-tax mistakes than to avoid tax mistakes because one lawyer’s “tax mistakes” are often another lawyer’s “tax strategies.” Non-tax matters are more objective, and as such are more easily – more tangibly – susceptible to mistaken application.

I posit that the following statement is axiomatic:

***It is impossible to avoid all errors in all documents and still practice law profitably.***

However, this is neither a justification for failure nor an alibi for acceptance of regular errors. To the contrary, it is a declaration that, as professionals, we must be ever mindful of this ever present danger.

### 1.2. Disclaimer

This outline and the accompanying materials are intended solely for other professionals and should not be relied upon without independent verification. Numerous statements in this outline are intended to raise ethical and other issues and provoke consideration of the matter by the practitioner and, as a result, the opinions expressed in this outline do not necessarily reflect the opinions of the author.

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## 2. COMMON MISTAKES

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### 2.1. Ministerial Glitches

Several of the most common mistakes I see in drafting Wills and Trusts can be grouped together under the generic heading, “ministerial glitches.” These are not judgment calls. These do not result from a failure of professional skill or knowledge. These are “typos.” These are mistakes that *anyone can spot* – lawyers, paralegals, secretaries, *and clients*. It is, perhaps, because lawyers know secretaries and administrative assistances are capable of catching and fixing these glitches, that lawyers so frequently fail to devote any serious energy to glitch prevention themselves.

#### a. EXAMPLES

##### (1) Misspelled Names, Wrong Birthdates, etc.

This may be the most common – and embarrassing – typo (it’s the one circumstance where the client can be positive you made a mistake) but there’s not much to say about it other than to admonish the practitioner that, in certain circumstances, misspellings can have dire consequences.

Families frequently have several male members with the exact same name save their respective suffixes (“Jr.,” “II,” “III”, etc.) which aren’t always assigned in order. I have had at least 2 clients whose daughter and [second] wife have the same first and last [married] name. Similar, albeit unrelated, charities frequently have very similar names. In all these cases, the embarrassment of a mere misspelling can blossom into a total upheaval of the client’s wishes.

##### (2) Numbering & Cross References

Cross references to numbered paragraphs are an essential element of the well drafted “client friendly” Will or Trust because they make it possible to have

short, plain English statements in the beginning of the document – that clients will actually read and understand – with unambiguous ties (via cross references) to the essential albeit frequently complex and convoluted boilerplate in the back. However, their benefit frequently turns to a liability when the reference that was supposed to point to the clause defining “children” to exclude the disinherited son, instead points to the tax apportionment clause.

Paragraph numbering glitches invariably arise when the scrivener renumbers some *but not all* paragraphs. This partial renumbering occurs in two situations:

- When paragraphs are numbered manually (i.e., with “hard coded” numbers and letters) and the scrivener fails to update every affected paragraph.
- When paragraphs are *supposed to be* numbered automatically (i.e., with automatic “paragraph numbering codes”) but one or more paragraph are in fact manually numbered.

Cross referencing glitches arise:

- When the scrivener updates manual paragraph numbers but fails to update manual cross references.
- When cross references are supposed to be automatic but one or more cross references are in fact manual.

### **(3) Codicil References to Will Paragraphs**

Codicils have their own unique exposure to the cross reference glitch in that they reference specific provisions of a separate document. “Second”, “Third”, etc. Codicils frequently reference a provision added (or modified by) a prior Codicil. I have seen several Codicils that fail to refer to the intended specific provision. I can only guess that this results from the physical difficulty of viewing the Will and all prior Codicils simultaneously, coupled with the confusion inherent in all Codicils.

### **(4) Failing to Conform a Mirror Image Document**

A husband and wife will frequently request identical “mirror image” estate plans. I’ve seen numerous cases where the documents for one spouse accurately reflect the clients’ wishes but the other client’s documents do not.

If it’s simply a failure to change every instance of “my wife” to “my husband”, the attorney may suffer embarrassment but little more.

If, however, it’s an essential tax clause added to the husband’s Will but left out of the Wife’s Will, or a failure to change “the beneficiaries of this trust are Tom Smith and Mike Smith” (husband’s instructions for his Irrevocable Life Insurance Trust), to “the beneficiaries of this trust are Sarah Henderson and Karen Henderson” (wife’s instructions for her Irrevocable Life Insurance Trust), the attorney may have significant liability exposure.

I’ve seen the issue arise in Wills and sole settlor trusts – i.e., where the husband’s and wife’s plans are implemented via separate documents – and, surprisingly, in joint settlor trusts – where “Part I, If Husband Survives Wife” is drafted properly and “Part II, If Wife Survives Husband” is drafted improperly.

Arguably, the potential for damage is only half what it could have been (if both spouse’s plans were prepared incorrectly). On the other hand, arguably, it gives the disgruntled client or beneficiary a prima facie case for malpractice, inasmuch as the clients’ wishes and the attorney’s failure to effectuate those wishes are both obvious from the face of the documents.

## **b. SUGGESTIONS**

### **(1) Proof Your Documents**

We all are, of course, far too busy to proofread our work product but, on principle, I’m compelled to recommend proofreading nevertheless.

### **(2) Master “People” List**

Maintain a *single* master list of all names, birthdates, addresses, etc., for each client. This can be a word processing document, part of your case management or contacts system, or document assembly software. The key is to have one consistent source for the latest, accurate client information that that everyone in the office will use.

### **(3) Copy/ Paste to Create New Paragraphs & References**

It is easy to institute – and I believe every law office should institute – a no-exceptions policy that absolutely *every* document with a dozen or more numbered paragraphs must utilize automatic word processor codes for all paragraph numbering *and* all

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