

The Estate Planning Graveyard: Four Estate Planning Monsters Lurking This Halloween and How to Defeat Them



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There is howling in the distance. The light of a full moon cuts through the fog. Suddenly, a blood-curdling scream cuts through the night!

Estate plans are designed with the best of intentions. Over time, however, even a well-drafted trust can transform into something unexpected, something...monstrous!

This Halloween, four of the most terrifying estate planning creatures lurk in the shadows, waiting to ensnare an unsuspecting client.

The Frankenstein's Monster Trust

Like Frankenstein's monster, this trust is assembled piece by piece from unrelated parts. The trust is amended repeatedly, adding and removing clauses, changing fiduciaries, and beneficiaries. What may have been beautiful at first has been patched together into something truly horrifying. A marital trust is established under article five, but article three makes a distribution outright to the spouse. The trust protector referenced in article nine does not appear anywhere else in the document. One provision assumes a corporate trustee while another contemplates an individual trustee.

If we ever face this monster, we can stop it dead in its tracks. Rather than continuing to tack on amendment after amendment, we can restate the trust in its entirety so that all the provisions work together toward achieving the client's goals.

The Ghost Trust

The Ghost Trust sits eerily quiet in a safe. The client sleeps soundly at night, comforted with the peace of mind that their loved ones are provided for and their assets are protected. Then, one night, a spine-tingling chill creeps up their spine; was the trust ever actually funded?

The client is in a state of shock. The bank accounts remain in their individual name. The deed to their home remains unchanged from when they first purchased the property. Business interests were never assigned to the trust.

The trust technically exists, but only barely.

Proper funding can bring this trust back from the dead and end this nightmare. Assets should have been transferred into the trust when it was first established, but it is never too late to fund a trust. As new assets are acquired, they too may need to be

transferred to the trust to ensure the client's estate plan will function as intended.

The Zombie Trust

The Zombie Trust is not necessarily bad. In fact, many Zombie Trusts were thoughtfully designed when they were created. But as years pass, what was once beneficial can atrophy and warp.

The trust was drafted years ago when the grantor's children were minors. Today, those children have their own families. Perhaps the trust was drafted when the federal estate tax exemption amount was a fraction of its current value.

Perhaps the client established an irrevocable dynastic trust. This may have been sensible when their business was worth millions of dollars. Now, several of those business ventures have failed, and the client would find themselves in a dramatically better position if they could only access those trust assets.

Circumstances change. Assets change. Tax laws change. Unfortunately, an outdated estate plan can create more problems than it was meant to solve.

We can defeat this monster through regular maintenance and review. Estate plans should be reviewed every few years, as well as whenever there is a significant change in family circumstances, assets, or the tax law, and, if necessary, revised to ensure that the client's estate plan remains aligned. Oftentimes, even an irrevocable trust can be undone with the assistance of an attorney.

The Mummy Trust

Wrapped tightly in layer upon layer of legal jargon, the Mummy Trust is perhaps the most intimidating creature in the estate planning graveyard.

The client wants every possible contingency addressed. The drafter wants maximum flexibility. Each provision adds another layer of protective wrapping. The trust may contain multiple classes of beneficiaries, numerous distribution standards, trust protectors, advisory committees, removal provisions, appointment powers, decanting provisions, tax formulas, and administrative procedures.

By the time the document is complete, it has become nearly impossible to navigate, even by an experienced fiduciary. The trust will be burdensome and complex to administer. Meanwhile, the trust's assets may only consist of a residence, several bank accounts, and a modest investment portfolio.

Complexity has its place. Large estates, blended families, special needs planning, asset protection objectives, and sophisticated tax planning may justify highly technical provisions. The Mummy Trust becomes a monster when the document's complexity exceeds the client's needs and actual circumstances.

The Mummy Trust is defeated through simplification. An estate plan should only be as complex as necessary and should avoid provisions that are not required to accomplish the client's goals.

A Final Halloween Warning

The most frightening estate planning problems rarely arise because someone failed to create an estate plan. More often, they arise because a trust was never funded, never updated, unnecessarily complicated, or patched together over time until its original purpose becomes difficult to recognize.

This Halloween, dust off your estate planning documents and take a closer look. You may discover a trust stitched together from mismatched provisions, a trust that owns no assets, a trust that has not been reviewed in decades, or a trust buried in unnecessary complexity. With a thoughtful review and proper maintenance, even the most terrifying Monster Trust can be laid to rest before it comes back to haunt you.

