

By **Avi Z. Kestenbaum**

The Definition of a Successful Estate Plan

An emotional tug of war may exist between the client's wishes and the attorney's satisfaction

How does one define a successful estate plan? I started to think about what factors would contribute to the success of an estate plan, and in no specific order, here's a brief checklist:

1. Fulfilling the wishes of my client;
2. Saving substantial taxes (gift, estate, generation-skipping transfer, federal income, local, state and international, if applicable);
3. Transfer of wealth in a responsible manner;
4. Satisfaction and happiness of my client;
5. Protection and preservation of assets;
6. Planning that has the best chance of keeping family harmony;
7. A cooperative working relationship with the other advisors;
8. Collection of legal fees in full without too much hassle; and
9. Feeling like I did the best job I could under the circumstances.

Emotional Tug of War

However, as I began writing this checklist, I realized that my definition of a "successful estate plan" was considering both the client's likely definition of success and my own feeling of satisfaction. It seems when we engage in the estate-planning process with our clients, there's often a psychological and emotional tug of war. Estate planners (we can't help ourselves) come in with

a certain value system based on our own personal and professional experiences and makeup. Our clients come in with their own value system. Some may argue that we shouldn't engage in estate planning that likely will cause conflicts, aggravation or disharmony down the road—such as disinheriting a spouse, favoring one beneficiary or leaving children unequal amounts, when we personally feel that it isn't fair or appropriate under the circumstances. Others may argue that our sole role is to help fulfill our clients' desires and goals, even if those wishes don't align with our own value system and even if we don't agree with them from a moral perspective. As one estate planner explained, even if he wasn't in agreement with a client's wishes, he had no regret about effecting those wishes because if he didn't draft the provisions, another attorney would.

Questionable Decisions

When I was a senior associate, one of my clients asked me to insert provisions into his estate-planning documents providing that certain children would have diminished inheritances if they didn't adhere to various cultural and religious observances. I didn't agree with the client's wishes and told him so. I advised him that it's not fair to indiscriminately judge his children's future actions right now and to punish a child for not following certain rituals and customs. For example, what if the child for a certain period of time became estranged from religion but a few years later rediscovered his beliefs? Furthermore, who in the future would be qualified to decide the exact parameters of the behaviors, if the offenses occurred and to what extent? Also, would the client feel the same way if the child had a negative experience with his congregation or was abused by a clergy member? Finally, I pointed out to the client that the child who didn't observe certain rituals would have his inheritance cut but a child who committed a federal

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crime could still receive his inheritance, and this didn't make any sense to me. I also explained that these types of provisions might not stand up in court if challenged as void against public policy. My client was still adamant that I insert these provisions into his documents, and reluctantly, I did so.

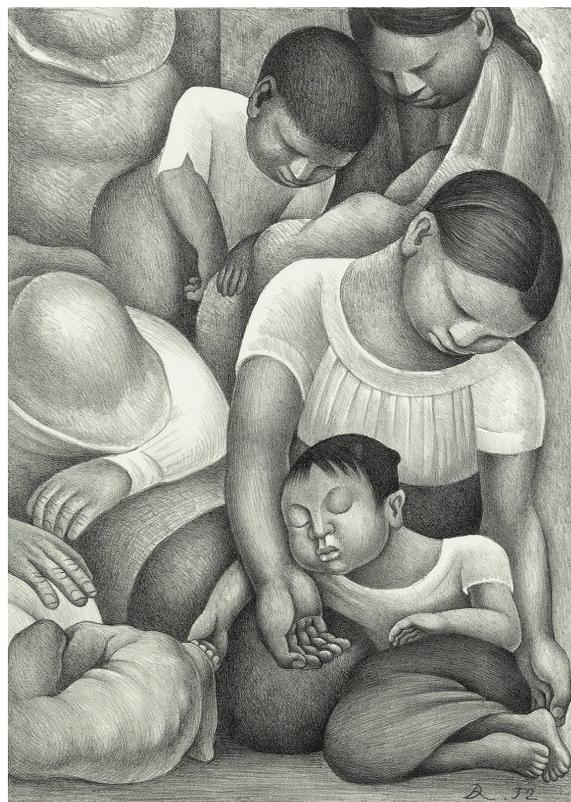
A few months later, I retold the story to Joe Katz, my mentor and the former head of my firm's Trusts & Estates Department. Joe immediately said that my name would be on the documents forever as the author and scrivener who prepared those provisions and asked me if I wanted that to be part of my reputation and legacy. As soon as Joe uttered those words ("forever," "author," "reputation" and "legacy"), I realized that I'd made a mistake. From that day forward, I've been more careful about drafting provisions, even if it expresses the client's most sacred wishes, if I feel the terms don't make logical or ethical sense or would be detrimental down the road. To be clear, I still draft very specific terms for particular clients that may be questioned later by others. However, I try very hard to dissuade my clients from creating documents that have provisions that I disagree with from a moral and ethical perspective, and I've refused many times to draft certain terms that I've strongly disagreed with.

Another more common example is when a client asks me to name a sibling to be a trustee for another sibling. In many situations, I tell the client that this is a mistake, and I won't draft the provision because it will fracture the sibling and family relationship and create bitter resentment if one sibling lords over the other. Most parents' greatest desire is that their children are close and loving of each other, and it often will create serious feuds and hostilities if one has or wields power over another. Obviously, every case is unique, and there's no blanket rule, but this type of situation happens frequently. Depending on the circumstances, I often try to take a strong stand because I feel it will be a mistake, and the client wouldn't want this if he really understood the future consequences. Most of the time when I take this posture, the client better understands the gravity of the future consequences and changes his mind.

Clients' Objectives

It seems that each of us may have a different opinion

concerning our exact role as an estate-planning attorney, and naturally we should fulfill our clients' wishes and objectives first and foremost. However, I suggest that we have a moral and ethical obligation to also maintain a certain standard or value system, and perhaps we should try harder to steer our clients if we feel that their definition of a successful estate plan is different from our own, or perhaps not. 🌀



No. 72 Diego Rivera 1932

SPOT LIGHT Together

El Sueño (La Noche de los Pobres) by Diego Rivera sold for \$27,500 at Swann Auction Galleries Old Master Through Modern Prints Featuring Latin American Art sale on May 2, 2019 in New York City. A prominent Mexican artist known for his many murals, Rivera had a knack for drawing on the walls since age three. Rather than punishing him, his parents installed chalkboards and canvases on the walls.