Practical Strategies for Avoiding Estate and Trust Litigation

PROACTIVE THINKING AND COMMUNICATION CAN MAKE A BIG DIFFERENCE

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It is no secret that estate and trust litigation is a thriving industry, which takes millions of dollars away from deserving beneficiaries and distorts estate plans.

While the estate planning community, and estate planning lawyers, in particular, tend to be straightforward, well-organized, and generally uniform in how estates and trusts are planned and administered, the intersection of inheritance vehicles, personalities and family workings, and a common lack of careful advanced planning can cause issues. This coupled with the American court system, results in a good many lawsuits, and also unpleasant disputes that may be resolved short of litigation or by arbitration, which can cause great harm to beneficiaries by reducing what is available, delaying or causing loss of educational opportunities, and causing families to not get along, or even to engage in active financial and interpersonal war as the result of circumstances that are commonly beyond anyone's control.

Along with this comes the increasing frequency of elderly or infirm individuals being taken advantage of financially by family members, friends, nursing and other professionals, notwithstanding laws that make it a jailable felony to take financial advantage of an elderly or infirm person in most states, although it typically requires a ''theft'' to trigger such statutes. The fact that almost all metropolitan, police departments, and sheriff departments have entire departments, or at least one dedicated investigator, to handle elderly abuse, provides all of the evidence needed that this is commonly occurring.

WHAT IS AN ESTATE PLANNER TO DO?

While estate planners usually do a good job of documenting client intent, asset and liability information, and how assets should be held and passed in the event of incapacity or death, there are some actions that can be taken to reduce the risk of clients and family members being improperly treated and inheritances being lost or significantly reduced. This potentially leaves the end result of an estate or trust administration to not even be remotely what the decedent had envisioned.

Estate planners may wish to evaluate what significant risks of trust and estate problems exist by looking for ‘‘red flags’’ that are commonly apparent, or which can become readily apparent in discussions with clients, family members, and other advisors.

When these red flags become apparent the planner can explain each prominent risk, and what can be done about it, and then take steps to avoid problems.

The primary circumstances that the authors have seen which should provide a reason for the possible proactive actions described below are as follows:

1. The infirm client;
2. The contentious family situation;
3. A spouse with separate children;
4. The undesirable fiduciary; and
5. The ambiguous or unclear estate plan.

Examples of what can be done with each of these categories of problems, as well as strategies for how the estate planner can protect him or herself and other involved professionals, including the following discussed below.

The Infirm Client

The infirm client may be an individual who is suffering from the beginnings of dementia, or who has mental health problems or physical afflictions that cause the person to be dependent upon caretakers or one or more relatives who may exercise undue influence to receive gifts and change inheritance plans to their favor.

Form an Irrevocable Trust for the Benefit of the Individual and Family

The infirm client may be well-advised to place their assets into an irrevocable trust with a trustworthy and independent trustee who is required to use the assets for the sole benefit of the infirm individual, to provide transparency and accountings to involved family members if appropriate, and to divide the assets according to the wishes of the infirm individual as expressed at a time when the infirm individual is able to make intelligent and balanced decisions.

Use a Safety Latch Provision in the Client’s Revocable Trust

Alternatively, or in addition to an irrevocable trust arrangement, a revocable trust may be amended to include a ‘‘safety latch’’ that prevents amendment or large withdrawals without consent of an advisory committee that acts in a fiduciary capacity, or medical/mental health professionals such as psychiatrists, neurologists, or licensed mental health counselors to assure that it is not easy to exert undue influence to change a living trust agreement.

Require Children and Others to Execute Agreements

Oftentimes the children of an infirm individual will enter into a ‘‘Care and Inheritance’’ agreement at the request of the infirm individual and his or her advisors which may require the following:

1. Full disclosure and transparency with respect to any financial dealings or changes in estate planning documents;

2. The right for a child who advances or spends money on behalf of the individual to be re-paid from his or her estate before the division of remaining assets among my siblings;

3. An inheritance agreement to provide that each sibling agrees to share any inheritance equally, notwithstanding whether the parent may change their estate plan;

This can be particularly important in families where one child tends to be imbalanced, and unable to support themselves.

What commonly occurs is that the imbalanced child arrives at the infirm parent's home and begins to help take care of them by helping him or herself to the assets in every way possible.

Caretaker Agreements

Many unskilled home nurses become multi-millionaires by helping elderly or infirm individuals.

A Personal Caretaking Agreement can provide incentive compensation for individuals who provide services for an infirm individual, by also providing contractual obligations on the part of the individual to not receive any significant gifts or inheritances. Typically the children or other individuals who are expected to benefit from the estate or trust of the infirm individual are made to be third-party beneficiaries of the agreement and are given the explicit light to disclosure and accountings as to the assets of the infirm individual and the management thereof.

Skeptical professionals may note that the above-referenced agreements and techniques are not foolproof, but the authors have found that individuals who sign such agreements or see that they are in effect are less likely to take advantage, or more likely to find someone else to take advantage of.

Communications and Transparency or Secrecy

When dealing with an infirm client that may have forceful or ne'er-do-well intended or unintended beneficiaries, the planner must make, or allow the client and their family to make, a number of decisions that can have a significant influence on whether there will be litigation or dispute, and how it might occur and end up.

One strategy is to be completely transparent, both with the questionable beneficiary or beneficiaries and those who may have involvement therewith.

Given that the client's mental state may not be expected to get stronger, and may not ever be better than what it is at a particular moment, the planner should not waste time or resources in deciding whether the client should be having mental health checkups, videotaped conversations about the situation, and direct communications with the potential ne'er-do-well or questionable beneficiary, so they do not have false expectations, and can complain, and possibly even file litigation or arbitration while the client is still living and able to express their position.

On the other hand, such steps can have a significant negative impact on the client or clients, if they find this to be upsetting, and do not wish to risk confrontation at the present time, or even at any future time during their lifetimes.

All in all, the estate planner will be safest from professional conduct and potential liability standpoint, if he or she consults with reputable probate and trust law litigation counsel, and the client and family members, and it is determined that the arrangement can be handled with full videotaping and audio recording of communications and transparency with all involved.

This can spare the lawyer from being accused of saying things or doing things that simply do not occur, and can save significant deposition time and expense, as well as the inconsistency that will always occur when different individuals are deposed about a common event.

On the other hand, if the mental status of the individual is weak, or they prefer to have privacy, a video or audio taping may not be feasible.

The rules of evidence also need to be consulted to determine what would be admissible.

FLORIDA COMMUNITY PROPERTY AND OTHER CONFIDENTIAL AND EXCLUSIVE BENEFIT TRUSTS

One common new form of trust is now available that enables a married couple to place assets under a trust where state law requires that they be the sole lifetime beneficiaries, and does not require any notice to any remainder beneficiaries, unlike most other Florida irrevocable trusts.

This applies under the new Florida Community Trust Act, which became law on July 1, 2021, and was designed to facilitate allowing the surviving spouse to receive a full stepped-up basis for all assets in the trust.

In addition, Florida provides that notice that would otherwise go to descendants or other beneficiaries under an irrevocable trust can instead go to a designated representative, who can be appointed in the trust agreement pursuant to Fla. Stat. §736.0306. A designated representative can also waive any right to notice or accounting of the trust.

SECOND AND SUBSEQUENT MARRIAGES

If there is a Prenuptial or Postnuptial Agreement, the estate planner should, of course, be very careful to assure that the agreement is being complied with and to see whether an amendment should be entered into in order to enhance the probability of enforceability, if this is desired.

For example, in many states, there is a requirement that both spouses make exhaustive disclosure of assets and income, and this is not always complied with. An amendment to a Prenuptial or Postnuptial Agreement can both fine-tune rights and responsibilities, and will often enhance what the less wealthy spouse is entitled to receive while increasing the probability that the agreement will be enforceable.

Many times, the wealthier spouse is required to leave a lifetime benefit trust for the surviving spouse's lifetime that can pass to or for the benefit of the descendants of the wealthier spouse after the surviving spouse's death. A wealthy spouse making gifts to irrevocable trusts for estate tax planning purposes may want to have an income or annuity interest held under the trust, in order to be able to satisfy the Prenuptial or Postnuptial Agreement, even if the personally retained assets of the wealthier spouse are lost in some sort of catastrophe or by reason of unintended large expenditures or lifetime gifts.

Planners should be aware that a high percentage of wealthy spouses in a subsequent marriage will commonly change their estate plan for the benefit of the new spouse so that the new spouse will receive more than what is contracted for under the Prenuptial or Postnuptial Agreement.

Descendants of the wealthy spouse may later complain that the changes resulted from undue influence, and may blame the estate planner for allowing this to occur. In those situations, it can be beneficial if the estate planner did not represent the less wealthy spouse, and to provide the less wealthy spouse with independent legal counsel, so that the estate planner is not accused of manipulating or assisting in the manipulation of the wealthy spouse by reason of fiduciary duty to the non-wealthy spouse.

In most non-community property states, a nonwealthy spouse has an entitlement to inheritance under elective share, courtesy, or dower statutes.

Another common question is whether the wealthier spouse is willing to benefit descendants of the less

It is possible to use trusts outside of the state of the residency of the wealthy spouse to hold assets that may not be subject to such statutes, assuming that the less wealthy spouse has not waived his or her rights under such statute, or that there is not a concern that any such waiver was not legally binding by reason of undue influence or otherwise wealthy spouse in exchange for use of the less wealthy spouse's estate tax exemption and gifting allowance?

For example, a wealthier spouse having a $20,000,000 net worth and two children and three grandchildren may wish to gift $150,000 a year in trust or outright to the children and grandchildren by having the less wealthy spouse sign a split gift tax return and may be willing to gift $10,000 a year to each of the less wealthy spouse's children in exchange for such cooperation.

THE NOT SO PERFECT FIDUCIARY

Commonly, individuals will name a relative, friend, or professional to serve as personal representative and trustee, not realizing the risk that such individual may not do a good job, or might even be untrustworthy and greedy with respect to actions taken.

Sometimes, the trustee appointed has relatively little business experience, or not-so-good judgment, or will be misled by a ne'er-do-well friend or advisor. While clients will commonly want to appoint family, friends, or professional advisors who may turn out not to be trustworthy, wise, or even coherent, a planner may provide language under a will or trust which permits one or more of the beneficiaries or a third party to require a change in fiduciary, or the addition of a co-fiduciary, using language such as the following:

> After my death or incapacity, any one of John Smith, Mary Smith, or Jane Doe may request that a Licensed Trust Company be appointed by the individual trustee or trustees to serve as cotrustee, and any such trust company shall be the ''tie-breaker'' in the event of a disagreement between one or more of the co-trustees. If the individual trustee or co-trustees do not choose a Licensed Trust Company meeting the definitions of Section 1.09 hereof within 20 days of receipt of a written demand to do so, then the majority of John Smith, Mary Smith, and Jane Doe who are able and willing to participate shall name a Licensed Trust Company or may request that the law firm of _____ name a Licensed Trust Company or a board-certified trust and estates lawyer to serve as such co and tie-breaker trustee.

> The very fact that an individual trustee may have to select or serve with a Licensed Trust Company or board-certified trust and estate lawyer may be sufficient to convince that individual to do their job properly and to comply with the advice of competent legal counsel.

The following language can also be provided:

> My trustee or trustees shall confer at least annually with the law firm of _____ or such board certified trust and estate lawyer or lawyers as they may select, and shall have such law firm or lawyers confirm in writing that they have and continue to be retained to represent the trustee and that to their knowledge the trustee is compliant with applicable law and advice provided in fulfilling all trustee duties.
>
> A provision such as the above may be completely ignored unless or until a beneficiary or legal counsel for a beneficiary gives the trustee or trustees' counsel a ''heads up'' that reasonable conduct is expected.

Many clients are also not aware that trustees in many states can charge a percentage of the value of trust assets, notwithstanding that they actually do very little. Trust language may attempt to reduce or even eliminate the right of a trustee to charge trustee fees, although the enforceability of such a provision will vary from state to state.

The following provision may be used to limit the compensation of trustees, or to at least attempt to do so:

> No individual named as a trustee under this Trust Agreement shall receive more than the greater of $10,000 per year or an hourly rate commensurate with what the individual earns as net compensation for services rendered multiplied by the number of hours reasonably spent by such individual. For example, if the trustee is a business executive who earns $200,000 per year, $200,000 divided by 48 weeks in a year divided by 40 hours per week is $104.17 per hour that the grantor would expect would be a reasonable maximum trustee fee. It is further requested that any and all lawyers, CPAs, or other professionals will charge no more than their normal hourly rate for services rendered so that they do not increase or decrease their personal income as the result of serving as trustee or co-trustee under this Trust Agreement.

AMBIGUOUS OR INCONSISTENT WILL OR TRUST PROVISIONS

Oftentimes there will be provisions under a will or trust that are inconsistent or ambiguous. This is simply a fact of life. Even the most conscientious and safe estate planning draft-person can make errors, and the English language itself along with the legal aspects thereof can cause issues to arise.

It can be advisable to appoint trust protectors who have the power to amend trust provisions or even a scrivener protector who will have the power to make changes to correct clerical errors and to ameliorate ambiguities.

The language that is part of the ''Scrivener Protector'' provision of the author's normal Revocable Trust Agreement reads as follows:

> The law firm of _____ has drafted this Trust Agreement and it is expected that the law firm will be available in the event of the grantor's death or incapacity in order to help to assure that the intentions of the grantor are followed, and shall

> serve as a trust protector in the event that there is no trust protector currently serving, based upon the terms of Section 6.16 hereof, which will require the appointment of an additional trust protector and having the limitations and powers provided under Section 6.16 hereof apply. It is recognized that in the course of drafting and administering trust agreements there can be ambiguities, inconsistencies, and changes in circumstances that can cause inconvenience, disputes, and hardships for trustees and one or more beneficiaries. The grantor hereby empowers the law firm of _____, or its successor, to make changes to this Trust Agreement by providing written notice confirming such change in order to comport with the grantor's intentions and to avoid potential uncertainty, litigation, or arbitration. Any such changes will be consistent with a fiduciary duty to follow the grantor's intentions. Such power granted to the law firm of _____ shall only apply so long as a member of the firm is a Martindale-Hubbell AV-rated and Florida board-certified trust and estate lawyer who approves such action, and the exercise of such power shall be limited as to not cause loss of the federal estate tax marital deduction or the federal estate tax charitable deduction with respect to any transfer to such trust or any trust herein established. Further, no such action may be taken without having written notice of the proposed action provided to each adult beneficiary of the trust, or to the designated representative of any adult beneficiary or beneficiaries who are empowered to waive and receive notifications for them.

Further, such power may be overridden by an act of the trust protectors acting under this Trust Agreement, if trust protectors are appointed under this instrument and empowered to make changes, and shall further be subject to the following limitations:

> Beneficiaries who may want to use any sort of confusion as to verbiage, inconsistency, or otherwise may be appropriately disarmed by reasonable corrections that are consistent with the intention of the grantor and may avoid the need to go to court or give a judge an easy solution to confirm the actions of a responsible scrivener protector or trust protector.

CONCLUSION

There are many other aspects of trust and estate planning that merit discussion and ameliorative or informative communications and safeguards that an estate planner can suggest and implement.

Perhaps the most important aspect of this is to remain vigilant and to have a good checklist and consultative relationships with lawyers who have knowledge in trust and estate litigation and other associated areas.

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