Recognize Red Flags in Estate Planning to Avoid Litigation

Advisors should be alert to heading off estate planning arrangements that will increase the likelihood of heirs initiating litigation after a client's death.

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Most clients do not want their lawyers to inherit their property. Yet sometimes the plans they desire to put into place are simply asking for that to happen. Litigation is expensive, and many states permit the attorney's fees to be paid from the trust or estate assets before anything is distributed to the beneficiaries. In addition, these proceedings are often lengthy and emotional, something that few wish to ever endure, and especially not after the death of a loved one.

Often trust and estate litigation can be avoided by careful planning. Thus, it is important for practitioners to recognize "red flags" during the planning process and to know how to advise their clients so that their estates are not settled in the courtroom, with the lawyers being the only ones walking away with full pockets.

Unequal distribution of assets among children

Clients who want to distribute their property to their children unequally could be asking for a fight. They may want to do this because they are estranged from a child or because they believe that one child "needs" more than another. The slighted child, however, may not agree with Mom or Dad's thinking. When this comes as a surprise to a child after the client's death—and the parent is no longer present to explain the thought process and to act as mediator among the children—the slighted child often feels like his or her only recourse is to hire an attorney to overturn the will.

The claim made is often one of undue influence. The slighted child claims that the other child who receives more under the parent's will has unduly influenced the parent in the will-making process. Undue influence has been defined as "mental, moral or physical exertion which has destroyed the free agency of a testator by preventing the testator from following the dictates of his own mind and will and accepting instead the domination and influence of another."[1]

Undue influence is a notoriously difficult claim to prove. The burden of proof is initially on the person alleging its existence but can shift to the other party if that person had a confidential relationship with the testator (such as acting as agent under Mom's power of attorney) or if suspicious circumstances are present, however slight they may be.[2] Even if a proceeding is dismissed on a summary judgment motion, it still costs the estate in legal fees, delays the estate administration process, and creates—or intensifies—bad blood between the children.

Of course, estate planning lawyers are suspicious when one

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child makes an appointment for Mom, drives her to the lawyer's office, and waits in the reception area while Mom tells the lawyer that she wants to leave her entire estate to that child. But what is a lawyer to do when undue influence does not appear to be at play? A parent can certainly decide to disinherit a child or to give more to one than another.

The practitioner must ask the client why he or she wants to leave the estate to his or her children in an unequal manner. Perhaps one child will receive a large life insurance policy outside of the will so the client wants the other child to receive the probate property. Or possibly the client wants one child to have the house and another to have cash. The problem, however, is that there is no guarantee that the client's assets will be the same at the time of death as they are when the plan is executed. What if the house has been sold, or the insurance policy has lapsed? In this type of situation, practitioners should explain the inherent risks in dividing property in such a manner, and encourage their clients instead to divide the residuary estate, rather than specific assets, among the children.

Another version of an unequal distribution might sound something like, "Michael has a lot of money of his own so he doesn't need any of mine," or "Sarah barely calls or visits me." Here, the best solution may be to have the client talk to his or her children, either separately or together, explaining why the parent has decided to treat the children differently. Admittedly, this is not an easy conversation for most people to have, but doing so forces the family to come to terms with the proposed plan while Mom or Dad is still able to explain the reasoning and act as mediator between the children—or, perhaps more likely, for the parent to rethink his or her decision and ultimately revise the plan so that each child is treated equally.

In the author's experience, the latter is what generally happens. The client decides that he or she would rather not even bring up the subject with the children, and realizes that Michael would be hurt if he did not receive an inheritance despite not needing any money, or that Sarah's lack of communication was really just a result of moving cross country and building her life away from home. As anyone practicing in this field knows, emotions are often more controlling than dollar amounts.

If the client remains intent on an unequal distribution, then an *in terrorem*, or no-contest clause, could be included in the will to detract (but not entirely avoid) a contest. This works only when the slighted child receives a nominal bequest, and if *in terrorem* clauses are enforceable in the relevant jurisdiction.

Tension between a spouse and children from a prior marriage

Married clients with children from a prior marriage should recognize that their current spouse and children may not be on the same page after the client's death, even if they seemingly get along well now. If a client leaves all of his or her property to the spouse, the children could feel slighted ("That's *our* inheritance!"). Or, if the client leaves his or her property to his or her own children, the spouse may be legally entitled to receive an elective share of the property (generally one-third of the estate). Sometimes the biggest fight does not involve dollar amounts at all, but instead revolves around the tangible property, such as who receives silverware that has been in the family for generations.

Perhaps the most common strategy practitioners employ in second (or third, fourth, etc.) marriage situations is to establish a qualified terminable interest property (QTIP)[3] trust for the benefit of the surviving spouse during his or her lifetime, with the children from the prior marriage as the residuary beneficiaries upon the surviving spouse's death. Although a QTIP trust is often thought of as a tax-savings vehicle because the property allocated to the trust qualifies for the unlimited marital deduction from estate taxes, its effectiveness is not limited to tax planning. By creating a trust, the client can exert some, or a significant, level of control over how the property is used for the surviving spouse during his or her lifetime and how the remainder is distributed upon his or her death. To some clients, having control "from the grave" is more important than tax savings.

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Creating a QTIP trust, however, is not always the only, or best, solution. Practitioners should also consider the following issues:

1. Is there a prenuptial or postnuptial agreement in place? If so, how does it address the

1 In re Niles Trust, 176 N.J. 282 (2003).
2 Haynes v. First National State Bank, 87 N.J. 163 (1981).
3 IRC Section 2056(b)(7).

distribution of each spouse's estate?

2. Are children from a prior marriage financially dependent on the client? If so, how does the client envision that dependence continuing after his or her death, and for how long?
3. What is the likelihood that the surviving spouse could deplete the QTIP trust property during his or her lifetime? Should other provisions be made for children to guarantee that they receive an inheritance?
4. What is the likelihood that the children could predecease the surviving spouse, and thus not receive the remainder of the QTIP trust? (This is more likely to be a concern if the surviving spouse and the children from a prior marriage are similar in age.)
5. Who will serve as trustee?

There is no right or wrong way to answer any of these questions, since they are highly dependent on the specifics of each client. There is also no guarantee that a fight will be avoided by implementing a plan that addresses issues of concern between a spouse and children. However, the estate planner must still be diligent in addressing these types of issues that are more likely to arise when advising clients who have been married multiple times.

Selection of fiduciaries

The choice of executor and trustee can create problems. Clients hope that the persons or entities chosen will administer the trust or estate without court involvement and without great expense or unnecessary delay. However, that intent may be thwarted if either:

1. A client names two (or more) of his or her children to serve as co-fiduciaries, but the children do not get along and cannot agree on the appropriate actions to take.
2. The fiduciary chosen by the client does not get along with a beneficiary.

In both instances, the disgruntled co-fiduciary or beneficiary might decide to commence an action in court against the fiduciary.

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The court will show great deference to the testator's selection of executors and trustees and remove a fiduciary only in limited, and extreme, circumstances, such as when the fiduciary has embezzled, wasted, or misapplied assets, or abused the trust and confidence reposed in him or her.[4] Mere hostility between the parties is not usually considered to be a ground for removal, unless it jeopardizes the trust or estate.[5]

Short of removing a fiduciary, a court could decide to deny commissions, surcharge the trustee, and/or direct the trustee to act in a specific manner. However, most, if not all, courts will protect fiduciaries who cause harm to estate or trust assets provided the fiduciary has acted prudently,[6] and courts will not substitute their judgment for that of a trustee who has broad discretion to make distributions from the trust. Thus, a beneficiary's complaint that the trustee improperly withheld a discretionary distribution or acted imprudently is unlikely to be successful.

Regardless of the outcome, the process is sure to be costly to the trust or estate. And ultimately, any result is likely to be unfavorable to the parties: if the court does not remove the trustee, it is unlikely that that trustee and the beneficiary, or the co-trustees, will develop a better relationship, and if the court does remove the trustee, there is no guarantee that a successor trustee will be any more satisfactory.

Choosing a fiduciary should always be given careful consideration. Many clients feel pressured to appoint a specific person or persons, or they may not want to have to choose between their son and their daughter for fear of upsetting the rejected child. However, practitioners must assist and guide clients in choosing a person who will perform his or her duties faithfully and as conflict-free as possible. Depending on the circumstances, it may be appropriate to name a close friend, bank, or trust company over an immediate family member.

Disposition of a family business

Many clients have amassed considerable wealth through family-owned businesses, and family mem-

4 N.J.S.A. 3B:14-21. See also Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 (App. Div. 1985) (the court's power to remove a fiduciary should be exercised "sparingly.")

5 See, e.g., Matter of Miller, N.Y.L.J., 8/7/1985, at 14, col. 2 (Sur. Ct. Richmond County); Matter of Edwards, 274 A.D. 844, 80 N.Y.S.2d 807 (4th Dept. 1948).

6 See, e.g., Stark v. U.S. Trust Co., 445 F. Supp. 670 (S.D.N.Y. 1978) (the federal court, applying New York law, refused to surcharge a fiduciary despite substantial losses because the fiduciary's decision to retain certain stocks had been made after careful and informed deliberation).

7 "Ex-boss claims brother used legendary La Grenouille as 'personal ATM,'" New York Post, 11/3/2018, available at www.nypost.com/2018/11/03/family-feud-consumes-the-legendary-la-grenouille/.

bers have different and varied involvement with and emotions towards the business. For other clients, the monetary value of the family business may not be great, but it may nevertheless constitute a considerable portion of their estates. Failing to carefully, and objectively, create a succession plan for the business is, more often than not, asking for an expensive and emotional fight that is sure to rip apart the family.

It is not unusual for the founder of the business to want the business to continue, while the next generation is not interested in taking over. Or perhaps one child is heavily involved in the business, but the other children are not and they would prefer that the business be sold and the cash proceeds distributed. Or perhaps one child does not approve of the other's running of the business. Without a plan and instructions, any of these scenarios could quickly escalate into a fight.

In fact, this is not uncommon and often these fights become public. That is exactly what has happened to the family who owns the famous New York City restaurant La Grenouille. Since the mother's death in 2014, the two brothers have fought over the control and ownership of the restaurant and the townhouse in which it is located. It appears that no succession planning for the business had been put into place. One brother has recently filed documents in court alleging that his brother, who is the executor, has improperly managed the estate assets.[7] It is too soon to know how this fight will play out, but regardless of the outcome one thing is certain: it will not be cheap.

Each family and each business is different, but the following issues should always be addressed when planning for the succession of a family business:

1. Will the business continue after the client's death, or be sold?
2. If any children (or other relatives) are involved in running the business, what interest/position/role will they have in the company after the client's death?
3. Will "no-show" positions held by family members continue?
4. Who will be in charge of the day-to-day operations?
5. How will the ownership interests be divided?
6. How will the rest of the client's property be divided?

The most successful business succession plan is created long before the client passes away. It is important that the plan is made known to the entire family so they will know how it will affect them individually and they can prepare accordingly.

Conclusion

The importance of careful planning cannot be overstated, and the cost will always be less than that of litigation after death. But even when the best laid plans cannot prevent a fight, a judge or other arbitrator can better implement the testator's wishes when those wishes are clearly indicated in a will and other estate planning documents. Even if a family fight does not end up in court, the dispute can still be costly and emotional. It is a safe bet that none of the family members will leave happy, which is not what anyone hopes will happen after their death. ■