The Wealth Counselor
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Trust & Estate Litigation: Its Common Causes

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Mixing family members and money doesn't always lead to love and happiness. While the work we do is often challenging and rewarding, protecting our clients, our colleagues and ourselves from unnecessary litigation remains a high priority. In many cases, litigation can be avoided with some basic precautionary measures.

This issue of *The Wealth Counselor* explores some of the most common reasons trusts and estates end up in litigation and some measures the planning team can take to help prevent it.

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At Price & Farrington, PLLC we work closely with our professional colleagues to help our clients plan, protect and pass their legacies to their loved ones through caring and confidential counseling.

When litigation ensues over an estate plan, it can take two forms: (1) it may be a challenge to an *estate planning document*, such as whether a will should be admitted to probate; or (2) it may also have to do with the *administration* of an estate, such as who will serve as Personal Representative (executor).

Challenges to the Plan

Challenges to estate planning documents frequently occur when children (and sometimes spouses) are not treated equally as beneficiaries, and especially if someone feels they were not treated "fairly", a very subjective determination. It is not necessary for someone to be disinherited for litigation to ensue.

Lack of Capacity

A common complaint is that a trustmaker or testator lacked the mental capacity to make a will or create a trust.

Definitions of legal capacity vary from state to state but, generally speaking, the testator needs to have the ability to understand at the time of making the will: (1) generally what assets he or she owns; (2) the dispositive provisions of the will; and (3) the testator's

relationship with those who will benefit from the will.

Every adult who has not been judicially determined to be incapacitated is *presumed to have capacity*. Therefore, the burden to prove incapacity is on the party contesting the will. Mere feebleness of body or mental weakness does not rebut the presumption of competence. Also, the moment at which *testamentary capacity* is to be tested is the moment the document is executed.

Because of these assumptions and requirements, it is difficult to void a will on the grounds of testamentary capacity. However, the prudent course is to take steps to protect yourself and your client as much as possible.

Planning Tip: Work closely with the estate planning attorney on your team. He or she will be familiar with the relevant state statutes and/or case law. If there is a concern, a medical doctor or psychology expert could evaluate the client just before signing his or her estate planning documents.

Fraud, Duress and Undue Influence

Fraud, duress and undue influence, commonly shortened to simply "undue influence," is statistically the most frequent basis for blocking probate of a will or enforcement of a trust. It can also result in *partially invalidating* a legal document if the remainder of the document is not invalid for other reasons. Simply stated, undue influence is *the substitution of another person's will for that of the testator or trustmaker.*

A frequent scenario in such cases is this: A family member or caretaker brings in an elderly client, stays with the client during the planning meeting, may even pay for the attorney's or other professional's services, and becomes the main beneficiary or heir. The beneficiary may or may not be related to the client.

When a court makes a determination of whether undue influence has been exercised, it considers a variety of factors, including whether the transaction took place at an appropriate time and in an appropriate setting, and whether the testator was pressured into acting quickly or discouraged from seeking advice from others. Courts also consider the relationship between the parties and the "fairness" of the transaction.

Planning Tip: If you suspect a client is being subjected to undue influence, meeting with the client alone may help to determine the client's capacity, their understanding of the events, and even their fear of some person in their life.

Revocation of a Will

A third common attack is that the document at issue has been revoked. A testator may completely revoke a will by intentionally destroying it. Complete or partial revocation of a will may also be accomplished by a writing executed under the same formalities of a will or by executing a new will.

There is a presumption that a will was revoked if it was in the possession of the testator and cannot be located upon his/her death. The burden is on the proponent of the will to establish otherwise.

Partial revocation of a will may be desirable, especially in cases of undue influence when only certain provisions of the will might be affected by the person(s) who stand to benefit from the undue influence, and where other provisions pertaining to innocent beneficiaries are unaffected.

Planning Tip: Many practitioners mistakenly assume that in the case of the invalidity of the last legal document, the prior legal document is automatically revived, but this may be rebutted by evidence to the contrary. If the later will shows a radical departure from the prior plan, the drafting attorney should explain in the document itself the reason for the departure. If a will is being revoked by a written instrument, the attorney should include an explanation of the reasons for the revocation and that the testator would prefer intestacy over the revival of the prior will.

Prenuptial and Postnuptial Agreements

These agreements, if valid, can affect the surviving spouse's *elective* share or *intestate* share of an estate, rights to *homestead*, exempt property, *family allowance* and preference on appointment as personal representative of an intestate estate. Prenuptial and postnuptial agreements are often challenged when a marriage ends by death or divorce.

Planning Tip: Creating a valid prenuptial or postnuptial agreement requires care. In some states, including Washington, fair disclosure of assets is required for both prenuptial and postnuptial agreements. It is more likely to be upheld if each party has retained its own lawyer to evaluate the agreement.

Matters Affecting Administration

Creditors' Claims

Litigated matters in an estate may relate to the claims of creditors. Some of the grounds include that the claim may be challenged as not valid or coming too late. So, too, an objection to a claim may be challenged as coming too late.

Removal of Personal Representative

There will be variations in state probate laws but, in general, a personal representative may be removed for various causes, which may include:

- physical or mental incapacity;
- failure to comply with a court order;
- failure to account for sale of real property or to produce the estate assets for

inspection;
- wasting or other maladministration of the estate;
- failure to give bond or security;
- conviction of a felony;
- conflicting or adverse interests against the estate;
- revocation of probate of a will in which he/she is named as personal representative;
- lack of present ability to qualify for appointment.

Simple disagreement between beneficiaries and the personal representative is not likely to support removal.

Planning Tip: Because a court is bound to follow the statutory preference of who should serve as personal representative (in the absence of that person's proven unfitness), the client must act to prevent that person from serving if the appointment is inappropriate..

Removal of Trustee

The general rule is that a court can remove a trustee only for incapacity or on a clear showing of abuse or wrongdoing in the actual administration of the trust. It is not enough to show that there is a potential for mismanagement or conflict of interest by the trustee. The party seeking removal must allege and prove actual conduct by the trustee amounting to a *breach of trust*. However, the court should allow for removal for unfitness when the likelihood of harm to the trust can be demonstrated, such as from habitual substance abuse or lack of ability.

Where there is hostility and disharmony between co-trustees that impedes administration of the trust and unnecessarily depletes the trust's assets, a court can remove the trustee determined to be the cause of the disharmony.

Planning Tip: Removal of a trustee may be authorized by the trust instrument itself. Clients should include such a removal clause if they want certain persons (possibly beneficiaries) to have the power of removal without the necessity of going to court. To avoid later concerns by third parties about the successor trustee's legitimacy or to avoid a challenge by the removed trustee, the removal should be accomplished in strict accordance with any procedural requirements contained in the trust instrument.

Breach of Fiduciary Duty

A trustee, whether a professional or a family member, has certain fiduciary responsibilities under the law, including:

- To follow the instructions in the trust instrument.
- To not comingle trust assets with his/her own. Bank accounts and investments must be kept separate.
- To not use trust assets for his/her own benefit.

- The trustee or executor must treat all beneficiaries the same. One beneficiary cannot be favored over another unless the will or trust states otherwise.
- To invest trust or estate assets in a prudent (conservative) manner, in a way that will result in reasonable growth with minimum risk.
- To keep accurate records, file tax returns, and report to the beneficiaries as the law or the trust requires.

Planning Tip: A family member who takes on the responsibility of being an executor or trustee must be educated about these fiduciary responsibilities, estate or trust administration and the terms of the will or trust itself. Rarely is a family member fully qualified to act as sole trustee without this foundation.

Avoiding Litigation

Exploring litigation risks and how to minimize them creates an excellent opportunity to assemble a qualified team of advisors who can ensure proper trust administration. However, even professionals are at risk when helping administer a trust for the beneficiaries. Here are some areas of concern:

Understanding the Terms of the Trust

The risk of litigation may be reduced by making sure all parties to the trust understand what the trust says: who will receive distributions from the trust, how much they will receive and when they will receive it; the fact that debts and taxes will need to be paid, how much they will be, and when they must be paid; who the trustee(s) and successor trustee(s) are, their responsibilities, and how they are to be compensated; what services from professionals will be required and how they will be compensated; and so on.

Administrative Issues of an Established Trust

At the incapacity or death of the grantor, there are many administrative tasks, issues and decisions to face. Frequently, the grantor's accounting records are not up to date, especially if the person was ill or losing mental capacity. Bills may be past due and tax returns may not have been filed. The trustee may need to be brought up to speed quickly and, if he or she is a family member, may not be emotionally ready to do so.

If the grantor has died, there may be several trusts that require administration, depending on the family and financial situation. For example, there may be: blended families; younger and older children; irrevocable trusts for tax planning; charitable planning; provisions for a surviving spouse; IRAs; 401(k)s; annuities; life insurance; etc. Also, a well-intentioned but uninformed or unsuitable trustee may make costly mistakes without careful oversight and instruction by a professional who understands the required accounting.

Distribution Standards and Decisions

When drafting a trust that will give the trustee discretion in providing for a beneficiary, the estate planning attorney will often use the accepted standards of *"health, education, maintenance and support."* Generally, this is interpreted to mean that a beneficiary can receive distributions that will maintain his or her accustomed standard of living. But does that mean providing unlimited funds to maintain that standard of living at the risk of depleting the trust assets? If the beneficiary is receiving income from other sources, should that income be taken into consideration? If the trust does not provide more explicit instructions, the trustee can be put in a difficult situation, pitted between the *current beneficiary* who is to receive the support and the *remainder beneficiaries* who are expecting to receive the trust assets after the supported beneficiary dies.

Balancing the Interests of Income Beneficiaries vs. Remainder Beneficiaries

Many ongoing trusts give one beneficiary (typically, a surviving spouse) the right to receive all of the income from the trust. After this beneficiary dies, another beneficiary (often an adult child or children) will be entitled to receive the trust principal. This can frequently lead to conflicts between the income beneficiary, who wants as much income as possible, and the remainder beneficiary, who wants the principal to grow as much as possible for later distribution. The trustee and the investment advisor will need to work together carefully to create as much balance as possible to provide for both.

Suitability of Investments

Each beneficiary of the trust may have different risk tolerance levels. Some may want to be more aggressive, others more cautious. Some may want the trust to invest in their business or buy them a house. The trustee, working with the investment advisor, is responsible for handling the trust assets in a prudent (conservative) manner for the benefit of all beneficiaries, not just one particular beneficiary.

Insurance Reviews

Regular reviews of the amount and type of life insurance policies are important. The amount of insurance may need to be adjusted up or down. If the individual is in good health, a different policy may be more suitable. Should irrevocable life insurance trusts own the policies? Is there a desire to establish trusts for grandchildren, charitable causes, or a special needs beneficiary? There are many valuable uses for life insurance in estate planning, and when done properly the proceeds will be free of estate taxes, income taxes, and probate fees.

Planning Tip: Professionals who work with trusts often forget that a trust instrument and its administration are foreign to the family members. The more assistance they receive in understanding the trust and its benefits, the more likely it is that you will help ease frustrations and avoid a court battle. Periodic updates and open communication to all involved parties, including other members of the advisory team, are essential.

Conclusion

Not all trust and estate litigation can be avoided or is, in fact, bad. There are times when it is necessary to protect the innocent or wronged. What you want to do is to protect yourself, your clients, and your colleagues from *unnecessary and avoidable* litigation, and there are steps you can take to do that. All members of the advisory team need to be familiar with the legal issues that may arise in probate and trust administration. You should not assume the family has any correct information about either of these subjects. Do what you do in a professional, ethical and conscientious manner. A good starting point is to communicate often and well to all involved.

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