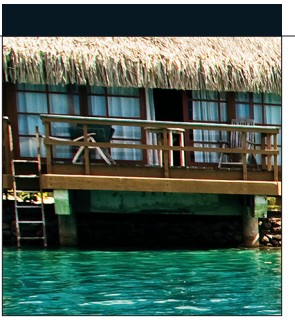

How to Navigate Trust, Estate, and Fiduciary Disputes

The personal nature of trust and estate scenarios can fuel the propensity for disputes, increasing the need to expert advice and interaction.

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Litigation involving estates, trusts, and other fiduciary disputes differs from most other forms of civil litigation. First and most important, this litigation is highly charged from an emotional standpoint. In almost all circumstances, trust and estate litigation involves families—along with all the history and emotional baggage that accompany many familial relationships.

Indeed, at least at the beginning, the majority of estate disputes are really not "about the money." Instead, these disputes often come from long-simmering family conflict, sometimes dating back decades. As a result, fiduciary litigation carries with it the emotional intensity of a divorce.

This type of litigation is also very complex. Disputes over the assets of a deceased or declining loved one operate on several different legal planes. The most obvious examples are will contests challenging the validity of a decedent's last will and testament based on undue influence, fraud, or lack of capacity. That is, however, only one example. These types of disputes very often involve equitable claims seeking to invalidate a trust, deed, or payable-on-death-account forms. In some circumstances, a petition for the appointment of a guardian or conservator may be necessary. Many of the legal theories necessary to address appropriately these types of disputes are esoteric and require creative legal thinking.

Similarly, trust and estate disputes sometimes depend on highly technical factual and legal issues.

For example, in a will contest claiming that the decedent lacked testamentary capacity, a deep understanding of the decedent's medical condition is absolutely necessary. Just getting such information will require navigating privacy rules, such as those under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Making sense of the health records once obtained is no easy task and may require the assistance of a medical expert. Likewise, trust disputes require not only an understanding of the instrument, but also an understanding of the factual basis for the trust's terms, such as asset protection or tax issues.

Trust, estate, and fiduciary disputes also involve very high stakes. Most obviously, in some instances, the amount of money at issue is very significant. The estate dispute involving the well-known Astor family in New York involved more than $100 million. The even more famous case involving the estate of J. Howard Marshall II and Anna Nicole Smith involved more than $500 million.

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Even outside the world of the very wealthy, however, the financial stakes tend be high to the participants. Today, for better or worse, most people pass away with enough assets for their family members and other loved ones to fight over. Thus, a case may involve a relatively small amount of money that may be material to a working-class family.

Fiduciary litigation is also somewhat unique in that the disputes often occur in "real time." In most civil litigation, the lawsuit follows a finite set of facts that occurred, and ended, sometime in the past. A personal injury case arising from an automobile accident necessarily follows the accident, and the operative facts are limited to those that occurred prior to the accident itself. In cases involving disputes or potential disputes related to the assets of a family member, however, sometimes, the facts that prove determinative do not occur until well after the existence of a dispute is clear.

For example, one sibling may undertake a years-long effort to isolate another sibling in the hopes of gaining a bigger share of their parents' assets. The sibling who faces potential disinheritance may see this occurring over a long period, and what he or she does in the interim is quite often determinative in whether the dispute is favorably resolved.

Despite the legal and factual complexity and the high emotional and financial stakes involved in estate litigation, these cases tend to follow very common and predictable fact patterns.

Local/remote sibling

This scenario is the most common. Assume a family of four with two siblings. Very often, one sibling stays close to home—the local sibling—and one moves far away—the remote sibling. The local sibling has more frequent contact with the parents for years. As time goes on and one parent dies, the local sibling frequently assumes more responsibility for taking care of the surviving parent. Ultimately, the local sibling might move in with the parent and take control of the parent's finances and health care. The remote sibling sees the parent much less often and bears much less responsibility for taking care of the parent. This situation very often leads to feelings of resentment and entitlement, causing disagreement over how the parent's assets should be divided. In some cases, the local sibling grows to resent that the remote sibling stands to inherit half of their parents' money.

The local sibling ultimately convinces the surviving parent that the remote sibling should get less, and very often this persuasion crosses the line into undue influence or fraud. Even if the parent agrees of his or her own volition that the local sibling should inherit more, this scenario has the makings of an intense estate dispute.

Late-in-life spouse

"Gold diggers," as people sometimes derisively refer to late-in-life spouses, are real. Certainly, most of these marriages are not based on money, but, some are. There are people in the world who target wealthy (or even modestly wealthy) people, often grieving from the loss of a longtime spouse, with the specific intent of getting their money. Setting aside the term "gold digger," simply combining finances later in life can create issues, particularly when each spouse has children from prior marriages.

The "trusted" caregiver

This situation is in some ways the opposite of the local/remote sibling scenario. Sometimes, a loved one has no family nearby; a spouse may have died and his or her children may have moved away long ago. In this situation, someone else steps in—a long-time accountant, professional caregiver (e.g., a nurse), or even a housekeeper. That person then assumes the role of the local sibling, and may work to isolate the loved one from family and friends, ultimately leading to convincing him or her to leave everything to the trusted caregiver.

Early preparation

The combination of all of these factors—emotional intensity; legal complexity; high financial and emotional stakes; and predictable, reoccurring fact patterns—puts a premium on early preparation and avoiding early mistakes in litigation. Steps taken prior to—or immediately at the outset of—these types of disputes greatly affect the odds of a successful outcome. Without early strategizing with a lawyer who has the right experience, a good result can be nearly impossible.

To maximize the odds of a successful resolution of a potential estate dispute, there are five important steps to go through as part of this process.

Step one—"see it coming." Many of the articles written about trust and estate disputes focus on solid estate planning as a tool for avoiding such disputes. That is absolutely correct. Good, comprehensive, and regularly updated estate plans are extremely important to minimizing the risk for these disputes. That is true of people even without what would commonly be considered significant assets.

The reality in today's world is that many people purchased homes decades ago that are now worth $500,000 to $750,000, and many people amass retirement savings in excess of seven figures, and pass away with hundreds of thousands of dollars in unspent retirement funds. Unfortunately, this is enough

money for people to fight over. Good estate planning will minimize—but cannot completely avoid—the potential for disputes among family members over a loved one's assets.

Very often, fiduciary disputes occur in the context of sound estate planning. In most instances, however, the disputes come to a head late in life, when additional planning may not be possible or advisable for a variety of reasons, including reasons of testamentary and contractual capacity as well as tax ramifications.

Moreover, even the best estate planning cannot eliminate the risk in the most common factual circumstances of these types of disputes. Take the local/remote sibling example. Notwithstanding the local sibling's belief that he or she is entitled to more than the remote sibling, the parent may hold firm and insist on sticking with the long-planned equal division of assets. Unable to convince the parent to change his or her estate planning, the local sibling may take matters into his or her own hands. The local sibling may have been made a signatory to a checking account for convenience purposes and may know enough about the parent's finances to orchestrate the liquidation of stocks and bonds, which the local sibling then moves to the jointly held checking account and spends. The bottom line is that despite sound planning and the failure of the local sibling to convince the surviving parent to disinherit the remote sibling, the local sibling may end up with everything anyhow.

Many of these situations are very common and devolve into estate disputes with great frequency. Recognizing these patterns and "seeing it coming" is an extremely important first step in addressing these types of disputes.

Step two—find the right lawyer. Clients frequently address step one sufficiently—they "see it coming." Indeed, sometimes, clients "see it coming" when it is not actually coming. They attribute nonexistent motives and acts to a relative based on the aforementioned emotional and familial history. In any event, if they do recognize the basis for a potential dispute, their first step is typically to reach out to an estate-planning lawyer.

Most people, even lawyers, tend to conflate the world of trust, estate, and fiduciary disputes into the world of drafting wills, trusts, and other documents. In addition, estate planning attorneys (like financial advisors) are often longtime trusted family advisors in other areas.

After step one, the time for planning is over. If one sibling has already started to influence and control a parent to dictate the disposition of assets, future planning is unlikely to work for a variety of reasons. An older parent may lack the capacity to execute new documents. The parent may be so isolated from others that, as a practical matter, it is impossible to get him or her to consider additional protections to an existing estate plans.

Sometimes, the money is already being spent, and no amount of planning will prevent that. In this last instance, the actual wrongdoing is continuing during the period when a client is attempting to determine the next steps.

Finding the right lawyer starts with finding a litigator. Because of the complexity of this area of the law, a general civil litigator is not sufficient. As discussed above, these cases are different from most types of civil litigation. In particular, the legal complexities require someone with familiarity with different procedural and substantive issues. For example, in the State of Georgia, the deadline to file an objection to a petition to probate a will can be as little as ten days after service, even if the objecting heir lives on the other side of the country. Such a short deadline can easily be missed, particularly by a lawyer without expertise in probate litigation.

Finding the right lawyer, however, is not the same as finding a hyperaggressive, flame-throwing lawyer. The individuals involved in these disputes are almost always in a heightened emotional state. As mentioned above, these disputes carry the emotional weight of a divorce. Indeed, sometimes it is even worse because, at the end of the divorce, the couple is no longer married, whereas a brother and sister will be a brother and sister forever. There is a great tendency for lawyers to play on this emotion, which can have the effect of throwing gas on the fire and unnecessarily escalating a dispute.

The incentives in this instance are misaligned as between attorney and client. The lawyer holding himself or herself out as the hyperaggressive flamethrower knows that he or she can play to the client's emotions and encourage the client to take drastic action, which greatly benefits the lawyer by generating a large dispute in which the lawyer stands to make a lot of money. It does not, however, serve the client's interests, because going straight to aggressive litigation tactics can deprive the client of a less costly and ultimately better solution.

Solution is the key. In these situations, the client needs someone who understands the law and understands the heightened emotions at play. The lawyer's focus should be on solving the problem for the client and resorting to intense litigation only in the absence of other solutions.

Step three—gathering information. There are two distinct paths to pursue in gathering information in anticipation of a trust or estate dispute.

First, there is the informal route. This might involve simply asking the relative at issue for estate documents or account statements. Likewise, in most jurisdictions, it is easy to find public property records that would indicate whether property is titled jointly with another person. In this regard, even open communication with the potential wrongdoing relative might provide additional useful information for analysis. Through informal information gathering, it is sometimes possible to get a relatively complete picture of a loved one's assets and estate plan.

In situations involving more complex estate plans or more aggressive potential adversaries, informal information gathering may not be enough. Particularly in instances where a sibling or other loved one is affirmatively attempting to unduly influence and control the asset disposition at issue, it may be necessary to resort to more formal ways of obtaining information.

In many instances, this requires some type of litigation. In some jurisdictions, the mere petition to probate the will of a decedent is sufficient to give a lawyer subpoena power that can be used to obtain bank records and other estate documents. Likewise, simply as a matter of routine, parents may execute powers of attorney contingent on incapacity naming multiple children as attorneys-in-fact. In these situations, the powers of attorney can be used to gain information about the parent or other loved one's plans.

The most important point to consider in step three—gathering information—is to make sure the advisor has a complete picture. Specifically, do not forget about non-probate assets. For most people, the majority of assets that will pass at death are non-probate assets. Most people save a portion of their savings in retirement savings. These accounts are frequently payable on death to designated beneficiaries as reflected on account forms with the financial institution that holds the accounts. Likewise, where there has been any decent estate planning, life insurance proceeds will be payable directly to beneficiaries as opposed to the decedent's estate. Often, real estate is held jointly with a right of survivorship.

In all of these instances, the asset passes immediately to the designated beneficiary as a matter of law upon the death of the decedent. No probate is necessary to pass title of these assets, and the contents of a will typically has no bearing on these non-probate assets. An extremely common mistake is for people contemplating a potential estate dispute to focus solely on the loved one's last will and testament, when the vast majority of their assets may be held in such a way as to make the will irrelevant.

Step four—try for resolution prior to litigation. Even when a client is lucky enough to find a good, experienced trust and estate litigator, this step is often overlooked. A good and appropriately aggressive lawyer will try to use the information gained throughout this process to look for opportunities for an early, non-adversarial (or less adversarial) resolution.

To be sure, seeking an early resolution does not, in any way, mean giving up or acquiescing to a potential wrongdoer. To the contrary, with comprehensive information gathering and sound strategic thinking, a good fiduciary litigator will hopefully have the opportunity to use leverage to bargain from a position of strength. Early planning and aggressive, strategic negotiation can achieve good results without the expense and significant emotional toll of engaging in ongoing estate litigation between family members.

In evaluating potential options for resolution, it is imperative to focus on economic reality. Although most estate disputes have at their genesis family dynamics or arguments often dating back to childhood, trust and estate litigation cannot address those fundamental issues of family discord. No matter what any lawyer says, the civil justice system simply does not deliver emotional vindication or really even "justice." The only thing that any type of litigation—including fiduciary litigation—can ever accomplish is economic reallocation. A good lawyer, even a litigator, will always keep the client's economic interests in focus and encourage an economically rational decision.

Many, many instances of blatant fraud or undue influence relating to estate planning simply do not involve enough money to engage in outright litigation. In these instances, following the first three steps of the process described in this article creates a much better opportunity for an early resolution that not only avoids the emotional toll of litigation, but also creates the opportunity for financially sensible resolution.

Step five—win. Litigation is sometimes the only choice. In those instances, taking an aggressive posture may very well be the best course of action.

For many clients, the nature of fiduciary litigation is unclear. In fact, it can take many different forms. Most clients are familiar with the traditional process of contesting the validity of a will offered for probate. The most common grounds for challenging the validity of a will are that the will was procured through undue influence or procured through fraud. Many states also recognize parallel tort claims to a traditional will contest,

such as the tortious interference with inheritance.

Will contests, however, are only one type of fiduciary litigation and, indeed, are probably becoming less important over time, due to the rise of transferring wealth through non-probate assets, such as payable-on-death accounts and trusts. Litigation involving these types of non-probate assets includes equitable claims to set aside beneficiary designations or breach of fiduciary duty claims against a trustee or holder of a power of attorney.

In each of these types of litigation, taking the initiative is important. Regardless of the underlying facts, there is an inherent benefit to being the plaintiff—the party who first appears to be the aggrieved party—as opposed to waiting in a responsive posture. Also, as a practical matter, stopping the flow of assets may be necessary. This might occur if a spouse is attempting to waste or remove assets from an incapacitated loved one, or where a jointly held checking account has been opened for convenience and is in the process of being drained.

Sometimes, merely informing a financial institution of a potential dispute will be sufficient for it to institute internal safeguards that will stop the outflow of money pending further inquiry or ultimate resolution through the court process. In other instances, it may be necessary to seek injunctive relief to prevent the dissipation of assets.

Less important from the overall perspective of winning a potential dispute, but more important to the perspective of eventually reaching resolution, is addressing the issue of personal property. Personal property of relatively small economic value, but significant emotional value, often hinders resolution of significant estate disputes. The number of high-dollar settlements that fall apart over the division of relatively worthless personal property is astonishing.

Figuring out a way to maintain the status quo with personal property pending the resolution of any dispute is important but difficult. In some instances, a court may enter injunctive relief to prevent the removal of personal property pending the end of a lawsuit. At a minimum, documenting and itemizing particular pieces of personal property may be enough to create a record that prevents the wasting or dissipating of those assets.

While an aggressive posture is important in these cases, one common strategy should be treated with care. As mentioned earlier, the key facts in these types of cases are occurring at the same time that strategy is being developed to ultimately resolve the issues. For example, in the instance of the local sibling and the remote sibling, the remote sibling may see the parent losing the capacity to manage his or her own affairs or may observe the local sibling simply wasting the parent's assets.

Lawyers without particular expertise in litigating these types of cases will advise the seeking of a guardian or conservator for the parent to assume control over the parent or the parent's assets. Courts treat this process very seriously and understandably so. The guardianship takes a person's ability to make decisions for himself or herself away and places it in the hands of a third party, sometimes a stranger. There is, again understandably so, an inherent bias against entering guardianships or conservatorships.

For this reason, the decision to pursue a guardianship or conservatorship should not be taken lightly. In the event that a guardianship or conservatorship is sought and denied, the opposing party will use that fact throughout any subsequent proceedings to argue that the issue of incapacity has already been resolved. This can lay waste to an otherwise well-conceived strategy to challenge a late-in-life change to an estate plan.

Conclusion

No one wants to be involved in this type of dispute. Sometimes, there is no other alternative. Decades of modest living, financial planning, and saving can be undone in a short period. The best estate planning can be undermined by an unscrupulous relative motivated by years of familial discord, real or imagined. Yet, when these situations happen, a chance for a good result remains. Getting there, however, requires vigilance and planning. Perhaps more in fiduciary litigation than in other types of civil litigation, thoughtful strategy early in the process greatly improves the odds of a favorable outcome. ■