

Estate & Trust Litigation Can Be Avoided: It's All in the Planning

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Your work is done. The estate documents and will are signed. You have completed your mission and accomplished the goals of the client, who is pleased.

Many years (hopefully) later, you receive the call about your client's passing. You pull out the documents and everything is proceeding according to plan *until* you hear from a family member, friend or business associate who is upset with the terms of the will. Disruptive, emotional, protracted, expensive and unpredictable litigation looms. You were so careful in preparing the documents. *Could this situation have been avoided?*

Unfortunately, not all litigation can be avoided. There are some relatively simple guidelines derived from actual litigation experience; however, that may reduce its likelihood – and some of its costs.

Avoid Amendments or Codi-

cils. Never make significant changes to a trust or will by amendment or codicil – and don't *ever* prepare a third (or higher numbered) amendment/codicil. Instead, restate trusts or rewrite wills in their entirety, especially when modifying documents prepared by others. The risk of undefined terms, or inconsistently used or conflicting antecedent references or substantive provisions is simply too great. And even if *you* understand the intended effect of your change, will the personal representative, trustee and/or beneficiaries be able to make sense of it?

Obtain Proper Title Information/Transfer Property into Trusts/Entities. Require clients to provide written evidence of how assets are titled. All too often, attorneys prepare instruments which competently dispose of *assets which the client does not own or hold in the manner initially described*. He may characterize his ownership of property "jointly" with a child when it is, in fact, titled exclusively in the

parent's name. The parent might claim exclusive ownership, only to find out that he did not own the entire property, due to an earlier gift or other transfer.

Frequently, the attorney drafts a trust or creates a partnership/LLC, and assists the client in executing the instruments, only to later discover the entity was never funded. In some instances, a decedent's property was never retitled in the revocable trust and the probate fees were not saved. In other cases, a residence was not transferred to the qualified personal residence trust, and the house was included in the decedent's probate and taxable estates. It's not uncommon that an insurance policy is not assigned to the irrevocable trust and the proceeds do not pass to the intended beneficiaries – and are subject to estate taxes.

Clients must provide copies of deeds (with recording information), accounts, investments and other

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title documents, or obtain authorization for the attorney to confirm title. The attorney should then assist the client, either in funding trusts/entities or providing documentary verification of proper funding.

Identify Disruptive Persons. Most litigation arises from intra-family or personal disputes and not from technical drafting errors. Try to identify the basis or likelihood of these disputes in the planning stages – Who is going to be upset or unhappy? Who is looking for vindication or revenge? – and then propose to the client means of reducing such disputes. It is proper planning, not intruding, to know the family cast of characters, their personalities, their emotional histories and their relationships.

It's smart to use both traditional and untraditional tools in addressing family dynamics. *In terrorem* clauses and "choice of law" provisions are also useful, particularly for trusts, and in some circumstances, estate instruments. Consider imposing attorneys' fees and other litigation costs on a challenger, in some cases regardless of outcome, as additional protection. Recent practice trends favor lifetime actions, even if revocable, in order to demonstrate intent and establish a history, thereby providing some protection against misinterpretation of portions of the estate plan.

State the Intent. Provisions stating intent may help guide interpretation of potential ambiguities. With the advent of multi-generational trusts and similar vehicles expected to "live" beyond changes in current law, the use of advisory or instructional information has become increasingly common. The greater use of trust protectors in U.S.

instruments is an outgrowth of the popularity of multi-generational trusts, family partnerships and foundations. A letter of instruction to the trustee is another popular – and potentially helpful – device.

Provide for Further Dispute Resolution. Even with the most careful lifetime planning, post-death disputes arise. The Uniform Trust Code, although not yet available in Maryland, suggests some useful dispute resolution mechanisms addressing administration problems through beneficiary consent and with court approval, *if consistent with the client's intent*. They can be incorporated into the documents, as permitted, so that trust instruments may be made to require the use of ADR or may empower a trust protector to resolve disputes definitively and without court involvement.

Trust and estate litigation can never be totally eliminated, but with foresight and fortitude, it can sometimes be avoided or resolved without court intervention, especially if the likely real-life "sources" of litigation are recognized and addressed. This is the consummate art of the counselor at law.

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