

The Law and You

An Outsider May Be Best for Your Estate

I am often involved in probate and trust litigation. Most litigation stems from disputes among family members.

In some families sibling rivalry has existed for years. Animosity between siblings may have manifested itself outwardly. Or, it may have been suppressed.

But when a parent becomes incapacitated or dies, that enmity can explode into full blown rivalry and hatred. When a parent is no longer the dominate figure in the family, one of the children often steps forward to take charge.

When more than one child attempts to assume the role of leader and if animosity exists between them, a fight usually erupts. It usually isn't physical. But it can become very nasty and expensive for everyone.

As parents, you may have thought about this possibility. And you may have prepared estate documents naming a particular child to be in charge of your estate, whether you have a simple Will or a Trust.

Unfortunately, most estate documents don't contemplate litigation. I have never seen a Will or Trust that expressly provides for the possibility that one of the children may initiate litigation.

There is often included in estate documents a provision that if a child challenges the Will or Trust, he or she will get nothing. That is, he or she will be disinherited.

But that kind of provision can't prevent a child from commencing litigation over the administration of the estate or trust. Such a provision is unenforceable.

Far too often I see substantial assets of trusts and estates depleted as a result of legal battles between children. Tens of thousands of dollars are wasted from estates or from one or more of a child's estate. Either way, it's

not what parents intended when they prepared estate documents.

You should also know that your trustee or personal representative will have, for all practical purposes, unfettered access to your estate to pay for his or her legal fees in defending against a rival sibling. That access emboldens your child to show other siblings just who is "boss."

So what can you do to deter a child from engaging in litigation or to minimize the damage such litigation may cause?

There is no absolute way. But you can take steps to reduce the emotional strain between siblings and likely bring a more speedy conclusion to the administration of your estate.

One method is to make specific provisions in your estate documents to bring in an "outsider" to take charge of the administration. This should be an independent person or entity who has no vested interest in your estate.

Someone who has nothing to gain from the estate is more likely to be fair and neutral. This is particularly true when it comes to distributing personal property of an estate.

Your trustee or personal representative is usually given power to distribute your personal things in his or her discretion. But it is rare for a person who is to receive your things to also be completely neutral. There is an inherent conflict of interest.

The child in charge may want a particular item that a sibling also wants. If animosity exists between those siblings, the one who is not in charge will undoubtedly distrust the one who is.

When that distrust explodes into litigation, the situation can get out of control and become very costly.

That is the time when a third party should

be appointed as trustee or personal representative of your estate. Administration of your estate can then proceed in a more straightforward and expeditious manner. This efficiency results from several factors.

First, distrust immediately disappears.

Second, the child who had been named or who was serving as your trustee or personal representative will have to pay out of his or her own funds any legal fees. That in itself is a powerful deterrent.

Third, an independent trustee or personal representative will be viewed by a court as being neutral with no particular bias toward any of the beneficiaries.

And fourth, minor disputes are more likely to be resolved through mediation when an outsider is in charge.

An outsider charges for services rendered. But that's a small price to avoid bitter fights between siblings that may destroy familial relationships and deplete the very estate you want to leave to your children.

In considering a Will or Trust and related documents, you should consult with an expert Elder Law Attorney. To locate an Elder Law Attorney, check your local Yellow Pages or the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at www.naela.com.