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Estate & Trust Disputes: Common Types and How to Avoid Them

By Richard M. Morgan & Loraine M. DiSalvo

Disputes that arise after a loved one dies can be incredibly destructive, to both assets and relationships. Such disputes can also cause the destruction of the loved one's intended asset distribution plan. Careful estate planning, carried out with the help of an experienced estate planning attorney, can often avoid estate and trust related disputes entirely or help minimize the damage caused by any disputes which do arise. In this June 2010 installment of our newsletter, we will review the most common types of estate or trust related disputes, and discuss how proper planning could have helped prevent each type of dispute.

A. Bad Fiduciary Selection: The Number One Cause of Estate and Trust Related Disputes. Most estate and trust related disputes are caused when a Power of Attorney agent, an Executor, or a Trustee fails to carry out his or her duties properly. This failure is referred to as a breach of fiduciary duty. Common breaches of fiduciary duty breaches include failing to provide required accountings and tax information to beneficiaries, improperly investing estate or trust assets, improperly using estate or trust assets for the fiduciary's personal benefit, failing to file returns and pay taxes, improperly dividing assets among beneficiaries, making improper distributions, and failing to make proper distributions. A breach of fiduciary duty can be the result of the fiduciary's deliberate action, or it can be result of a fiduciary who has unintentionally acted inappropriately or failed to act as a result of the fiduciary's own incompetence, ignorance, distraction, or stress.

Careful fiduciary selection during the estate planning process can often help avoid or minimize the risk that a selected fiduciary will breach his or her duty, by focusing a client's attention on selecting only those nominees who are most likely to be diligent, honest, and prudent in acting as fiduciaries. Clients should also be advised about issues which can arise when family members are put into fiduciary roles which allow them to control or affect the interests of other family members. Estate planning documents should clearly spell out beneficiaries' rights and the rights and responsibilities of the fiduciaries, to help ensure that both beneficiaries and fiduciaries are clear about what and how frequently information should be provided, what investments and other transactions may be made, and what rights beneficiaries have with regard to distributions from the estate or trust. Finally, estate planning documents should provide ways for beneficiaries to remove a bad fiduciary without having to bring a lawsuit.

B. Will and Trust Contests. Will and trust contests usually involve at least one of the following questions: (i) whether a Will or trust is legally valid (which can mean either that the document was not signed correctly or that the person signing did not have the required minimum knowledge and awareness to legally create the Will or trust), (ii) whether the Will or trust should be respected as a true expression of the intent of its creator, or (iii) what the correct interpretation of a Will or trust provision should be. This type of dispute can involve allegations that a Will was not properly signed. This type of dispute can also involve allegations that the provisions of the Will or

trust do not truly reflect the desires of the person who signed it, but that the document's provisions were really the result of a third party's undue influence over the document's creator.

A Will or trust contest may be the result of legitimate concern by family members. However, a Will or trust contest may also be an attempt by a disgruntled beneficiary or would-be beneficiary to improve the benefit he or she receives under the document. Either way, these disputes often involve allegations that one or more of the following factors is present:

1. The Will or trust document is improperly executed. This type of allegation is particularly common where a Will is involved, since Wills must be signed in a particular manner and under very particular circumstances to be legally valid. Under Georgia law, the person who is signing the Will as his or her own (the "testator") must make clear to at least two disinterested witnesses that he or she understands that this document she is about to sign is his or her Will, and that he or she intends to sign the document for that purpose. The Will must be signed by the testator and the witnesses at the end, and the testator and the witnesses must all see each other actually sign the Will. If all of the Will signing requirements are not properly met, the Will is not valid. Invalid execution is a less common argument where a standalone trust (one which is not created under the terms of a Will, but under a separate document; for example, a revocable living trust) is involved, since the signing requirements for a trust are pretty much the same as those for any other contract.

2. The Will or trust was created by someone who did not have the required legal capacity to do so. Questions regarding whether a Will or trust creator had the legal capacity required to create the document are often raised in an attempt to show that the document is invalid. This is because, if a person does not have the required level of capacity to create a Will or trust, and he or she attempts to do so anyhow, the resulting document is not legally recognized as the person's Will or a valid trust. "Capacity," in this context, can be thought of as a combination of knowledge and awareness. The required level of capacity to create a valid Will is lower than for most other legal documents, including standalone trusts. To have the capacity to create a valid Will, a person needs to understand who is in his or her family, what assets he or she owns, and how he or she wants those assets to pass to others at his or her death. To have the capacity to create a valid standalone trust, the person must have the capacity to enter into a valid contract. This generally means that he or she must generally understand what the trust says and intend, by signing it, to actually create the trust.

3. Someone exerted influence over the Will or trust creator, and that influence led the Will or trust creator to do something he or she did not really want to do, or would not otherwise have done. Many Will or trust contests involve allegations that a person who was close to a Will or trust creator exercised an undue or inappropriate level of influence over the creator's actions, and that the undue influence then resulted in the creator making a Will or trust which reflected the other person's desires regarding the creator's assets, rather than the creator's own desires. The person alleged to have exercised the undue influence may be a family member, friend,

professional advisor, hired caregiver, or other service provider. The alleged influencer has generally developed or maintained a close relationship with the document creator. Often, there are allegations that this person prevented the document creator from seeing or communicating with family members or others who would normally be in contact with the person, isolating the creator or surrounding them only with new contacts selected by the influencer. In many cases, the influencer is also said to have been taking advantage of the document creator, by inducing him or her to make gifts or otherwise provide economic benefits to the influencer, or by having the document creator name the influencer as his or her attorney-in-fact under a financial power of attorney or as a joint owner on financial accounts, real estate, and other assets.

It is important to note that, if you suspect that a loved one is being taken advantage of, you should investigate the situation and take action as soon as possible. Unfortunately, in cases where financial abuse or other inappropriate influence is actually occurring, it is not always possible to catch or stop the bad actor. Such cases can often result in emotional, financial, and even physical devastation for the influenced party as well as his or her family.

How can an estate planning attorney help in these situations? An experienced estate planning attorney who has worked with a client over a long period may be the first person who becomes aware that someone has asked the client to change his or her power of attorney, Will, or trust. That attorney will also be in a good position to tell whether the requested change appears to be consistent with the client's past history, or whether something seems off. The attorney may also be able to communicate his or her concern to the client, and to refuse to help the client make changes the attorney believes do not truly reflect the client's intent, or that the client may not have the legal capacity to make.

If the attorney believes that the client is acting on his or her own desires and has the capacity to sign the requested documents, a careful estate planning attorney will walk the client through considering the overall plan, and try to ensure that the client's actual intent is clearly expressed in the documents. Experienced estate planning attorneys should know when to suggest that a client use documents in addition to a Will, such as a revocable living trust, to help reduce the ability of a contesting party to create havoc with the estate administration process. Good estate planning attorneys also know what steps are required to ensure that Wills and trusts are signed correctly, and they can help ensure that a client's capacity to sign is verified and well documented in cases where there may be some question. An experienced estate planning attorney will also know what provisions to include in a document to help minimize the risk that anyone will attempt to contest. The attorney should also help you ensure that you know how to own your assets and set up your beneficiary designations, so that they are consistent with your desired estate plan.

It is especially critical that you obtain the advice and help of an experienced estate planning attorney in any situation where you may have one or more family members who are not happy with your desired asset distribution plan, such as where you want to favor some children over others, where you want a third party trustee to manage a beneficiary's inheritance for

him or her because you believe the beneficiary may have problems acting in his or her own best interests (substance abuse, perhaps), where you want to benefit friends, unmarried domestic partners, or other non-heirs instead of or in addition to your family, or where your spouse or partner may not be the parent of some or all of your children.

C. Disputes Over Benefits Payable From a "Pot" Trust. Assets intended to be held in trust for the benefit of a group of different beneficiaries can either be divided into separate trusts, one for each of the people who are intended to be the primary beneficiaries of those assets, or held for the benefit of all of those people. This second type of trust structure is often referred to as a "pot" trust, because multiple beneficiaries are all being served from the same pot of assets. A pot trust can be useful over a fairly limited period, such as when some or all of the primary beneficiaries are dependent children and the goal is to allow educational and other expenses to be borne by all of the beneficiaries until all of them reach a certain stage of adulthood, rather than each beneficiary having to fully bear all of his or her own expenses. However, at Morgan & DiSalvo, we generally recommend, where the intent is for a trust to continue for many decades, that the trust assets be divided at some point, so that separate trusts can be created for each of the primary intended beneficiaries. We make this recommendation because, in our experience, pot trusts often serve to generate negative feelings among the multiple beneficiaries, and they can frequently lead to disputes or outright litigation. The risk is that one or more of the main beneficiaries will feel that they are not being treated fairly, and that other beneficiaries are being treated more favorably than is warranted. In addition, secondary beneficiaries (the ones who may not be intended to receive benefits from the trust while the primary beneficiaries are living, but who may receive benefits from the trust after the primary beneficiaries' deaths) may feel that their interests are not being properly represented, because too many distributions are being made for the primary beneficiaries, because trust assets are being invested for short-term results rather than to preserve or increase the value of the assets over the long term, or for other reasons. An experienced estate planning attorney can advise a client of the potential benefits and drawbacks of pot trusts, and help the client consider when the benefits outweigh the drawbacks and when separate trusts are the better way to go. Considering these factors in the planning process can help reduce the risk that trust beneficiaries will be unhappy and perceive unfair treatment.

D. Disputes Over a Closely Held Business or Other Special Asset(s). Where you are involved in a closely held business, the need for business succession planning is critical. Who will own, who will control, and who will benefit from your interest in the company after you are gone? Are sufficient assets available either in or outside the business to fund all of the business and desirable family support needs? Failing to plan for these issues can result in disputes in the event of your death (or even your long-term disability during life). A failure to plan for these issues can also lead to a lack of appropriate leadership for the business or a lack of liquidity available to it. If a dispute, a lack of appropriate leadership, or a lack of liquid assets arises, your business could end up destroyed. Your family, your fellow business owners, and their families could all be devastated as well. An experienced estate planning attorney, especially one who has worked with many closely

held business owners and focuses on business succession planning, can help you, your family, and your business partners think through the issues and develop appropriate plans to protect the business, its owners, their families, and its unrelated employees. These plans can then help head off potential disputes and disasters.

E. Year's Support Claims. In most states, a surviving spouse has a right to elect to take a set share of a deceased person's estate, even if the person's estate plan provided for a different benefit for the spouse. Georgia is different and unique in that a surviving spouse does not receive the right to a set share of a deceased person's estate. However, Georgia does give a surviving spouse, and any surviving minor children, the right to seek an award of Year's Support. In general, the year's support award is intended to provide the spouse and minor children with assets from the deceased person's estate. The property actually distributed to the spouse or children as part of a year's support award is supposed to the amount needed to actually support them for a year after the decedent's death. A spouse or child who wants to request a year's support award must file a petition with the probate court, setting out the assets they are requesting. Generally, if no interested party objects to the petition, the request will be granted. If any interested party objects to the petition (an adult child or a creditor of the estate, for example), then one or more hearings may be required. If the parties do not come to an agreement, the court will make the determination of what, if anything, is actually awarded. Recent Georgia cases have indicated that other resources and income available to the person seeking the award should also be considered by the court. In a case where the estate has a large number of unsecured creditors, a year's support claim may be able to help preserve the estate's assets for the benefit of the spouse or minor children, since a year's support award takes priority over most unsecured creditor claims. However, in other cases, a year's support claim may be made by a spouse who is not happy with the deceased person's intended estate plan (this type of claim could also be made on behalf of a minor child, by a former spouse who is the child's parent). In any situation where you do not intend to leave all of your assets outright to a spouse, or where you fear the parent of a minor child of yours may seek to interfere with your estate plan (to get control over assets which would pass to the child or just to have more assets pass to the child), you should consult an experienced estate planning attorney. It is possible, with proper planning, to minimize or avoid a potential year's support claim against your estate. Your attorney can discuss the available options, which can include a fully funded revocable living trust, the use of a prenuptial or postnuptial agreement, or other techniques.

We always want to help our clients avoid problems, especially those which may not arise until death or disability has happened and which can result in the destruction of a family, a business, or an intended estate distribution plan. If you recognize your own situation or that of someone you know in this article, please feel free reach out to us at (678) 720-0750.