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The Not-So-Obvious Reasons that Estate, Trust, Conservatorship, and Guardianship Related Disputes Are Going to Explode in Number in the Future

By Richard M. Morgan & Loraine M. DiSalvo

Common sense tells us that, as the number of older people in our country increases, the need for estate planning, trust planning, conservatorships, and guardianships will increase. Common sense also tells us that a increase in these matters will tend to result in an increase in the number of disputes related to estates, trusts, conservatorships, and guardianships. However, there are a lot of other factors which will lead to an increase in these kinds of disputes in the future, many of which are not as obvious. In this issue of *The Passionate Estate Planner*, we take a look at some of these not-so-obvious factors.

1. Bad Fiduciary Selections. Many, many disputes related to estates, trusts, guardianships, and conservatorships arise because the fiduciary selected to serve in a given role turns out to have been a bad choice. Fiduciary roles include (A) an attorney-in-fact (also sometimes called a agent) under a Power of Attorney; (B) a health care agent under an Advance Directive for Health Care (or other, similar document that appoints someone to make health care related decisions for another person); (C) an executor appointed under a Will to administer a probate estate; (D) an administrator, who is appointed by the court to administer the estate where the decedent did not have a valid Will; (E) a trustee appointed to administer a trust; (F) a guardian, who is appointed by a court to make health care and other decisions relating to the physical care and custody of a minor child or an incapacitated adult; and (G) a conservator, who is appointed by a court to manage the assets that belong to a minor child or an incapacitated adult. The first step in making a good fiduciary choice is planning: for example, the need for an administrator, guardian or conservator in many cases can be avoided with good estate planning, including a Will or trust with appropriate provisions, a Power of Attorney, and an Advance Directive for Health Care. The next step in choosing a fiduciary is carefully considering the available options and striving to choose the right individual(s), if such person(s) exist, or choosing a good corporate fiduciary (usually either an independent trust company or a trust department affiliated with a bank or brokerage house), if there aren't enough suitable and capable individuals available. **This is a critical issue since fiduciaries are responsible for taking care of either you, your assets, or your loved ones.** Choosing the wrong fiduciary can result in real horror stories: the waste, misuse, or outright theft of assets and the neglect or even abuse of you or the people you love. We've covered the topic of how to select a good fiduciary in the past, so we won't go into full details here. For more information, please see some of our prior newsletters, including: Fiduciary Selection – A Critical Part of Any Well-Prepared Estate Plan; Corporate Fiduciaries for Estate & Trusts: Reliability, Prudence, Reasonableness, Protection and Peace of Mind and Tips on Choosing your Estate Planning Team.

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2. Insufficient Planning. Insufficient planning includes both failing to do any estate planning at all or doing it poorly. Much poorly done estate planning results from attempts at self-help, such as trying to use asset titles and beneficiary designations to direct the disposition of all assets at one's death or trying to prepare a Will or trust for yourself using commercially available legal document software. Many laypeople believe that preparing a Will, trust, power of attorney, or other legal document is a simple task that can be adequately handled by technology. This belief leads to the view that "estate planning" with the help of an experienced professional advisor is not a necessary process, but that Wills and other legal documents should be sold as commodities and made available for people to fill out on their own. While fill-in-the-blank legal forms, including Wills, deeds, and other documents, have been available for decades, often at office supply stores, there are also an increasing number of software products out there aimed at people who want to do their estate planning on their own. LegalZoom and WillMaker are only two of the most well-known providers. The pre-printed forms have been causing trouble for years, because in many, many cases they aren't filled out or executed correctly. The documents produced by commercially available do-it-yourself estate planning software are cheap and quick, and many people who would be unlikely to trust a pre-printed form may well be more likely to believe that a software product, with a question-and-answer template and likely at least some kind of additional provided information, will produce a better result. In some cases, if the software is well-designed, if the user is very careful when answering the questions and filling out the documents, and if the final documents are correctly executed (which can be a big hurdle in its own right), a software-produced, do-it-yourself document can be better than nothing at all. However, in a lot of cases, there will be errors or omissions in the document that can mean that having the document may actually be worse than having nothing at all. In addition, when someone attempts to do his or her own estate planning without the help of an experienced professional advisor, that person often falls victim to many of the commonly held misunderstandings that exist in the estate planning area, or fails to recognize, understand, and properly address issues that need to be addressed. An increase in do-it-yourself estate planning will very likely result in an increase in disputes and other problems that require court action to resolve. The attempt to save time and money up front will, in many, many cases, result in the waste of much more time and money in the long run. For a further discussion of the pitfalls of the do-it-yourself approach, and for an example of a free Will preparation service on the internet, see our prior newsletters "Do-It-Yourself Wills" & Other Estate Planning – if You Really Care, Beware! and Ashton Kutcher's Latest Production, Wills.com, Not Ready for Prime Time.

3. Attorneys Using Legal Forms Software Services (A Look Behind The Curtain, And A Very Big Deal!). The increase in the number of software products being marketed to laypeople, the availability of the cheap documents or sometimes even free documents produced by these products, and the related increase in the number of people who believe that estate planning can be adequately handled by a simple, mechanical question-and-answer process, has increased the pressure on attorneys to provide estate planning documents and services as quickly and cheaply as possible. This

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pressure often means that attorneys are unable to make a profit while still spending the time necessary to seriously think about and consider whether a particular plan or particular documents are suitable for a given client's situation, and to ensure that the documents and the plan allow enough flexibility to let them adapt to changing circumstances. In response to the demand for cheap, fast, estate planning documents, many attorneys have turned to commercial software products designed to let them produce documents quickly and cheaply, without a lot of time and thought being put into the process by the attorney. The availability of these products has also led to a significant increase in the number of attorneys who don't focus on estate planning, but who decide that it can be an easy add-on to their existing practices. Many of the attorneys who use these products did little or no estate planning before getting their practice software programs, and so they are unaware of many of the issues and pitfalls that can exist. Even among attorneys who practiced estate planning law for many years before getting their software programs, it's common for them to stop actively thinking much about estate planning issues, and to rely increasingly on the producers of the software packages to ensure that the documents produced work and address issues adequately. This can result in attorneys who overlook problems that the software contains, or who make poorly-handled changes to documents and actually create problems. It also often results in attorneys who rely on paralegals to prepare documents to which the attorney then gives only a cursory review. As with the increased reliance on do-it-yourself estate planning document creation software by laypeople, an increased reliance by attorneys on software to prepare documents and develop plans is likely to result in increased number of documents that contain significant errors and other problems. In turn, the increased number of problematic documents will lead to an increased number of lawsuits. Our firm has reviewed many of these document preparation software services in the nearly 20 years since they began to appear on the market. However, we never began to use them because we never found any that we thought could actually help us easily produce the individualized documents our clients need and deserve, and we continue to use our own form templates. These form templates are subjected to a continual process of consideration, reconsideration, development, and improvement. Our attorneys are constantly striving to learn and keep up with new developments in the estate planning world so that we can ensure that our documents will work as well as possible, and we want them to be as flexible as possible and to fit each client's actual situation and desires as closely as possible.

Let us give you an example of a matter that we recently came across. We have a new client that just moved to Georgia from another state, and he came to us to review his estate plan and determine what he needed to do to ensure his plan worked properly in Georgia. This married client happened to be worth over $20 million so estate tax planning was definitely an issue. The plan included a trust to be created for the benefit of the client's spouse if she survived him, with another trust to be created for the benefit of his children. In order to reduce the impact of estate taxes at the client's death, the trust for the spouse was intended to qualify for the marital deduction against estate taxes. However, upon reviewing the documents, we found out that the trust that would be created for the

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spouse did not qualify for the marital deduction, because it did not require that all of the trust's net income be distributed outright to the spouse at least once a year. Instead, it allowed the Trustee to decide whether or not to distribute income to the spouse. This error, which reflects the failure to comply with one of the most basic rules in the estate tax system, would have meant that, at the client's death, all of the assets passing under his primary estate planning document would have been subject to estate taxes, with no marital deduction available. The client's documents also included an irrevocable life insurance trust ("ILIT") that was created by the client's spouse to hold life insurance on her life. The intent behind creating this ILIT and having it own life insurance on the client's spouse was to (1) provide a source of liquid funds at the client's spouse's death to help pay for any expenses, debts, and taxes, as well as providing for the family, and (2) enable these proceeds to be received without them being subject to estate tax at the death of either the client or his spouse. However, the ILIT gave the spouse (the creator of the trust), the power to change the Trustee to anyone she wanted at any time for any reason, with no restrictions preventing her from even appointing herself as the Trustee. The fact that the spouse holds this unlimited power to change the Trustee of the ILIT means that the IRS will treat the ILIT as if the spouse was the Trustee in determining whether the ILIT's assets should be includible in her estate for estate tax purposes. As a result of this treatment, the proceeds of the life insurance held by the ILIT, along with any other assets it holds at the spouse's death, will then be included in the spouse's estate for estate tax purposes. In other words, letting the spouse/trust creator hold this power to change the Trustee would defeat the entire purpose of having the ILIT own the insurance in the first place, and would cause the loss of the estate tax benefits the ILIT was designed to create. Again, this is a technical error in a fairly basic area. However, these apparently small, mostly technical, errors can have huge implications. In this particular case, these errors, if not corrected, may mean over $4 million in additional estate taxes will be due at the client's death, even if his spouse survives him, because the trust for her benefit does not qualify for the marital deduction. In addition, these taxes will need to be paid in full, in cash, within 9 months after his death. The need to pay these taxes this quickly could produce a significant liquidity problem and possibly force the immediate sale of illiquid assets at a loss. Finally, at the spouse's death, the inclusion of the life insurance proceeds in her estate may generate additional estate taxes, when those proceeds were expected to be excluded from the estate tax calculation. Sadly, these were not the only problems we noted with these documents, they were just the most potentially damaging ones we found. Had the client or his spouse died without these errors being caught, the intended beneficiaries would likely have suffered major economic damage and litigation would likely have resulted.

This example led us write to this Newsletter about this serious and growing problem. The attorney who prepared the client's documents was a highly regarded estate planning attorney who had a Master of Laws (LL.M.) in Estate Planning degree from a well-known and well-respected law school. Unfortunately, it appears that he acquired some form software, felt that he could rely on the forms and their developers for the necessary intellectual heavy lifting, and stopped doing his own deep

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thinking and analysis. He may also have stopped really reading the documents his firm was producing, relying on staff to put the right names in the right places and not analyzing each individual document to ensure that it would work properly. Richard Morgan mentioned this situation to a well known local estate and trust litigation attorney, and that attorney said that he'd recently filed a major lawsuit against another attorney for the same kind of form-based errors.

This is not to say that attorneys should stop using form software systems. There are decent products out there, and if the attorney using such a product is careful to ensure that he or she stays aware of important issues and developments and engages in a continuing process of learning and developing his or her knowledge and skills, these systems can certainly provide some increased efficiency without creating problems. However, attorneys who use these systems must be very careful not to rely on the developers of the software to keep up with the ever changing estate and tax planning world, and not to stop really thinking about the issues and the rules for themselves. They also must ensure that they very carefully review all documents prepared before anything is executed, and that they know exactly how to make changes to the documents when needed and how to make sure those changes are appropriate. No matter how much laypeople may believe that estate planning should be a commodity, it can never be a commodity when it is done properly, and attorneys who practice estate planning with the help of forms software systems need to ensure that they never let the assistance provided by the systems become a crutch, or a set of blinders.

We hope that this Newsletter will not offend anyone in the estate planning community. We would like it to serve as a call to action for those who are using forms software systems to remember how important it is to consider a client's individual situation, to ensure that the estate planning documents prepared are appropriate, and to really read and review the documents before they are signed to be sure that they work properly.

For our non-attorney readers, we hope that this newsletter helps you realize that estate planning is not work that can or should be done on a mechanical basis without professional advice. There are just too many issues out there that should be considered and addressed, and too much misinformation, for the do-it-yourself approach to work well. Wills and other legal documents are not commodities and should not be viewed as such. Instead, estate planning, which includes, but is not limited to, preparing Wills and other legal documents, should be a process. It can and should mean that someone really considers your situation, your wishes, and your needs, and educates you about the different ways available to address all of those. It can and should take some time. Estate planning directly affects the well-being of you and your loved ones. It shouldn't be shortchanged.

If you have concerns about your existing estate planning documents, or if you haven't done any estate planning, we at Morgan & DiSalvo are happy to help. Please contact our administrative assistant at admin@morgandisalvo.com in order to schedule your no-charge, no-obligation estate planning consultation.