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Take Steps to Prevent Destructive Post-Death Disputes Over Your Estate Plan

By Richard M. Morgan & Loraine M. DiSalvo

A large part of the estate planning process is determining how you want assets distributed at your death and selecting the fiduciary who will be in charge of carrying out your intended distributions. When considering these issues, it is also critical to consider whether your desired asset distribution plan or fiduciary choice is likely to upset someone, because if an heir or beneficiary gets upset, the risk of a post-death dispute increases. The more likely it is that someone will be upset by your planning choices, the more important it is to decide what steps you will take to reduce the possibility of disputes arising after your death. Post-death disputes, especially those which result in full-blown litigation, can cost tremendous amounts of time and money. They can also destroy relationships and create permanent bitterness and resentment. Many situations can increase the risk of a post-death dispute. Just to name a few examples, these situations include: (1) those in which family members with the same status will not be treated the same, as when one child receives a larger share than another child; (2) those where a family member who might reasonably expect to benefit will receive nothing, as when a child is disinherited completely; (3) those where a beneficiary may not like the way in which his benefits will be received, as when assets will pass to a tightly-controlled trust rather than outright to the beneficiary; (4) those which involve a blended family, where there are stepparents and stepchildren; and (5) those in which one or more family members are generally inclined to complain and create problems.

Clients and their advisors should not shy away from plans which may result in a heightened risk of a dispute. There are often good and valid reasons that assets should not pass to a particular beneficiary outright, such as drug or alcohol abuse, spendthrift habits, disabling conditions which might create a need for needs-tested government benefits, immaturity, or other personality factors which weaken the beneficiary's ability to properly handle finances. Similarly, a beneficiary who has limits on his ability to be self-supporting may have a real need to receive a larger share of inherited assets than a beneficiary who is well-to-do and successful, and the client may wish to provide more to the one with the greater needs. Finally, a client may simply not wish to provide benefits to a person who has mistreated the client or from whom the client has long been estranged. If the client really prefers a plan which creates a heightened risk of post-death disputes over one which is less likely to result in such disputes, then we believe the client's plan should reflect the client's true desires and intent. However, we want those clients to know what options they have for helping avoid or reduce the risk of post-death disputes, so that they can use those options to the furthest extent they wish. Some clients may decide not to take significant steps to avoid a post-death dispute; others will want to button up their plans as tightly as possible. It is the job of the estate planning attorney to help the client decide what feels right for him.

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Here are the steps that should be considered where an increased risk of post-death disputes exists:

I. Use An Experienced Estate Planning Attorney, Try to Document That the Client Had Capacity and Was Not Under Any Undue Influence, and Carefully Choose the Documents Used to Carry Out the Plan.

1. **Make Sure Documents are Clear & Unambiguous.** The drafting attorney and the client should both strive to ensure that the client's documents are as clear and unambiguous as possible. Ambiguous language in a Will or trust can cause a dispute that ends up in court, especially when the ambiguous wording determines who receives how much and when benefits are received.

2. **The Attorney Should Carefully Determine the Client's Competency and Document the Steps Taken in Doing So**. Many estate and trust disputes arise when a deceased person made changes to her estate plan while she was very old or very ill, whether the changes were changes to a Will or trust, to beneficiary designations, or to asset ownership. This situation increases the risk that a person who wishes to dispute the result of the changes will claim that the decedent was either incompetent or under undue influence. When working with a client whose age or health may make these challenges more likely, the attorney must very carefully determine whether the client is competent, and that undue influence from others is not a factor. Some of the indicators of competency include whether the client can describe, on her own, what assets she owns and the persons in her family. Other indications that a client may or may not be competent or whether undue influence may be present include whether the desired plan appears objectively reasonable from the client's perspective, whether the client can articulate the reasons behind her planning decisions, and whether the client appears to be making statements based on her own strong beliefs or looking to others for direction. The attorney should take appropriate steps to communicate with the client outside of the presence of any others who may be influencing them or helping them mask a lack of understanding or memory. Our firm was recently involved in a death-bed Will situation, where the client, who was in hospice, decided to make significant changes to her previous Will. We took every step we could to ensure that we determined to our satisfaction whether the client was competent and whether she, rather than anyone else, was the one making her estate planning decisions. These steps included extensive discussion with the client of the desired plan and the changes being made to the previous plan, along with an extensive review of the prepared Will by the client, in the presence of the witnesses to the Will. Both the planning and review discussions took place with the client, away from others who might be influencing her, and the client appeared to clearly understand what she was doing, what she owned, and what she wanted to see happen under her Will. The Will was prepared by us and properly signed by the client. We included contemporaneous documentation of the various meetings and discussions in our files. An unhappy family member hired legal counsel after our client's death, apparently intending to challenge the Will. However, after the family member's attorney reviewed the facts, he appeared to realize that his client's chances of a successful

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challenge were not good, and the possible dispute was resolved fairly quickly, without full-blown litigation. Where time allows, the very elderly or very ill client should also consider getting an examination by one or more appropriate medical personnel at or very near the time the documents are to be signed, and having the examiners provide written opinions as to the client's competency. One thing we don't normally recommend is video recording the Will signing ceremony. While some attorneys favor video recordings, our fear is that a video recording may create more doubt that it eliminates, because people who are being recorded can appear unnatural or stilted, or get flustered, and they may not seem the way they do in person. For additional discussion of this topic, see **When Mom Isn't Quite Right: Aging and Incapacity**.

3. **Ensure That Legal Documents are Properly Signed.** Estate planning related legal documents **must** be signed properly in order to be legally valid. It is critical to know how many witnesses are needed, whether the document needs to be notarized, and whether special formalities are needed. In general, it is best to ensure that the client, any witnesses, and any notary all watch each other sign the document, and that they all know what is being signed. We also normally recommend that the client initial each page of a Will or Trust during the signing ceremony, to help prevent any claim that new pages were substituted for original pages after the document was signed. In some cases, the client may even want to re-sign versions of the same Will on more than one occasion, to create the need for a challenging person to have to challenge multiple Wills rather than just one in order to defeat the desired plan. In these cases, it may be best if each newly signed Will is signed in front of different witnesses, instead of the same witnesses each time. The multiple document technique could also be used with a trust, although each subsequently executed trust agreement might need to be an "Amended and Restated" version of the original.

4. **Consider Using a Fully-Funded Revocable Living Trust Instead of a Will as the Primary Estate Planning Document.** In cases where the risk of a post-death dispute may be higher than normal, we typically recommend that the client consider using a fully funded, revocable living trust ("RLT") as his primary estate planning document, instead of relying only on a Will to carry out the desired estate distribution plan. However, for cases where the client may have diminished capacity and where his competency may be questioned, it may be safer to use a Will than an RLT, because the standard for competency needed to sign a Will is significantly lower than the standard of competency for a trust. For additional information on Wills and RLTs and how they compare, see **Should I Use a Will or Revocable Living Trust? Separating Facts From Fiction** and **What is a Trust?** Using a fully funded RLT as part of an estate plan can significantly decrease the chance that a disgruntled would-be beneficiary will be able to successfully challenge the plan. For one reason, challenges to a trust in Georgia are handled by the appropriate county Superior Court, rather than the Probate Court, where challenges to a Will are initially held. A second reason for the decreased chance of a successful challenge to a trust is that there is no formal opportunity for an unhappy heir to challenge a trust, as there is with a Will during the process of

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having the Will admitted to probate. This makes it harder to even get into the court with a trust challenge. Finally, a challenge to a Will generally relates only to whether it was properly signed and what facts existed at the time it was signed. Challenges to a trust relate to the trust's entire existence, from the day it was first signed through the moment of the trust creator's death. This presents a much higher hurdle for a would-be trust challenger and makes a successful challenge to a trust highly unlikely except in cases of clear fraud or forgery.

5. **Use In Terrorem Clauses.** In Terrorem clauses are provisions included in either a Will or a trust which state that any beneficiary who attempts to dispute the validity or the terms of the Will or trust at issue will lose any benefits which would otherwise have been provided to them under the Will or trust. We recommend that our clients use these clauses, as we believe our clients should be able to prevent anyone from fighting over their plan, and threatening to disinherit anyone who attempts to dispute the plan or any of its terms is a good way to discourage such actions. However, if the party who is likely to bring the dispute is not receiving significant benefits under the Will or trust, the In Terrorem clause likely will not be a deterrent, because he has nothing to lose. In cases where the client intends to completely disinherit someone, steps in addition to an In Terrorem clause will be required. In addition, In Terrorem clauses are not always enforced, because of the harsh results they can inflict, and because of the possibility that they could end up protecting a plan which did actually result from undue influence or lack of capacity. In most states, including Georgia, courts will interpret In Terrorem clauses very narrowly, and will not enforce them if the court believes that there are valid reasons behind the dispute. In some states, such as Florida, In Terrorem clauses are not enforced at all. These states generally take the position that anyone with a dispute should be able to have her day in court.

II. Carefully Consider the Plan Details. Plan details include who gets what, when and how benefits will be received, and who is in charge of making sure the plan gets carried out as intended.

1. **Choose Fiduciaries Very Carefully.** Many post-death disputes arise not from the provisions of the documents themselves, but from real or perceived problems with the implementation of the plan they contain. For this reason, choosing the fiduciaries who will carry out the estate plan is absolutely critical and should be done deliberately and with careful consideration. Family members, often ones who are also beneficiaries, are commonly named as fiduciaries. However, in many cases, it may be best to use independent fiduciaries, instead of family members, to reduce the possibility that the fiduciary will have a conflict of interest and help the fiduciary be perceived by the beneficiaries as fair and unbiased. Independent fiduciary choices could include friends of the client, trusted professional advisors, or corporate fiduciaries. Family members who are not also beneficiaries or potential beneficiaries might also be independent fiduciaries, although the family ties can still be a problem. Corporate fiduciaries, in particular, may be the best choice for potential sticky or hostile situations, as they will tend to have the most experience and broadest resources for dealing with the various issues involved. The various

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fiduciary positions include Executors under a Will, Trustees of a trust, attorneys-in-fact under a financial Power of Attorney, and health care agents under an Advance Directive for Health Care. For detailed discussion of the issues relating to fiduciary selection, see **Fiduciary Selection: A Critical part of Any Well Prepared Estate Plan** and **Corporate Fiduciaries for Estate & Trusts: Reliability, Prudence, Reasonableness, Protection and Peace of Mind**.

2. **Consider Providing Some Benefits to A Potential Challenger Instead of Completely Disinheriting Him, and Consider Providing Benefits Sooner Rather Than Later**. If a would-be beneficiary is completely disinherited, he has less to lose from attempting to challenge the estate plan. One way to help reduce the chance that an unhappy beneficiary will actually bring a challenge is to provide some benefits to that person in the plan, or to his family members, and to use appropriate In Terrorem clauses. This can work in several ways: First, the benefit provided may be enough to keep the beneficiary happy enough not to challenge, even if they aren't completely happy about the plan. Second, the possibility that the In Terrorem clause may result in the loss of the benefit may be enough to keep the beneficiary from trying to challenge. Third, if the would-be beneficiary's family members receive benefits, either instead of or in addition to the benefits provided to the beneficiary himself, they may not be willing to support him in any decision to challenge the plan. As an example of how this can work, it is fairly common for those with blended families to provide that the children of the first spouse to die will receive some significant benefits immediately at the first spouse's death, instead of having the surviving spouse be the only beneficiary at that time. This allows the first spouse's children to have some assurance that they will receive at least some assets from their deceased parent, and also helps separate the surviving spouse financially from her stepchildren.

3. **In the Planning Process, You Should Consider Possible Reasons that Post-Death Disputes Might Arise, and Try to Plan to Avoid Them**. One of the important functions of an estate planning attorney is helping his client consider what problems the client's desired estate plan may create, and what steps can be taken to avoid those problems. For example, for a married couple where both spouses have children from prior marriages, both spouses may agree on a specific plan for how the assets remaining at the surviving spouse's death will be distributed to family or others, but if they simply leave all of the first spouse's assets outright to the surviving spouse at the first spouse's death, they have no assurance that the agreed-upon plan will actually take place at the second death. Instead, the agreed-upon plan may never be carried out. If the surviving spouse remarries and does not take extraordinary measures to ensure that the assets received from the first spouse will be distributed in accordance with the original plan, if the surviving spouse is manipulated or taken advantage of by family or others, or if the surviving spouse ends up with any kind of creditor problems, the original plan likely will not be realized at the surviving spouse's death. Having the estate plan create a trust for the benefit of the surviving spouse at the first spouse's death can help ensure that any remaining assets from the first spouse will follow the

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plan she wanted at the surviving spouse's death, instead of ending up wherever the surviving spouse's own assets end up. Another example of how to use planning to reduce the possibility of a dispute is discussed in Paragraph II.2 above, where we talk about providing assets to a decedent's children from a prior marriage as well as to the surviving spouse, to reduce the risk that the decedent's children may complain about the estate plan at his death.

4. **Make Sure That Assets are Titled Correctly and that Beneficiary Designations are Completed Properly.** You can have the most well-drafted, carefully-structured legal documents and estate distribution plan in the world, but if beneficiary designations and asset titles are not consistent with the plan, it still may not work as intended. Incorrect asset titling and beneficiary designations can result in post-death disputes as well as the partial or total defeat of the desired estate plan. When creating and implementing an estate plan, it is critical that the client and the attorney consider how assets should be owned and how beneficiary designations should be set up in order to help ensure that the plan works as intended. The client and his advisors should also take whatever steps are needed in order to ensure that the recommended titles and beneficiary designations are actually put in place. For a more detailed discussion of these issues, see **Importance of Proper Asset Ownership and Beneficiary Designation**; **Banks Wreak Havoc on Estate Planning By Forcing the Use of Joint Accounts**; **News Alert: U.S. Supreme Court Says Inherited IRAs Are Not Protected From Creditors Under Federal Bankruptcy Law**; and **IRAs and Qualified Plan Accounts: Should You Pass Them to Beneficiaries Outright or in Trust?**

III. Communicate With Potential Beneficiaries Regarding Your Wishes. One very important way to help avoid a possible post-death dispute is to actually communicate your wishes and your intent to your family members and those who you believe may be unhappy about your plan. This obviously will not always be the best course of action, and we don't want a client to do anything which could create a risk that someone would attempt to harm the client or create or increase family disharmony. However, in many cases, this type of communication can go a long way to preventing a post-death dispute from ever arising. We have seen a number of cases in our practice in which someone who was mostly or completely disinherited by a family member, and who could have been expected to create trouble or challenge a Will, simply said something along the lines of "yeah, I was expecting that because I knew how Mom always felt about it." and allowed the plan to be carried out without a fight. Unfortunately, we have also seen the result of a "surprise," where the unhappy would-be beneficiary expected to receive certain benefits under a plan (or to have family members receive certain benefits under the plan), and was surprised when the plan was significantly different than the would-be beneficiary had expected. The surprises tend to result in hostility and disputes much more often than the plans which weren't a surprise.

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If you are concerned that your desired estate plan may create a high risk of a post-death dispute, and you would like to know your options for addressing that risk, please contact Karrah Hammock today at (678) 720-0750 or khammock@morgandisalvo.com to schedule a free estate planning consultation with one of Morgan & DiSalvo's attorneys.