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Traditional Estate Planning Fosters Family Disharmony

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Traditional Estate Planning Fosters Family Disharmony

By Timothy P. O'Sullivan, Esq.

If given a choice between preserving family harmony and maximizing the value of assets passing to family members upon their deaths, most parents unquestionably would choose to preserve family harmony. Thus, it is ironic that the topic of family harmony is largely absent from estate planning seminars, publications, and even the practice of estate planning.[1] During the first two decades of my practice, I marched blithely with the vast majority of my peers, giving little more than a modicum of deference to this issue.

I am now convinced that this long-standing professional neglect is the primary cause of the high incidence of family disharmony in the estate planning and administration process, its consequence being higher legal and administrative costs and the often-compromised integrity of estate plans. This article summarizes several selected strategies, most of which are only rarely employed in the estate planning process, which can significantly reduce, if not avoid, family disharmony in that most vulnerable of situations when adult children become primary beneficiaries under their parent's estate plan. This usually occurs upon the death of the surviving parent.

Choice of Financial Fiduciary

The choice of a fiduciary to administer the estate or revocable trust when children become primary beneficiaries is probably the single most important decision impacting family harmony. A parent's normal predilection is to name a child as such "financial fiduciary."[2] However, personal experience and inquiries of scores of estate planning professionals

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have led me to conclude that choosing a child as financial fiduciary in a multi-child family causes significant family disharmony at least a third of the time.[3]

The reasons are legion and well known to estate planners. Non-fiduciary children may resent the parental choice of financial fiduciary. Disputes frequently arise over myriad administration and communication issues involved in the administration process. Occasionally, siblings even sue a sibling financial fiduciary for financial loss from perceived or actual fiduciary inattention, negligence, or malfeasance.[4] Children's objectivity, whether as a financial fiduciary or as a non-fiduciary, is unavoidably compromised by their conflicting financial interests in the estate or trust, if not also by sibling rivalry, inimical family relationships, and the emotional volatility accompanying parental loss. A family cauldron of suspicion, second-guessing, discontent, confrontation, and even outright enmity often results, occasionally fomented by fractious in-law participation.

Parents often dismissively conclude this prospect "can't happen in my family" or "I don't have much to fight over." However, the risk of family disharmony usually has a greater correlation with the number of children and in-laws than estate value. Additionally, estate and trust administration is a legal and financial matter which is hindered, not furthered, by family dynamics.

Choosing an experienced third-party fiduciary, such as a corporate fiduciary or certified public accountant, lends professional objectivity and competency, greatly reduces

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family disharmony risks, and relieves a child or children of this administrative burden usually unappreciated by siblings.[5] Even under the rosiest of scenarios where a child would have managed the estate or trust to the same economic benefit as an experienced third party fiduciary, the net additional cost of having a professional fiduciary is normally quite modest, perhaps averaging no more than one to two percent of the underlying assets. In less salutary scenarios, it can be far more financially beneficial to have an experienced third party serve as financial fiduciary due to the reduction of costs otherwise occasioned by fiduciary errors and potential malfeasance, outside professional advice and legal fees attendant to family disharmony.

Unfortunately, attorney-client discussions regarding financial fiduciary choices tend to be perfunctory. [6] When afforded a full discussion of the pros and cons of financial fiduciary choices, I have found that a large majority of clients will choose a third party over a child. Less divisive and more constructive family input in the post-death administration process can be effectuated by reposing authority in a child or children to discharge the named third party financial fiduciary and designate another independent third party as successor. Parental concerns regarding a child's adverse perception of such third party choice can

be assuaged by including a "personal declaration" provision in the governing instrument, clearly stating such choice was made solely to minimize any potential risk to family harmony and avoid placing an administrative burden on children.

Gifts, Loans, and Property Passing Outside of the Testamentary Document

A number of provisions can be inserted in wills and revocable trusts which reduce family disharmony by eschewing frequently contentious post-death administration situations. For example, lifetime parental transfers often present post-death family arguments, as well as legal and factual issues. These include whether such transfers were intended by the parents to be gifts or loans, the terms of verbal loans, and the transfers' intended effect on children's shares of the estate or trust.

Thus, if gifts are not intended to be treated as an advancement against a donee/child's share, the governing instrument should so state. A viable strategy for loans consistent with most clients' goals is to provide for the forgiveness of verbal loans (due to difficulty in proving status and terms)[7] and allocating the unpaid balance of written loans to the child's share, irrespective of legal impediments to enforcement or any alleged modifications not in writing.[8]

Similarly, with respect to addressing the far too common circumstance of property passing directly to a child as a surviving joint tenant or beneficiary outside of the testamentary instrument, the governing instrument should specify whether any property passing outside its provisions is to be disregarded or instead treated as an advancement against such child's dispositive share.[9]

Child's Claim for Personal Services Rendered to a Parent

Following the passing of a parent, children frequently contend their dispositive share should be increased to account for pre-death personal non-fiduciary services rendered to their parent, such as care, financial management, transportation, and meal preparation. Such claims may be based strictly on a "family equity" argument or an asserted express or implied contract. Unless based on a written agreement, such claims often are without legal merit and almost always result in significant family disharmony.

To avoid such consequence, the governing instrument may specify parental intent that any such filial services not rendered under a written agreement are to be considered to have been rendered strictly out of affection and not in anticipation of any monetary remuneration. The instrument may additionally provide that the satisfaction of any such claim would be treated as an advancement against the child's share of the estate or trust.

Overbroad Use of "in Terrorem" Provisions

Estate planning attorneys are also well advised to discuss with clients other provisions discouraging legal challenges to the estate plan or providing for their resolution in a manner more conducive to family harmony. To that end, many estate planning attorneys routinely employ "no contest" or "in terrorem" clauses in wills and revocable trusts to combat the risk of family litigation. However, such clauses commonly are too broadly drafted, potentially applying not only to a challenge of a dispositive provision or the instrument's integrity, but also to the seeking of an interpretation of ambiguous clauses or the raising of issues involving the post-death administration of the will or revocable trust.

Such use of overbroad "in terrorem" clauses is tantamount to using a sledgehammer to kill a fly and has a high failure rate as a preventative strategy. They can cause litigation by placing a child's entire share at issue in every conceivable circumstance such clause might apply. Further, courts often place legal limits on their enforceability.[10] Additionally, overbroad and ambiguous language can have a chilling effect on the raising of quite legitimate legal and administrative issues. None of these consequences furthers family harmony. Such clauses normally should be narrowly crafted and sparingly used. Their most appropriate use is in targeting challenges to the integrity of the instrument, such as undue influence or incompetency claims that the decedent's attorney knows would be specious.

Not Considering Inclusion of Mediation and Arbitration Provisions

In addition to or in lieu of properly drafted "in terrorem" clauses,

consideration should be given to including mediation and arbitration provisions in the instrument. Controversies having children as adversaries could be required to first be submitted to mediation, and if mediation proves unsuccessful, to binding arbitration.

Such provisions have many clear advantages. First and foremost, alternative dispute resolution is much less damaging to family harmony than litigation.[11] Moreover, the proceedings are private, not a matter of public record, more efficient, generally faster, and can be far less costly.[12] Because mediation and binding arbitration normally must be by agreement, a "stick" to compel compliance among beneficiaries is usually needed.[13] This can be accomplished by providing in the governing instrument for a forfeiture or substantial reduction of the share of a dissenter who resorts to a judicial resolution.

Inappropriately Disclosing Estate Plan to Children

Conventional wisdom held by the general public as well as many estate planning professionals dictates that parents should inform children of their estate plans to clear the air or to avoid surprises. Admittedly, there are situations favoring at least a limited disclosure of the estate plan. For instance, discussing any family business succession aspects of the plan with children active in the business is necessary to test the viability of the succession plan. However, in most other scenarios I believe that family disclosure meetings generally present far more family harmony problems than they can potentially solve.

It is first important to be aware of both parental expectancy levels and the typical family milieu in which the disclosure would take place. Just as parents are less than accurate predictors of family disharmony that may follow their deaths, they also tend to overestimate the benefits of a disclosure meeting. Further, they normally are overly optimistic about their children's objectivity, failing to appreciate it has often been fatally compromised by economic self-interest and intra-family relationships. Finally, disclosure may create an unhealthy air of expectancy and unwanted in-law participation.

The fact is, specific post-death administration issues cannot even be anticipated with any degree of certainty during the parent's lifetime. Instead, such potential disputes are best minimized by incorporating the above-discussed strategies in the estate planning process. With regard to disharmony that might result from elements of the plan a child might not like, in my experience lifetime parental disclosure of the estate plan normally does little to reduce such dislike or prevent it from being used against siblings.

The better strategy is for the parent to simply place a well-articulated rationale regarding anticipated sensitive provisions in the parent's will or revocable trust, keeping the sensibilities of children in mind and noting the estate plan was independently derived and not the product of the influence of any child.

Finally, parents should be counseled to consider three significant downside risks to such disclosure beyond simply not having the desired effect. First, disclosure can create the very disharmonious family circumstance it was intended to alleviate. Lifetime disclosure and ensuing family discussions afford children an opportunity to discuss any elements of the plan, often resulting in disheartening disagreements, arguments, and in-fighting over provisions with which they disagree. Children may pressure parents to change the estate plan to their own advantage to the consternation of their siblings and parents. If parents do not agree to make such changes, children tend to hold their parents in disfavor. Children also occasionally solicit parental gifts as advances to "enjoy the benefits of our inheritance now, at a time we can most use it." Even the relationship of parents with their grandchildren can be indirectly adversely affected. Second, any such disharmony will have presented itself during the parent's lifetime and is likely to be quite enduring. Third, any disharmony among children emanating from such disclosure will tend to exacerbate family disharmony during the post-death administration of the parent's estate or trust.

Conclusion

The preservation of family harmony in the estate planning process is only attainable through a holistic approach combining appropriate client counseling with ameliorative document provisions. Achieving this normally penultimate estate planning goal is also essential in achieving the other important estate goals of maxi-

mizing the amount of assets passing to family members and ensuring the integrity of the estate plan. Estate planning attorneys who give family harmony its rightful priority will find immediate credibility with clients, as strategies fostering family harmony reduce legal and administrative fees. More importantly, such focus will provide clients with a much greater level of satisfaction with the entire estate planning process. ■

Footnotes

1 See, e.g., *Gen. Practice Session, Am. Bar Ass'n., Wills and Estate Planning Guide: A State and Territorial Summary of Will and Intestacy Statutes* (1995) (discussing distribution to descendants, will execution, estate planning, and gifts without mention of family harmony considerations).

2 See *id.* at 1–5 (discussing fiduciary forms and responsibilities).

3 Although there was a wide range (between 10 and 90 percent) in the estimated degree of this risk opined by a large number of estate planning attorneys surveyed by the author, the vast majority of such opinions fell in the 25–50 percent range.

4 See L. Rush Hunt & Lara Rae Hunt, *A Lawyer's Guide to Estate Planning: Fundamentals for the Legal Practitioner* 125 (3d ed. 2004) (discussing the tendency for family fiduciaries to be less informed and less diligent with their compliance with provisions of the instrument and the law).

5 See *Hunt & Hunt*, supra note 4, at 126 (stating that the selection of a financial fiduciary should be based on factors like capability, experience, and reputation).

6 See *id.* at 125 ("[The] activities involved in estate settlement require a more thorough discussion of this important function [of estate asset management] with the client than simply asking whom they would like to name as executor.").

7 Such forgiveness should have no adverse income tax consequence to the promissor. The forgiveness of debt under a will or revocable trust in a family context constitutes a gift. See I.R.C. § 61(a)(12) (2006).

8 Sometimes loans may be unenforceable for reasons such as a violation of the statute of limitations. See 51 AM. JUR. 2D Limitations § 135 (2002) ("[i]n some jurisdictions, there are separate statutes of limitations for written and unwritten contracts, and the statute for written contracts is longer.").

9 In the context used by the author, the term "advancement" means that the gift is treated as if it was still part of the parent's estate or trust in determining the child's share and deemed distributed in satisfaction of such share in the same manner as an ademption.

10 Such clauses have historically been favored by the courts in furthering public policy objectives of discouraging litigation and upholding the testator's intent. The trend is now in the opposite direction. Now, a majority of states either do not enforce such clauses or enforce them only when the contestant lacks probable cause for initiating a judicial challenge to the testamentary instrument, which is the position of the Uniform Probate Code and the Third Restatement of Property. See Donna R. Bashaw, Are In Terrorem Clauses No Longer Terrifying? If So, Can You Avoid Post-Death Litigation with Pre-Death Procedures? 2 *Nat'l. Acad. of Elder L. Att'ys J.* 349 (2006) (discussing use of in terrorem clauses).

11 Studies have indicated that parties who go through mediation are more likely to have a higher satisfaction level than those who litigate. See, e.g., Robert E. Emery, *Renegotiating Family Relationships: Divorce Child Custody, and Mediation* 184–93 (1994); Gwynn Davis & Marian Roberts, *Access to Agreement: A Consumer Study of Mediation in Family Disputes* (1988).

12 See Jay E. Grenig, *Alternative Dispute Resolution* 3–4 (3d ed. 2005) (discussing benefits of dispute resolution methods, including privacy and preservation of relationships).

13 Thirty-five states and the District of Columbia have adopted the Uniform Arbitration Act. *Unif. Arbitration Act*, 7 U.L.A. 2 prefatory cmt. (2000). The federal Arbitration Act governs arbitration in maritime transactions and matters involving interstate commerce. 9 U.S.C.A. § 2 (West 2007). As one would expect, both acts require the unanimous agreement of the parties to the arbitration.