Sacks Glazier Franklin & Lodise LLP
Specializing in Litigation Regarding Trusts and Estates

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Family Feuds

By Bob Sacks

It is common knowledge that Americans have become extremely litigious and that our court system is floundering in a sea of civil cases. What is less well known is that the court activity includes not only tort claims such as personal injury, but also lawsuits involving wills and trusts.

Practitioners in the field of estate and trust litigation have seen a dramatic increase in recent years in lawsuits concerning probate estates and trusts, and the related areas of conservatorships and guardianships.

With all this litigation, a common question is, how can I prevent litigation over my estate plan?

The answer is, you can't.

Lawsuits can be filed by anyone and there is no sure way to avoid them. In estate planning, it is also impossible to anticipate every issue that could give rise to a lawsuit. There are, however, ways to reduce the likelihood of litigation.

What Are These Lawsuits?

Estate and trust litigation encompasses claims filed in a type of state court often referred to as probate court. These lawsuits most commonly challenge the validity of a will or trust, often by focusing on whether the signer was mentally competent and/or "unduly influenced" by someone into signing.

Trust and estate lawsuits can also seek to remove an executor or trustee on the grounds they acted improperly. This usually involves allegations that they breached fiduciary duties, such as by improperly taking trust property for their personal use, favoring certain beneficiaries or mishandling investments.

Probate courts may also be asked to interpret a language ambiguity. For example, if a will leaves "the vacation home" to a beneficiary, does that mean the house at the beach, the condo in Aspen or the old fishing cabin?

Finally, probate courts may be asked to settle issues related to conservatorships and guardianships that assist someone deemed incapable of handling their personal or financial affairs. Such matters may be contested either because the subject opposes having someone else take over for them or because a dispute arises about who should serve as the fiduciary.

Find A Qualified Attorney

For people with substantial wealth, the first step in drawing up a legally sound estate plan is to have an experienced lawyer prepare the document. The underlying documents must be prepared with care to ensure the language is clear, the trustor's wishes will be carried out and the chances of litigation are lessened. Taking shortcuts in the planning process is asking for trouble. The courts are full of cases involving large estates of people who wrote their own wills by hand, used forms they bought at a store or over the Internet, or who used a "low-cost" estate planning service with little or no legal expertise.

Families with pre-existing relationships with estate planning attorneys should strongly consider using their services since it provides the type of continuity that is valuable in estate planning.

Only an experienced estate planning attorney should be considered for a client with substantial assets. Referrals from friends or other professionals can be invaluable. Another excellent resource is the American College of Trust and Estate Counsel (ACTEC), which is a professional organization of experienced estate and trust lawyers. ACTEC's Web site is www.actec.org.

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Beneficiaries Should Be Part Of The Planning Process

It is crucial that clients be candid with their estate planners. Numerous lawsuits arise because people conceal relevant information, such as having had a child out of wedlock, having family members with substance abuse problems or other issues that could impact succession planning.

Another important step is to hold a discussion with beneficiaries during or after the estate planning process. No one likes to think about their own death and in many families talking about finances or an estate plan is taboo. But if the goal is to avoid conflict, letting the beneficiaries know what to expect and having them feel they are part of the process can be invaluable.

If the issue is the disposition of a family business, for example, it's helpful for the beneficiaries to know which family members will be expected to be involved in the business after the parents die. If beneficiaries find out after the fact, it may lead to discord and litigation.

These discussions can be uncomfortable, but they may help avert a dispute down the road. Having a professional family counselor lead an open discussion of an estate plan is an excellent way for people to share their views before the plan is completed.

The 'No Contest Clause'

Some states allow a "no contest clause" to be included in a will or trust. It generally says that if a beneficiary challenges the validity of the document, or any of its terms, the beneficiary forfeits his inheritance. If the beneficiary's challenge is successful, then the document is deemed invalid and the clause does not apply.

Some states, such as Florida, will not enforce such clauses and other states have strict limitations on when they can be enforced or what constitutes a "contest."

Good estate planners will advise clients to include a relatively substantial gift to family members who may have reason to challenge a plan. In this way, the beneficiary has to make a choice between receiving the gift—which would undoubtedly be far less than what the beneficiary would receive if the estate plan were declared invalid—or to roll the dice in litigation.

Review Your Estate Plan Often

Taking steps to "bullet-proof" an estate plan does not end once the documents are prepared and signed. Tax laws change and estate plans may need to be changed along with them. To ensure everything is up to date, clients and their attorneys should review trusts and wills as frequently as once per year. Estate planners generally contact clients when changes in the law affect estate plans, but some may not. So clients should not forget to check up on such issues from time to time.

In addition, clients and their families may undergo changes that bear directly on the estate plan. Dramatic changes in wealth may necessitate revisions to the plan. Births, deaths, marriages, divorces and other significant family events should also be followed up with an estate plan or trust review. It would be imprudent to file away the estate plan and assume everything has been taken care of as the years go by.

The recent economic downturn provides another reason to review an estate plan. The reason: market losses may have wiped out an intended gift. Some estate plans, for example, leave beneficiaries a percentage of assets that remain after specifically assigned gifts are distributed. Such beneficiaries could end up with nothing if an estate's assets decline substantially due to market losses.

Choosing The Trustee

People often give too little thought to the selection of a trustee, which is a mistake given the role's importance. Even a trust that calls for outright distribution to the beneficiaries upon the trustor's death may take years to administer. Some distributions can take decades. During that time, the trustee will have to deal with numerous administrative, estate and income tax issues. It's also important to note that trustee actions often give rise to litigation.

Picking the right trustee is not always easy. Sometimes people will automatically ask their children to serve as fiduciary. Some clients may ask their estate planning lawyer to either serve as trustee or make the decision for them.

The appointment of a trustee, however, shouldn't be done hastily. Clients need to ask themselves key questions. Is the candidate a good fit to handle the type of assets held in the estate? Does the candidate have the right temperament and personality to deal with the beneficiaries? Is the candidate competent, honest and professional?

Another consideration is whether there should be more than one trustee. Clients sometimes want a family member to serve as a co-trustee with a corporate fiduciary. Others prefer to have all their children jointly serve as trustee. There is no right and wrong answer, but be aware that issues could arise if multiple trustees have to reach unanimous agreement.

The consideration of questions such as these could influence whether an estate plan becomes the focal point of a court battle.

Ways To Limit Litigation If It Occurs

Litigation over an estate plan is sometimes unavoidable even if the document is well prepared. In such cases, the focus should be on how to efficiently settle the dispute.

Court battles involving trusts and wills are both expensive and public, and may involve personal issues and substantial delays. Mediation and arbitration, however, are alternatives that can streamline the process and take it out of public view.

In mediation, a neutral party—often a retired probate court judge or an experienced trust and estate attorney—is selected to hold a confidential settlement meeting where everything is "off the record" and cannot be used in litigation. This allows the opposing parties to candidly discuss settlement options. If the meeting is successful, all parties will sign a binding agreement at the end of the session. In arbitration, an arbitrator takes on the role of a judge, making the final ruling in a private process that involves less discovery than the public probate courts.

In recent years, estate planners have started to include clauses in wills and trusts that mandate the use of mediation or arbitration if there is a dispute after the trustor's death. Because these clauses are a new technique, however, there is little legal guidance on their enforceability. Clients should nonetheless discuss this option with their estate planners.

Conclusion

Although there are no guarantees that careful estate planning will prevent litigation, there are a number of ways to minimize the risk of litigation or attempt to resolve disputes out of court. Careful estate planning means using a qualified lawyer, being open and honest in the planning process and paying particular attention to the selection of the trustee or executor.

Sacks, Glazier, Franklin & Lodise LLP specializes in litigation and appeals involving substantial trusts, estates and conservatorships, as well as trust and estate mediations. Since 1991, our lawyers have provided high-quality legal representation to our Southern California clientele, including individuals, charitable organizations, educational institutions, large and small businesses, and corporate and individual fiduciaries.