

# The Power Tools of Estate Conflict Management

## Recharging the Culture of Estate Conflicts, Part 1

By Paul Fisher

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In a contested estate matter emotions can run high. Families leave the estate litigation process exhausted financially and emotionally and embittered by strained or destroyed familial relationships. As if this damage were not enough, the goals of the testator may have been frustrated or, worse, altogether defeated in the process.

All lawsuits come at a significant financial cost. Estate litigation can range from \$10,000 per party to \$1 million per party in larger estate conflicts. For example, one case had fees of \$550,000 on a \$1 million trust in dispute, and after eight years of litigation a distribution had yet to be made. Attorney's fees are often "payback" to the parties, frequently family, who do vengeful things to each other. Some clients are not interested in resolving a dispute until they have bloodied the other side, which can take a long time and a lot of money.

Checkbooks are not the only burn victims in estate contests. Too often, parties become refugees in the very war they have created. An unsettling number of relationships are totally destroyed because of "scorched earth" litigation: "It becomes scorched earth when people have such strong emotional issues that the money becomes irrelevant." See, e.g., *Taubman v. Taubman*, No. B194074, 2008 WL 2440245 (Cal. Ct. App. June 18, 2008). In one case, a family will lose land it has held since the early 1800s, almost entirely because of the dysfunctional family dynamic, most likely reducing the family to ruins. Sometimes, even physical violence erupts among family members and is severe enough to require a restraining order.

In addition to the financial and emotional consequences, the parties also must endure the lengthy and generally frustrating time it takes to move their case through court. In California, the general consensus is that litigation takes one to two years; there are, however, many brutal exceptions. For instance, one case has been festering for 20 years and family communication is nil. Another case has been in the court system for 26 years and has been up on appeal four times, attorney's fees have climbed to \$1.8 million, and not a single distribution has been made to date.

From the wreckage of estate litigation, messages are extrapolated that will form the foundation for change in the culture of how estate conflicts can be managed and resolved with less damage to families. Managing estate conflict presents the possibility of delivering more financial and emotional value to clients, providing higher client satisfaction, higher personal satisfaction, and more client referrals to the practitioner.

This article incorporates the issues brainstormed at more than 20 estate conflict management workshops I have conducted with almost 900 participants—many of whom are quoted in this article—from my personal experiences as a party to an estate contest, and from interviews with many estate planning and estate litigation attorneys. Having practiced law for many years, served as an arbitrator on almost 200 cases, and mediated many hundreds of conflicts this is an opportunity for me to have a positive effect on conflict management and the profession.

### Changing the Culture of Conflict

Estate conflict management is a way to break the institution of how conflict is handled to reduce the harsh consequences of breaking the bank and breaking up families. Traditionally, the term "alternative dispute resolution" described a party's alternatives to litigation. But over the years attorneys and mediators have learned that some disputes cannot be resolved; they can, however, be managed. Thus, "conflict management" is a more practical description than "conflict resolution."

The origin of modern alternative dispute resolution lies with Frank Sander, who observed the great financial and emotional toll going to trial took on his clients. From these observations, he concluded: "There has to be a better way." Sander's innovative theories proposed a court system that helped direct disputants to the most appropriate route to resolution through choices of arbitration, mediation, early case evaluation, and litigation. I, too, have seen how litigation takes a very costly financial and emotional toll on the parties. My brothers and I litigated our parents' estates, and while the process cost a small fortune, it also destroyed our relationship. I have endured family wars, both mine and those of countless others, and have reached the same conclusion as Sander: "There has to be a better way."

### There Has to Be a Better Way:

#### The Value in Managing Estate Conflicts

When it comes to fighting over family money, rational people become irrational. "Money does strange things to

people, especially when it's not their money, or they imagine that it should belong to them." For instance, one client would rather pay his attorney \$20,000 than pay his sister \$20,000 to go away. In many cases, at least one party refuses to settle or reach a compromise with the other family members. Often the emotions between siblings and family members are darker and more volatile in trusts and estate litigation than in divorce cases. "When someone dies, it's like shaking a bottle of champagne and popping the cork. All these negative emotions fizz up to the surface."

Retired California Commissioner Paulette Barkely, who heard all probate and estate cases in Riverside County, comments that families become alienated from each other. "Litigation results in a destruction of the whole family, something that the trustor never intended." Some family members hate each other and will never forgive each other. "It's irretrievable. The family gets stuck on issues from childhood. It is devastating. It destroys relationships."

To discourage clients from litigating a will or trust, attorneys can counsel clients about the tremendous costs involved—litigation is incredibly expensive and may result in family members never speaking to each other again. Before starting the process, clients need to say to themselves, "That's okay." Often when parties file suit, they justify the action with a need to vindicate past sibling rivalries or honor what they believe their parents wanted. In reality, filing suit sends a message that the family has no value. In the end, the client may be better off not receiving under the will or trust to hold the family together rather than pursuing such costly litigation.

In addition to saving parties from the wrath of litigation, managing estate conflicts at an earlier point in time also serves the interests of estate planning professionals. This avenue creates more options for practitioners and more value for clients by increasing the value of the practitioner's services as advocate and counselor. Managing estate conflicts at an earlier point in time provides a means to maximize client satisfaction, minimize future disputes, and avoid malpractice claims, while efficiently resolving or managing disputes. Ultimately, through greater client satisfaction, there will be greater economic and personal benefit to the practitioner: "The bottom line is estate litigation makes no business sense."

### **Building the Relational Estate into the Estate Planning Process**

The traditional role of the estate planner includes minimizing death taxes and avoiding probate. Today, there is an additional approach: "Estate planning concerns death and taxes, but it is primarily about a larger subject, and that is people," something Jerome A. Manning refers to as "the relational estate." Jerome A. Manning, *Estate Planning: How to Preserve Your Estate for Your Loved Ones* (1992). Gerald Le Van describes the relational estate as "the whole web of interpersonal relationships that connects [the family] across generations." Gerald Le Van, *A Family Council for the "Relational Estate"* (July 2008), [www.levanco.com/readings/relational\\_estate.php](http://www.levanco.com/readings/relational_estate.php). When potential conflicts are discovered during the traditional estate planning process, the estate planning professional often ignores them. Instead, in certain jurisdictions no-contest provisions are included (California all but eliminated these provisions as of January 2010); yet, the resulting conflicts often end up in probate litigation.

Fortunately, there are alternatives to this traditional approach. These include addressing potential conflicts during the estate planning process and creating a mechanism to address conflicts as soon after the testator's death as practicable. Including a mechanism in estate planning documents to deal with postmortem conflict can help prevent or reduce estate litigation. Judith Stern Peck refers to this as "preemptive work," while others call it a "preemptive strike." Rachel Silverman, *Making Peace over Money*, Wall St. J. (Oct. 21, 2006).

### **Benefits Conveyed to the Testator**

Testators benefit significantly when issues of conflict are resolved during the estate planning process. For instance, testators gain peace of mind by knowing there will be greater likelihood of family harmony after they pass, and the comfort of knowing the estate will go to the intended beneficiaries and heirs without being diminished by attorney's fees or expensive and emotionally destructive litigation.

**Minimizing Conflict by Maximizing Discussions with the Testator Client.** Most estate planning professionals believe they have an obligation to explain the consequences of the estate plan even though there is no ethical obligation to do so. "Educating clients can help avert conflicts that may come about and can provide confidence for the testators as to what will happen after their deaths." Generally, there is greater comfort for clients in resolution than in nonresolution. Educating the client, however, may not be necessary nor appropriate in every situation. Some practitioners may feel uncomfortable telling their clients how to handle family conflicts, or the practitioner's handling of the client's matters may ultimately cause more turmoil and friction within the family.

**Putting Conflict on the Table by Bringing Everyone to the Table.** Once the estate plan is complete, some testators want to be secretive and "lock it up in a vault," while others want to tell the family "this is what you get." Whether the practitioner counsels the client to share the estate plan with family members or not is a matter of personal and professional preference.

One attorney may wish to ensure the client's testamentary goals are memorialized first and then have the clients share the plan with their children. Another approach is to meet with the testators and their children to get their ideas, input, and preferences. The testator may use this opportunity to explain to a disinherited person why he or she has made such gifts in an effort to create understanding and possibly avert litigation postmortem. The attorney should be careful to explain to the children at the outset of the conversation who the client is: the testator parent.

### **Benefits to the Heirs:**

#### **A Different Kind of Gift to the Beneficiaries**

Addressing beneficiary-related issues during the estate planning process reduces conflict and court battles. If heirs feel crushed and their expectations are not met, conflict ensues. When issues are addressed there are no surprises and it smoothes the transition. Heirs benefit from learning of the testator's intentions directly from the testator because having personally heard from the testator, they can be sheepish to seek changes after death.

### **Benefits to the Trustee:**

#### **Guarding the Trustee from Conflict**

The testator who selects as trustee a person who is an heir or beneficiary may subject that person to accusations that might place his or her gift at risk. Competing petitioners often believe they should be trustee instead of their siblings. Postmortem may be too late to deal with these successor trustee issues, which can devolve into estate litigation. Estate planning professionals may help avoid litigation by determining who does not want to be successor trustee. If an appointee knows there could be problems among the heirs, he will want to avoid taking the position as trustee. Furthermore, the practitioner can designate an independent fiduciary in the estate plan to minimize the likelihood of litigation arising from a client's choice of trustee.

#### **A Profit-sharing Plan for the Attorney**

The attorney ultimately needs to understand the client's needs and interests. When representing an heir or beneficiary, the attorney may find that his client's interests include the obvious—preserving the largest amount of a gift as possible—but also extend further to emotionally driven internal conflicts. The proactive estate planning professional navigates treacherous waters by addressing the client's relational estate to unearth potential postmortem conflicts and by encouraging the testator to deal with them during the estate planning process.

Many attorneys believe it is very gratifying to resolve these conflicts during the estate planning process, thus providing their testator clients peace of mind. What is most beneficial to the attorney and what makes most ethical sense and what makes good business sense? Having a client who pays your bill and does not sue you. Resolving conflicts earlier, when there is sufficient information to counsel the client, provides a less financially and emotionally costly outcome to the client. A satisfied client is the best source of new client referral.

Addressing conflict early provides a particular benefit to the attorney who represents the disinherited or contesting party. That attorney is often on a contingent fee arrangement and is paid only when the matter is concluded and there is a recovery. Thus, the attorney and his client may be highly motivated to reach an earlier agreement.

### **How Can the Family Business Profit?**

Many complex issues surround a family business and the death of the business owner. At stake is the future of the family business, generations of relationships, and the potential to reduce sibling animosity. Half of all family businesses fail to make it through the next generation. As a Chinese expression illustrates: "Wealth does not pass three generations." John L. Ward, *Perpetuating the Family Business: 50 Lessons Learned from Long-Lasting, Successful Families in Business* (2004), at 4. "Without deliberate intervention, any conflicts, tensions, disagreements, or dysfunctional patterns that exist in the family environment will be brought into the business environment." Quentin J. Fleming, *Keep the Family Baggage Out of the Family Business: Avoiding the Seven Deadly Sins That Destroy Family Businesses* (2000), at 30. Risk of future conflict is severely increased without discussion of these issues before the key owner's death.

### **The Downside to Unearthing**

#### **Conflict During the Estate Planning Process**

Despite the benefits of confronting conflicts during the estate planning process, it may be in the testator's best interest to avoid creating worse family conditions than existed before the estate planning process. If conflicts are raised and not resolved, the testator is at risk of prolonged unhappiness. Other clients fear the consequences that may be inflicted on them as a result of the conflict exposed during their lifetimes and might walk away from the estate planning process entirely.

In most instances the risks of not resolving conflicts during the estate planning process exceed the benefits. A failed attempt to resolve conflicts could produce a very unhappy client, who might eventually terminate the attorney client relationship or worse. In the end, the estate planning process produces higher personal satisfaction when the clients' wishes are carried out and conflict is either resolved or avoided, depending on the circumstances of each attorney and client.

The client may have already attempted to resolve a particular issue outside the estate planning process. A couple may have reached an agreement in years past concerning such things as gifts to children or stepchildren, and that agreement may have been reached after many lengthy and arduous discussions. Addressing potential conflicts may resurrect these long ago agreed-on and buried issues and tear open painful wounds previously closed and gratefully forgotten.

The estate planning professional also must be sensitive to the possibility that the client's estate plan may involve matters that cannot practically be exposed at that time, such as the girlfriend or the child no one knows about. The testator may wish to keep the lid on the volcano. Here is an additional caveat for the practitioner in such situations: Some conflicts cannot be resolved. If there is a conflict that is unresolved, the first thing that happens is the estate planning professionals get fired. They know too much.

If matters are not resolved, the estate planning professional loses control over the process. The family is in emotional shock and angry at the testator. Heirs are targets of the other parties, especially those who have been disinherited. In some instances, if a child's inheritance does not meet his expectations, the child may lobby or even harass the testator until the testator makes a change and the child gets what he wants. Some children may go so far as to sue the testator parents during their lifetimes if the children know the trust's contents.

The ramifications could be worse for an elderly or infirm client who might fear he or she is in danger from the person who will inherit a minimal gift, conditional gift, or no gift at all. The elderly client might fear being threatened by that person, or worse, fear the possibility of elder abuse or financial elder abuse. In addition, conditions change over time, and testators change their estate plans and amend trusts. Problematic conditions that existed when a trust was first created may change for the better.

### **The Golden Window of Opportunity**

The alternative to ignoring estate conflicts during the estate planning process is to address the conflicts postmortem before litigation begins. At this time, just after the curtain closes on the testator, a golden window of opportunity opens through which the survivors can escape the litigation process with family and checkbooks intact.

#### **Benefits of Discussing Conflicts Postmortem: What Doors Does This Window Open?**

One advantage to waiting is that conditions change over time and conflicts that existed during the planning stage may go away. Another advantage to addressing conflicts postmortem is that some testators prefer to keep a lid on the conflict. Many clients are conflict averse and do not like to face the conflicts in their lives. Luckily for them, they are not obligated to deal with conflicts during the estate planning process.

There is an additional advantage when a disinherited or contesting party is involved. He or she has a special incentive to resolve or mediate a dispute before the running of a statutory deadline for filing a contested matter. Resolving a claim or conflict before filing a petition avoids the risk of the judge declaring a violation of the no-contest provision and forfeiture of any gift. Furthermore, the attorney representing a contesting party is often on a contingency fee, so the sooner the contest is resolved, the higher the effective hourly rate earned for his or her time. If the contesting party's claim is highly questionable, there is great incentive for the attorney to settle as soon as possible rather than spending the time and money to prepare for a risky trial. This presents a golden opportunity for early mediation and resolution.

Not all situations are suited to address conflict within the golden window, however. A family business to be passed on to the next generation is more likely to succeed with a succession plan already in place. Estate plans that force heirs to own property jointly may set the stage for conflict postmortem. These issues are best addressed during the estate planning process.

#### **Framing the Golden Window: When Postmortem Should a Discussion Take Place?**

The golden window to address conflicts postmortem is found within the period after death when the family is able to talk about issues and before the statutory deadline for filing a contest. In Delaware and 10 of the most populous states, the time during which a will or trust contest may be brought ranges from 10 days after service of notice to two years after admission to probate or three years after the settlor's death. This golden window of opportunity ap-

pears when the fog of grief begins to lift even though the dynamics now may be more complicated for those involved.

When, if ever, should there be a reading of the will or trust? Some attorneys and other estate planners caution not to have a reading of the will or trust too soon after the funeral because emotions are volatile. While most might be grieving, others may be celebrating. Everybody has allegations in their head and nobody can prove them. “Was Dad really competent when he signed the fifth amendment to the trust? Who influenced him to cut me out?” Other attorneys prefer to avoid a reading of the will or trust altogether, depending on the jurisdiction and consistent with a statutory requirement on the part of the trustee to not disclose the contents of the trust. Yet, some state statutes also require trustees to periodically report to beneficiaries the financial condition of the trust. This creates a tremendous tension for those attorneys who believe that providing information early on may reduce the risk of conflict.

Families must move past their grief before they can deal with any serious issues. The grieving process can take time—for some people a year or much longer—and some issues cannot wait that long. Perhaps, then, the golden window of opportunity opens when the initial shock wears off. Discussions any sooner may simply not be fruitful.

The golden window of opportunity provides the critical elements for potential resolution: a desire to resolve issues early and a compelling desire for distribution. What can get in the way, unfortunately, is the toxic and highly volatile combination of grief, greed, lack of flexibility, anger built up during lifelong relationships, and the desire to carry out what each family member fervently believes are Dad’s last wishes. But, if there is the right balance of factors postmortem, great things can happen, such as resolution and the preservation of familial relationships. This is why the window of opportunity is golden—it is a precious moment that should not be squandered.