

The Power Tools of Estate Conflict Management

Recharging the Culture of Estate Conflicts, Part 2

By Paul Fisher

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This is the second of a two-part article that discusses the alternative methods and tools to address and manage conflicts that may surface during the estate planning process or after the testator's death. The article provides the practitioner with opportunities to discuss these concepts with clients and colleagues and encourages the reader to move several steps forward toward changing the culture of how these conflicts are resolved.

Part one, in the March/April 2010 issue, discussed the need for change in how conflicts can be addressed during the estate planning process and/or postmortem in a way that avoids the extraordinary financial and emotional cost of estate litigation. The benefits and disadvantages to the testator, heirs, trustee, contesting parties, and attorneys also are examined.

Mediums to Invoke a Peaceful Means to Your Estate Planning Client's End

The client may wish to send messages from the other side, with the goal of minimizing potential conflict without suffering the consequences of facing that conflict in his lifetime. For these clients, there are alternative tools estate planners might consider building into estate planning documents to encourage disgruntled relatives and friends to turn over a new leaf so the testator client does not turn over in his grave.

Preserving the Testator's Intent

Preserving the testator's intent can be accomplished in a number of ways. Some attorneys may prefer to have their clients write out what they want to accomplish and why. In addition, some may want to create a detailed memorandum in their client meeting file should they be called on to testify in the future.

A small number of attorneys videotape the signing process to help the estate plan endure against potential disputes regarding the testator's competency or for claims of fraud and undue influence. The client can explain what he is doing, why he is doing it, and his thought processes. Furthermore, videotaping the meeting demonstrates that, at the time of signing, the testator was fully competent. Interview with Mark Lester, California attorney.

Some practitioners may wish to videotape only those matters that are emotionally charged or those that look strange, such as an elderly client who may be transferring the estate to persons other than those one would normally expect. Videotaping the signing process, however, does not always bring finality. Contesting attorneys might argue that the events leading up to or following the signing were not videotaped and contain the "true intent" of the testator.

Side Letters to Loved Ones and Those Not So Loved

The will or trust is the last formal communication of the testator. Each is cold, impersonal, and often contains form language that conveys none of the testator's thoughts or feelings. The postmortem period may find some family members in grief, confusion, and in need of an explanation of the bequests from their deceased relative or friend. A "side letter" written by the testator, but not intended to be a testamentary document, can provide peace to the family. The side letter expresses why the testator has decided to make the bequests he or she has made and, if written from the heart, can also bring understanding. Karin Prangle, Illinois attorney, meeting of the ABA's Emotional and Psychological Issues in Estate Planning Committee (June 12, 2009).

Often it is that which is not said that leads to trouble. In one case, a testator left her entire estate to her son because he had managed her life for 50 years, but left nothing to her two daughters. The extremely angry and disappointed daughters unsuccessfully contested the omission of gifts to them. An attorney representing one of the siblings commented, "Will contests are not always about the money, it is often the symbolism. The symbol of the maker's love or absence of it. In this case a side letter from the testator would have helped convey the testator's reasons and might have prevented the misinterpretation of the maker's intentions." Interview with Peter Gulia, Pennsylvania attorney.

The side letter may not always be helpful in preserving the testator's intent. The letter could be construed to suggest the testator was unduly influenced. In addition, side letters will not mitigate conflict in a family that is prone

to fighting. Interview with Gary Wunderlin, California attorney. A side letter has little influence on contentious beneficiaries who may claim the testator was coerced into writing the side letter. Such letters, however, can still have a significant effect in court as corroborating evidence of the testator's intent when making the contentious gift.

Side letters should be used cautiously if testators are angry when expressing their reasons for omitting an heir from a will or trust. An emotional client may say something that causes more problems in the future. The attorney may want to write the letter while the client describes the reasons for his or her decisions, and then have the client sign it. In this way, the attorney can be confident that the letter supports and is consistent with the estate planning documents. Interview with Mark Lester. Some attorneys strongly oppose the use of side letters because they "could infect an otherwise apparently supportable estate plan. A side letter could foment litigation, and the potential for mischief is almost unlimited." Interview with Susan Davidoff, California attorney.

Can Mediation Provisions in Estate Planning Documents Provide for Less Conflict?

The opinions of attorneys are diverse regarding the benefits of including a mandatory mediation provision in estate planning documents. Many attorneys believe the greatest benefit to having a mediation provision in estate planning documents is that it sends a message: that the testator's wish is that any conflicts be resolved through mediation rather than litigation. "Getting people into mediation early on can in most cases be very important in enhancing the chances for settlement—before further polarization of the parties, derogatory pleadings, inflammatory brilliance by attorneys feeding the emotional flames, and of course before attorney's fees themselves become a critical part of the discussion. The almost invariable clarion call arising from deep-rooted emotions in many of these cases is an invocation of what the testator 'wanted.' That can be put to good use if mediation is directed by the testator. A skilled mediator can then use the testator anointed process to guide the parties to agreement." Interview with William Andrews, California attorney.

Frequently there is little or no communication between counsel before the first will or trust hearing. Early mediation can mitigate problems arising from this lack of communication. If one of the parties is not willing to settle, it will be learned very quickly. Interview with Lawrence Lebowsky, California attorney. Even if a mediation is concluded within the first hour, there is the added benefit of counsel, through the assistance and guidance of the mediator, being able to set goals and milestones, including the exchange of documents, limited depositions, and whatever else they can agree on to avoid unnecessary discovery and motions and keep a lid on attorney's fees and costs.

Despite the benefits to early mediation, there is considerable controversy about these benefits among practitioners. Some attorneys believe there is no downside to a mandatory mediation provision. Others believe a mandatory mediation provision weakens a no-contest provision because mediation would provide the potentially contesting party a "free look" at the parties and issues. Also, heirs are not contractually obligated to participate in the mediation, making enforcement impossible. "If a person wants to contest a trust or will, whatever you put in the document will not prevent some people from contesting." Interview with Susan Davidoff.

Timing can be everything in mediation. Some parties will never appreciate the value of mediation unless they have paid the tremendous costs of litigation—such as taking depositions and conducting discovery—and waited for progress to be made. But counsel should make use of depositions cautiously because this could result in much greater anger among the parties and greater difficulty in resolving conflict. Interview with Gary Wunderlin. "The early mediation is not for the same purpose as the mediation 6 or 12 months after filing. You're dealing with the emotional issues that block resolution, such as sibling rivalry." Interview with Lawrence Lebowsky. Confronting these emotional issues as early as possible can avert months or years of significant financial and emotional expense.

The author is unaware of any appellate or lower court decision concerning the enforceability of a mandatory mediation provision. In ruling on this issue, the court will have to consider the competing interests of supporting the last wishes of a testator versus enforcing a provision against a party that is not a signatory to such an agreement. Interview with Cozette Vergari, California attorney. If the contesting party claims, however, that the testator was under undue influence or lacked capacity or that there was fraud in the creation of the estate planning documents, the court will likely grant a hearing to determine the validity of the underlying testamentary documents, notwithstanding the presence of a mandatory mediation provision or no-contest provision. Interview with Kristine Knaplund, professor at Pepperdine University School of Law.

Ultimately, when considering mediation of an estate conflict, practitioners should compare the cost of one mediation session to the cost of a multiplicity of court hearings, and the financial and emotional benefits of an early resolution for their clients. Interview with Lawrence Lebowsky.

Incentivizing the Contesting Party

Another way to reduce the likelihood of an estate contest is to force the potentially contesting party to choose

between his gift, as intended by the testator, or no gift at all. “Add a provision to the no contest clause such that a failure to mediate is deemed to be a contest, and as a result of the beneficiary’s failure to mediate, any gift otherwise provided lapses.” Interview with Joel Pipes, California attorney. This combination in effect says, “If you challenge these documents before first mediating, you lose your gift.”

Instead of attempting to force a party into mediation, one could include a voluntary mediation provision framed to incentivize contesting parties to accept the gift or face a significant delay in distribution, that is, not sooner than 300 days after the date of death, or receive the gift within 120 days if there is no contest. Alternatively, the practitioner could couple the voluntary mediation provision with an incentive: “If both sides agree to mediate to resolve their difficulties, then the legal fees of both sides are paid out of trust property. If a party declines to mediate and if they lose their case in court, legal fees from all parties are charged against the losing party’s share of the estate.” Interview with Michael Whitty, Illinois attorney.

An alternative incentive tool is a document called “Guarding Against the Failure of Future Estate Planning.” The premise of this tool is that there are only two motives for challenging an instrument: (1) to gain under a prior instrument or (2) to gain through intestacy by knocking out all documents. These two motives may be thwarted by including the following language in the first estate planning instrument: “In the event that the contesting beneficiary takes under this instrument as a result of his successful claim of invalidity of a future instrument, then this gift shall lapse unless this person first attempted or offered to mediate the dispute involving the future instrument which led to its invalidity.” Interview with Lawrence Lebowsky.

The best deterrent to a will or trust contest could be as simple as a gift from the decedent by way of the trust or will to the possible contesting party. The gift needs to be substantial enough to deter the probable contesting party from taking any action at the risk of forfeiting the gift. This may be difficult, however, for testators that are reluctant to provide a gift that is large enough to be an effective deterrent. Interview with Gary Wunderlin. The testator should authorize the trustee to defend any claims, which will create a dual incentive for the contesting party to resolve the claim before litigation—the risk of losing the gift combined with the knowledge that the distribution will be reduced by the attorney’s fees paid by the estate in defending the claim. Interview with John Raskin, California attorney.

Finally, one could use a “Prophylactic Gift.” The testator makes an outright lifetime gift to the beneficiary within a short time after signing the estate planning documents. The purpose of the lifetime gift is to undercut the contesting beneficiary’s possible argument that the estate plan should be set aside because of the testator’s lack of capacity. The contestant’s acceptance of the testator’s gift shortly after signing the estate planning documents in question would undermine that claim. Interview with Michael Whitty.

The Legal and Ethical Agenda for a Meeting of Interested Parties

Eventually all interested parties in the trust and estate conflict must meet to address the issues. Getting to that moment, and the meeting itself, can be treacherous. “Having such a meeting during the estate planning process can be so complicated that the testator would not want to have it.” Comment heard at San Fernando Valley Estate Planning Council. Such a meeting could, however, resolve the conflicts that are likely to arise on the testator’s death. Agreements reached at these meeting opportunities can avoid postmortem litigation, help maintain family harmony, preserve the testator’s plan of distribution, and conserve the estate in the face of expensive attorney’s fees. To have a productive meeting that concludes in an enforceable written settlement agreement, certain legal and ethical criteria must be met.

The Guest List: Who Should Attend These Meetings?

When such a meeting is called, the estate planning attorney or the trustee can invite interested parties such as heirs, beneficiaries, the disinherited, and potentially contesting parties.

Although some attorneys have suggested inviting all stakeholders, others have suggested these meetings might be handled better in stages by first inviting only the heirs, beneficiaries, and potentially contesting parties, then by inviting other interested persons to subsequent meetings. Furthermore, the attorney or trustee may wish to invite the accountant or financial advisor, whom the heirs might already know and trust, to “go over the economics of the situation.”

Having spouses present at the meeting offers both benefits and disadvantages. Spouses are not direct stakeholders and can be disruptive. On the other hand, if the true decision maker is the spouse, it is better to include him or her at the meeting. Otherwise, progress can be delayed or stymied by the party that must consult his or her absent spouse before making a decision.

Attorneys will be involved in the process at some point in time or another. The better practice is for attorneys to participate early on. The bigger issue is more one of approach than timing. All parties will benefit if the approach taken by the attorneys is cooperative or problem solving and not competitive or adversarial. A cooperative

approach is one that addresses the interests and needs of all parties. Problem solving goes further, adopts a solution that is the best of all available outcomes, and is legitimate—no one feels “taken.” It can include brainstorming among counsel for the benefit of all parties. A competitive counsel seeks to get the absolute maximum for his or her client at the cost of the other party. This often leads to a breakdown of communication and relationship between counsel and possibly to impasse, litigation, and ultimately trial.

On the Record or Off?

Most attorneys prefer meetings to be confidential. To maintain confidentiality, it is necessary to either conduct a “confidential settlement negotiation” pursuant to statute or have a mediator facilitate the meetings so that conversations are protected by mediation confidentiality. The benefit of having a mediator present is that parties will not speak openly otherwise. A small number of attorneys want the ability to take the depositions of persons who have attended such meetings in case no settlement is reached. The best practice is to preserve the confidentiality of the meeting, which is necessary to provide a comfortable platform for open conversation leading to resolution.

Meeting Objectives for the Unobjective Parties

A meeting held during the estate planning process or postmortem can reveal conflicting interests and positions. For example, one stakeholder may take the position that his claim for a disproportionate share of the estate is justified, based on his belief that being the testator’s sole caregiver entitles the stakeholder to that compensation. The stakeholder’s sense of entitlement is the interest driving the position. Other interests can run much deeper, founded on events as far back as childhood when “Dad gave my sister a teddy bear and I didn’t get one.” And yet, principle is often the driving force: “This is what Dad wanted and I deeply believe we must carry it out.”

Often these underlying issues or difficult personalities need to be addressed during a confidential private session with a neutral person to discuss, understand, and fully appreciate the driving interests. Then, the party may become flexible enough to make progress on the larger positional issues so that resolution can be attained. Once an agreement in principle is reached, a binding, written settlement agreement should be signed. To ensure a binding and enforceable agreement, each party should have the agreement reviewed by his or her own attorney before signing, or the nonrepresented party “can wriggle out of it.”

Takeaways: Parting Words to Keep Conflict Apart from Those Parting Ways

Probate courts are the land of broken dreams, the arena in which the testator’s plans are laid to waste by conflict and attorney’s fees, and familial relationships are left in ashes. But there may be a better way. Managing estate conflicts at an earlier point in time provides a nontraditional, nonlitigious, and potentially golden opportunity to resolve conflict timely and efficiently.

Dig Deeply into the Relational Estate

Today, the emerging role of estate planners goes beyond simply avoiding death taxes and probate and should include an in-depth conversation with the testator concerning “the whole web of interpersonal relationships that connects [the family] across generations.” Gerald Le Van, *A Family Council for the “Relational Estate”* (July 2008), available at levanco.com. Digging deeply into the relational estate can reveal “flashpoints” that may lead to conflict after the testator passes. Discovering these conflicts is the first step to addressing them and possibly avoiding traditional trust and estate litigation.

Consider Addressing Conflicts During the Estate Planning Process

There are great potential benefits for all those who address conflict during the estate planning process. The trustor can rest assured his wishes will not be thwarted by litigation and his heirs saved from a court battle. The potentially contesting party can find an early resolution to a claim, and the attorneys can achieve higher professional and financial fulfillment with happier clients and without the tumultuous path of probate litigation. If addressing these issues during the estate planning process is unsuccessful, however, there is the added risk that the last years of the client’s life will be distressing and take a toll on his or her quality of life. Still, under the right circumstances, this approach can be beneficial to many.

Address Conflicts Timely Postmortem

The best alternative to estate litigation for families not suited to earlier conflict management might be within the golden window of opportunity, at a time when the players are able to deal productively with the issues but before estate litigation commences. Generally, early resolution, when all the critical ingredients are present, is better for

the parties, preserving relationships and reducing costs.

Incorporate Conflict Management into Other Estate Planning Documents

Estate planning professionals can offer new choices to clients that have the potential to preserve more of the testator's financial estate and better preserve family harmony and the relational estate.

- *Preserve the Testator's Intent.* Preserving the integrity of estate planning documents by videotaping the signing process or taking copious notes during the estate planning process can protect the estate against claims of incapacity, fraud, or undue influence.
- *Sway Potentially Contesting Parties with a Side Letter.* A side letter from the testator can elicit understanding from beneficiaries and disinherited heirs, making them less likely to bring an estate contest. The side letter expresses why the testator has decided to make the bequests he or she has made and can bring understanding.
- *Consider Using a Mandatory or Voluntary Mediation Provision.* A mediation provision relays the testator's desire that potential conflicts be resolved through mediation rather than litigation. The provision may not be enforceable, however.
- *Incentivize the Contesting Party.* Consider adding a clause to the no contest or mediation provision such that a failure to mediate is deemed to be a contest, and as a result of failing to mediate, any gift lapses or results in a significant delay in distribution. Another incentive tool is a substantial gift from the decedent to the possible contesting party combined with a provision authorizing the trustee to defend any claims. In the alternative, providing for a reduced or lapsed gift under a prior estate plan for a beneficiary who successfully challenges a future will or trust may also prevent an estate contest.

Consider Holding a Postmortem Meeting

The goals of such a meeting, whether held during the estate planning process or postmortem, are to resolve the conflicts that are likely to arise on the testator's death, maintain family harmony, preserve the testator's plan of distribution, conserve the estate from the huge eroding costs of litigation, and allow for a quicker distribution.

Have Courage to Undertake Uncomfortable Conversations with Your Client

Uncomfortable conversations are those that could be fraught with tension and conflict between counselor and client. As an estate planner it can be uncomfortable to dive into the goo of the client's painful relationships. Yet, it is necessary to counsel the client about conflict and the client's choices about when and how to address those conflicts in a manner that will preserve his estate and carry out his testamentary wishes. These conversations can be brutal on the counselor and the client. They may include issues the client does not want to hear about, much less deal with. For some clients who do not want to even acknowledge certain issues, the attorney faces the potential reaction, backlash, or wrath from their most difficult clients. These are courageous conversations that, if not opened at the counseling level, will have to be dealt with during mediation or, worse, during trial.

Something for Everyone, Including Estate Planners and Estate Litigators

Managing estate conflicts at an earlier point in time presents the opportunity to create more options for practitioners, more value for clients, and ultimately through greater client satisfaction, more client referrals and greater personal benefit to the practitioner.

Push the Envelope: Be Inspired to Change the Culture of How Estate Conflicts Are Resolved

If the envelope is the current paradigm and cultural tradition of estate planning and estate litigation, find the courage to push beyond that tradition and try something new, in appropriate cases: address conflicts at the earliest practical opportunity and at the same time maintain what is in the best interest of the client. Twenty-five years ago, Chief Justice Warren Burger urged: "The entire legal profession . . . has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be Healers of Conflicts. For many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. . . . Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."

Changing the culture means thinking about things differently and exploring these tools with colleagues on the same side and on the opposing side of conflicts to change the traditional paradigm. Most importantly, changing the

culture of conflict means *doing* things differently. If not now, when?