

Family dynamics

Jordan Atin discusses the importance of considering the emotional aspects of estate planning

Because of our work in the estates field we get a unique perspective on families and family dynamics. This perspective is crucial, because at the heart of most estate plans, and almost certainly every estate dispute, lie family dynamics.

Obviously, a good estate plan has to work from a technical and practical viewpoint. From a technical point of view, the will has to comply with income tax and trust law, for example, the law against perpetuities. A good practical estate plan will have considered the proper mechanics to permit a smooth estate administration, for example, providing for tie-breaking in the event that the executors are deadlocked.

As STEP members, our clients can rest assured that the technical and practical aspects are well taken care of. But do we do as good a job of raising and giving advice on the emotional effects of the will that arise after the testator has passed away? Do we contemplate with our clients how the words in the will are going to resonate with the beneficiaries? Do we consider how the beneficiaries are going to react?

A lasting record

A will is usually the last thing that a parent says to his or her children. Written in black and white, it creates a definitive, lasting record of the relationship between parent and child and among a child and his or her siblings. That reason alone explains why estate disputes are so hotly contested. Estate litigation is often about 'correcting' versus 'upholding', that lasting record.

In most cases, the dispute is about relationships that have continued for 30, 40 or even 60 years. Thus, the fact that the estate plan is simple or complex does not matter. It is history that matters.

Take a typical, simple scenario: Mother with three children all in their late 30s and 40s. The eldest is a son, the middle is a daughter and the youngest is another son.

Mum wants to treat her children equally. However, she has concerns about the youngest child who, because of a recent bankruptcy, still lives in the family home. She doubts his ability to make sound financial decisions.

What can we do to protect him from himself, she asks?

Simple, we say, let's set up a trust that provides payouts over time. It may even be beneficial from an income tax point of view, since we can split income between the trust and the son.

We point out that Mum needs to appoint a trustee. No problem, her oldest son is a lawyer, very financially responsible and trustworthy – all the criteria for a good trustee.

We have a good plan and we draft a good will.

When Mum dies, suddenly, we hear about a fight in the family. How can that be? The plan was solid, the will valid.

When the kids all got a copy of the will, they did exactly what most children do, they look to see if the will confirms their own perception of their family and their role in it.

What did the will say to each of them?

To the eldest, the will confirms the trust

Mum had in him throughout her life. She put him in charge because she knew he was the most responsible. Mum was smart to put a limit on his brother's money because of his



failed business attempts. 'Mum wants me to protect him from himself.'

To the youngest, the will is just like the way he has always been treated – like a baby. It was that way growing up and it is still that way even though he is 38 years old. 'Older brother is in charge and is going to tell me what to do. Mum never trusted me and she is showing it again.'

The middle daughter says 'Here we go again. I can see it now, my brothers are going to fighting and I'm going to be in the middle.' She has already started getting calls from her baby brother saying how the will isn't fair. She is also getting calls from her older brother. He wants her to support him in his decision not to give more money to the younger brother. 'Why would Mum do this to me again,' she asks?

The will stirred up all the emotions and feelings that had been bubbling under the surface for all those years. That intangible 'lid' that often kept emotions from manifesting is gone when both parents die. Those childhood feelings and family dynamics are redirected and focused on something tangible – the parent's estate. It becomes the lightning rod for the years of underlying emotion.



It's the principle

How do siblings justify fighting each other over their parent's estate. It is a rare occasion when a party will admit that he or she is fighting only for the money. Instead, when an estate dispute arises, children justify their involvement in one of two 'principled' ways:

i) *It is not what Dad really wanted.*

For example, in a will challenge, the challenger will justify his challenge by alleging that the wishes in the will is not what Dad really wanted, because he lacked testamentary capacity or was unduly influenced. The child propounding the will, justifies fighting by protecting dad's true wishes as expressed in his will.

ii) *It's not fair!*

For example, this justification might be

used when one child receives the family business, which increases in value out of proportion to the assets which are left to the other children.

In Mum's case, the fight that ultimately takes place is started by the youngest child. For him it is about 'righting the wrongs of the past'. To do so, all he needs is a legal hook. Perhaps he challenges the validity of the will, seeks an accounting or applies to remove his brother as executor. In any case, those legal proceedings will create a forum for the siblings to fight one another. The youngest will be fighting to correct the final written record – the will – and prove that he is equal to his siblings and as much as Mum's child as they are. The eldest will fight back, enforcing Mum's wishes and standing up for her, now that she is gone.

Could we, as Mum's estate advisor, have helped prevented the fight?

Did we discuss Mum's family and their relationships with one another in sufficient detail?

Did we, using our experience, adequately explain how Mum's simple, 'good' plan was going to play out emotionally with the beneficiaries?

Did we encourage Mum to think about the relationships and the emotional impact of her options in devising the plan?

If not, perhaps we can do a better job of considering the emotional, and not just the technical and practical, aspects of estate planning when creating a 'good plan'.

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