

AVOIDING PROBATE LITIGATION ATTORNEYS CAN HELP FAMILIES PREVENT COSTLY DISPUTES

BY JESSICA S. FORREST & PAUL R. SHUGAR

The mixing of financial issues with the emotion of losing a loved one is a big reason probate litigation occurs, and demographics support that estate and trust disputes only will increase in the coming years.

According to the Population Reference Bureau and Census Bureau, there are roughly 76.4 million Baby Boomers in the United States. The youngest members of this generation will turn 65 in 2029, and Fortune.com estimates that Baby Boomers should transfer roughly \$53 trillion to their heirs and beneficiaries through 2045. To put that \$53 trillion in perspective, the United States' national debt is roughly \$31 trillion at this time.

The triggering event for most of these transfers will be death. And while death is inevitable for everyone, Mental Health of America recognizes that the loss of a loved one "is life's most stressful event and can cause a major emotional crisis." Potential responses include denial, anger, and guilt; grief can cause anxiety attacks, chronic fatigue, depression, and obsession with the deceased.

This is why even the closest families can fight over everything from a non-probate beneficiary designation on a bank account to the division of the decedent's Hummel collection.

Some clients cannot avoid litigation, but attorneys advising fiduciaries and beneficiaries/heirs should help clients avoid unnecessary disputes when possible. Here are five steps attorneys can take to help avoid probate litigation:

Use your words

Poor communication is the most

common cause of probate litigation. Even a small dispute after the death of a loved one can cause communication to break down and necessitate attorney involvement for the entire estate/trust administration — or, worse, lead to litigation.

If representing the fiduciary, the attorney needs to openly communicate as to the estate/trust assets, the pending administrative issues, and the expected timeline. The more involved the beneficiary feels in the process, the more the beneficiary will approach the administrative decisions from a position of trust to help limit disputes.

First impressions matter, which is why something as small as an estate inventory can set the tone for the entire administration. Attorneys who take time to provide the proposed estate inventory to the beneficiaries for their input before filing are sending the message that they want to work with the beneficiaries — not dictate to them.

If representing a beneficiary, the attorney needs to make sure the client timely responds to the fiduciary's communications and clearly states the beneficiary's positions on any administration issues.

By maintaining open and clear communication, attorneys for both fiduciaries and beneficiaries help to avoid litigation.

2 Prepare your fiduciary

Before even taking action to obtain a fiduciary appointment, attorneys should spend time talking to their clients to explain a fiduciary's role. Attorneys should advise the potential fiduciaries that their respective appointments will mean they owe legal duties to the beneficiaries that could make them liable should breaches occur. This is also a good time for attorneys to confirm

that only the fiduciaries owe duties to the beneficiaries, and that the attorneys are not accepting any delegation of duties.

Because fiduciary appointments become routine, many attorneys do not take this time to ensure their clients are ready for their positions. Some clients struggle because their grief makes handling their fiduciary duties overwhelming. Others want everything done as soon as possible, and their rush creates conflict.

A fiduciary's job is to get the estate/trust settled pursuant to the decedent's governing instrument and Ohio law. Attorneys should focus their clients on doing things correctly instead of focusing on speed. If the client cannot handle the fiduciary duties, then that person should consider not serving or resigning.

By carefully selecting and then educating the fiduciary, the administration will proceed more smoothly (and without an annoying lawsuit or action for removal).

3 Be an open book

Fiduciary attorneys often make the mistake of ignoring or not timely responding to beneficiaries' reasonable requests for information. Such actions could make beneficiaries believe the fiduciary is hiding something and further fuel the dispute. Failure to respond could also lead to the probate court removing the fiduciary.

Beneficiaries often will believe decedents have additional assets or that assets are missing. They also might not understand the distinction between non-probate assets passing via designation and estate assets passing via testamentary document or Ohio law. If a beneficiary has questions, the fiduciary should respond as transparently as possible. If the fiduciary needs more time

to respond properly, the attorney should communicate this to avoid creating conflict.

The more timely, open, and complete a fiduciary can be with beneficiary requests, the less likely an action for an accounting or removal will be.

4 Check the client's unrealistic expectations Too often, attorneys fail to help clients understand the economic realities of their issues.

For example, one of two brothers could be upset that the decedent made a \$100,000 account payable on death to his sibling. In evaluating the issue, the brother learns that there was no previous beneficiary designation. This means, should a probate court invalidate the beneficiary designation on the grounds of lack of capacity or undue influence, the decision would return the \$100,000 account to the estate with each brother receiving half. What appears to be a \$100,000 claim is really a \$50,000 claim (and that is assuming the decedent's will

does not divide the estate into smaller shares to multiple beneficiaries).

In short, some wrongs do not warrant probate litigation's costs.

5 Separate sorrow from legal issues Attorneys should never minimize their clients' grief — whether the death was sudden or long anticipated. Attorneys should refer their clients to grief counselors, especially if emotional issues are driving disputes. Such counseling can help clients process their emotional issues and approach the legal issues without this additional baggage clouding their decision-making. Once a client is in a better frame of mind, they might try to negotiate before they file a complaint.

The next 20 years will have their fair share of unavoidable probate litigation. Attorneys who set realistic expectations and communicate openly with clients and beneficiaries will help keep their clients out of adversarial matters.



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