# Estate Planning Insights

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## AVOIDING PROBATE COURT LITIGATION

*Some of you may have read the two-part series in the* Houston Chronicle *on June 24 & 25 regarding the high cost of "contested matters" in the Probate Courts (both financial and emotional). This newsletter will address some of the factors that lead to such "litigation" in the probate courts and possible ways to avoid it. Of course, human nature being what it is, not all disputes can be prevented. It is important, however, to consider what actions (and failures to act) might increase the likelihood of "probate problems" and do something preventative.*

**If Every Decedent Had Only One Child.** When I was a young lawyer, I attended a meeting with several attorneys that was called for the purpose of discussing certain "contested matters" that had arisen after the death of a widower (the "decedent") who died survived by four children. I was shocked to hear one of the seasoned attorneys say, "If all decedents had only one child, my workload would decrease to nothing." Whether you go back to Cain and Abel, or only as far back as the Smothers Brothers ("Mom always liked you best"), sibling rivalry is a chief factor in a lot of disputes that arise after a parent dies. Many lay people attribute all litigation to greed, but in the case of family situations, there is often much more going on than that. Sometimes children hold deep seated resentments, which may be based on perceived unfair treatment by a parent or sibling, often going back many years. Sometimes the last living parent is the only "glue" holding the children in the family "together" (if they ever truly were, in fact, "together"). Sometimes parents have unrealistic expectations about family.

**What Is Probate Court Litigation?** The terms "contested matters" and "litigation" are often used interchangeably. Both refer to situations that may require some type of Court action to resolve a dispute or fix a problem. Some contested matters do not involve animosity between the parties, while others definitely do. If the matter surfaces due to a person's death or mental incapacity, then any necessary court proceeding will usually be filed in a court that has "probate jurisdiction". Larger counties, like Harris County, have specialized courts, called "statutory probate courts", with specific authority to handle most matters involving decedents' estates and mentally incapacitated persons. In smaller counties, these matters may be heard in the county court or in the district court, depending on the type of action, the amount involved, and the preference of the parties (some of the medium sized counties also have specific courts designated to handle probate matters).

Most of the matters handled by probate courts, such as admitting Wills to probate and appointing Independent Executors, are routine and *not* contested. Routine probate matters can be handled very efficiently. The recent *Chronicle* articles do *not* apply to these situations.

"Contested matters" handled by probate courts (a/k/a "probate court litigation") is a broad term that includes a variety of situations, including, but not limited to:

- Will Contests (a challenge to the validity of a Will);
- Will and Trust Construction Suits (a request that the Court make a determination regarding the legal meaning or effect of particular wording used in a Will or Trust);
- Guardianship Contests (a fight over [i] whether a Guardian should be appointed for a particular individual who allegedly has lost his mental capacity [and did not do any advance planning, such as executing Powers of Attorney], and [ii] if so, who should be appointed as the Guardian to make medical decisions and handle financial matters for that mentally incapacitated person);
- Trust Modification and Trust Reformation Suits (a proceeding requesting the Court to change [or "fix"] the terms of a Trust, because something is wrong with the way the trust is worded);
- Trust Termination Suits (a legal action brought to terminate a trust because the purpose of the trust has been fulfilled or can no longer be fulfilled); and
- Breach of Fiduciary Duty Actions (suits by beneficiaries against an Executor, Trustee, Guardian or Agent alleging that such fiduciary failed to act in accordance with the law and/or the instrument appointing her, and thereby caused damage to the beneficiaries).

**Another High Risk Factor.** Besides having more than one child, another high risk factor for probate litigation involves having more than one spouse (not at the same time, of course!). We mean the so-called "second marriage" situation. First of all, too many people marry for a second (or even third or fourth) time without signing a Pre-Marital Agreement ("Pre-Nup") prior to the wedding. Many people, including the media, still mistakenly believe that the sole purpose of a Pre-Nup is to specify how the couple's assets will be divided upon divorce. While such matters *can* be addressed in a Pre-Nup, from our point of view as estate planning lawyers, we are more concerned with the "messy issues" that develop upon death (we have an optimistic attitude that our clients' marriages will work out; we have a pessimistic attitude when it comes to death, however--all of our clients will die someday). To our way of thinking, the Pre-Nup is one of the best ways to avoid probate litigation upon death. It can also avoid a very expensive "forensic accounting" on the death of the first spouse. We have previously discussed at length the provisions of Texas marital property law that cause technical asset ownership problems in a second marriage and will not repeat that discussion here. The essence of the problem is that many people mistakenly believe that they own certain assets as their separate property (perhaps simply because the asset was in existence prior to the marriage and/or is titled solely in their name) when, in fact, the asset has become community property, in whole or in part, during the marriage (this happens most often due to earnings being added to an account, dividends being automatically reinvested, etc.). It is better for living persons to create the necessary documentation regarding the ownership of their assets, even if it involves a Pre- or Post-Marital Agreement, than to have family members fight over these matters upon the death of their spouse or parent. Not to be "too harsh", but it appears irresponsible (and, perhaps also, "penny wise and dollar foolish") for anyone who owns any significant assets to enter into a second marriage without a Pre-Nup. Even if the spouses in a second marriage are themselves happy to treat all assets on hand upon the death of the first spouse as community property, unless the proper legal documentation is in place, there is nothing to stop one or more children of the deceased spouse from claiming otherwise after the death of their parent. This is the classic probate court litigation case: children of the first marriage versus the spouse of the second marriage.

**Dysfunctional Families.** The term "dysfunctional family" is used a lot by lawyers who handle probate litigation (one of my former law partners liked to explain his practice by saying that he represents "dysfunctional families with wealth"). By definition, a family involves multiple people who have wants and needs and must interact with each other. It is easy for dysfunction to arise in families, especially if resources must be shared. Family relationships can be very rewarding, but they can also be very hard. It appears that a lot of misunderstanding arises due to the fact that people do not always communicate clearly with each other, leading to unresolved issues. Sometimes it is just too painful for people to address issues that really should be addressed. We are not psychologists, but we understand the difficult situations some people are in. We are here to help our clients, if we can. We generally find that focusing on–and actually dealing with–difficult issues in a pro-active way is a better approach than "sticking your head in the sand". "An ounce of prevention is worth a pound of cure." This is particularly true when it comes to avoiding probate litigation. Some people say they don't care what happens after they are dead; the problem is that, if there is probate litigation after the person's death, even the person's *favored* beneficiaries suffer. Good planning is the answer.

**Factors that Could Lead to Probate Litigation.** Over the years, we have seen various contested matters end up in litigation in the probate courts. Here is a list of *some* of the factors (in no particular order) involved in the litigation we have witnessed, grouped by categories:

• **Creating a "Non-standard" Estate Plan**. This includes estate plans that (i) "cut out" a child, (ii) treat children differently, (iii) create overly detailed trusts that attempt to "control from the grave", and (iv) make gifts to mistresses, for example. It does not matter if the person creating the plan has "good reasons" for doing what he is doing. A non-standard estate plan increases the odds for probate litigation after death. It's just a fact.

• **The Second Marriage Situation.** As previously noted, if there is no Pre-Nup or Post-Nup that clearly defines the ownership of assets by couples who were married previously, the potential for litigation upon the death of a spouse is much greater (especially if there are children from the prior marriage). Also, if assets are not cleanly divided between the surviving spouse and the children from the prior marriage, problems can arise. Sometimes using life insurance is the only way to separate the interests of the deceased spouse's children from the surviving spouse and provide for both of them. The use of trusts can help, but the trust must be carefully structured. Probate litigation is more likely with plans that create a trust for the surviving spouse (i) with the children of the first marriage as *permissible current beneficiaries* of the trust along with the spouse, (ii) that gives the surviving spouse a power of appointment over the trust, especially if the trust assets can be given to beneficiaries other than the decedent's children, and (iii) in which either the surviving spouse or a child of the deceased spouse (or both together!) are the Trustee(s)–this type of trust is usually best handled by an independent Trustee, such as a bank or trust company.

• **Not Appointing the Right Fiduciary.** Serving as the Executor of an Estate, the Trustee of a Trust, or an Agent under a financial Power of Attorney requires a huge commitment of time and effort and absolute honesty. When considering who should be named in these important fiduciary positions, the personality traits and skills of the appointee should be carefully considered. It would be a big mistake to name someone in one of these fiduciary positions who

• does not communicate well with the beneficiaries

• does not read (or listen to) *and follow* the instructions of the attorney advising him

- procrastinates in getting things done
- is not 100% trustworthy
- may be susceptible to the (bad) influence of his/her spouse or someone else
- is arrogant, conceited or a "know it all"
- is disorganized and/or loses things
- is lacking in common sense

Further, it is often a mistake to name two people to act together as Co-Fiduciaries (unless both individuals are extremely mature, sensible and well-adjusted, good communicators and good at coordinating their efforts).

• **Ill-Conceived or "Faulty" Planning.** We have seen so many examples of "bad" estate planning that it is impossible to list them all here. Some are the result of incompetence and/or lack of experience on the part of the attorney who prepared the plan. Others are the result of individuals trying to do things themselves that are not well thought out. Some examples in this category include (i) a person writing his/her own Will or Codicil (unless the instrument is a handwritten Codicil that disposes *only* of personal effects); (ii) having a "customized estate plan" prepared by an attorney who is not Board Certified in Estate Planning and Probate Law (or who lacks the necessary expertise to draft non-standard provisions); (iii) creating a "group trust" for adult beneficiaries (i.e., one trust out of which the Trustee can make distributions currently to any of several persons); (iv) appointing one child as the Trustee over another child's trust; (v) buying too many annuities (these assets are almost impossible to deal with effectively in an estate plan); (vi) an Executor, Trustee, or Agent ("Fiduciary") not hiring an attorney to represent and advise him, at least initially;(vii) an Executor hiring a lawyer who lacks the necessary expertise to help with the post-death matters when the Will contains tax and other "sophisticated" estate planning in it (we are currently "cleaning up" a situation like this, where the lawyer "bailed out" after probating the Will, without properly funding the Bypass Trust created in the Will); (viii) a Fiduciary not hiring an accountant to prepare all required income tax returns and provide relevant tax advice affecting the Estate, Trust and/or the beneficiaries; (ix) a Trustee not hiring an investment advisor or agent to assist her with managing the investments of the Trust; (x) a parent not explaining or discussing his estate plan (at least in general terms) with his children; (xi) a person signing a Will or Codicil on her "death bed" or while suffering from a serious illness; (xii) a person naming a minor (a person under age 18) as the direct beneficiary in a Will or Living Trust or as the beneficiary of life insurance, IRAs, retirement plans, etc.; (xiii) attempting to dispose of non probate assets (such as assets that pass by beneficiary designation) in the Will; (xiv) arranging for the complete disposition of assets in a non probate manner by using "multi-party accounts" (such as JTWROS and POD/TOD), leaving the Executor with no funds to pay debts, taxes and expenses after death; (xv) attempting to dispose of all assets, individually, rather than using percentages (at least for the bulk of the estate); (xvi) in a taxable estate situation, having a plan that disposes of assets passing outside the Will differently from assets passing under the Will and not properly coordinating the tax consequences of the dispositions.

• **More Difficult Situations.** Other situations that are always more difficult to plan for and increase the need for solid planning to avoid probate litigation (and other problems): (i) heterosexuals living together who have not executed a "Non Marital Cohabitation Agreement" to avoid a "common law spouse" lawsuit upon death; (ii) gay and lesbian couples who do not do "special additional planning" in order to place their partner in a secure position of control (to override state law priority statutes) and to arrange for the unassailable transfer of assets to their partner upon death (tax planning can also be harder because the estate tax marital deduction is not available to gay and lesbian couples); (iii) making unreported "taxable gifts" during life (a taxable gift is a gift that is more than $12,000 per person per year [the current annual exclusion amount]); (iv) making gifts during life to just one child and not to all children in equal amounts; (v) failing to tell your estate planning attorney about your illegitimate child or child from a prior marriage; (vi) failing to organize your financial and other important information to enable the Executor of your estate to do a good job when you die.

• **Failure to Follow Up.** This category includes (i) failing to review your estate plan on a periodic basis (estate plans become outdated very quickly now); (ii) failing to do the necessary "homework" incident to your estate plan (such as re-titling accounts and completing beneficiary designation forms as instructed, so that non probate assets are coordinated with your estate plan in your Will or Trust); (iii) failing to change your Will, account titles and beneficiary designations after marriage or divorce; and (iv) failing to re-title all of your assets in the name of your Living Trust before you die if your intention is to avoid probate completely.

**How to Avoid Probate Litigation.** Don't do things that could cause serious legal consequences without first discussing them with us or your other advisors. We always reserve time for "existing clients" for consultations. Come in for a "check up" on a regular basis and, when you do, discuss every issue and concern you have. Bring your estate planning documents up to date. Follow through on necessary "homework" (see above). If you are going to create a non-standard estate plan, we may need to use "stronger" techniques (such as a Living Trust) and include additional provisions (such as a "No Contest" clause). Keep in mind, however, that a No Contest clause has no "teeth" unless the disinherited person is at least given some amount worth losing.

**Please Be Considerate!** Every week we get calls from both clients and prospective clients who have an alleged "emergency" situation. They need Wills and/or other estate planning documents *immediately* because _______ (fill in the blank with items such as, they are leaving on a trip next week and they have to change the Guardians for their children; or, they are having surgery in four days and they need to change the Executor in their Will and/or the agent in their Power of Attorney; or, they have just been diagnosed with cancer and their estate planning documents are 20 years old). These cases are examples of poor planning. If you know you are going on a trip or to work overseas, you usually have some advance notice of that. Don't wait until the week before leaving to contact us. We cannot always drop all of the work we are doing for other clients for these "man-made emergencies". It is your responsibility to call us to come in for an estate planning "check up" if you have not had one in more than 5 years. Further, as soon as something develops that could require a change in your estate plan, call us to schedule an appointment. We sometimes work seven days a week, several weeks in a row, to take care of our clients. Thus, it is not always possible to add another client on top of our existing workload, especially if it is a "rush" situation. Further, far more mistakes are made in rush situations than in normal situations. We are glad to help you if we can, but don't demand emergency treatment when most of the problem is your failure to plan ahead. We know people are busy, but we are busy, too. Remember Aesop's fable: Those who plan ahead, like the ant, will be fine, while those who play the fiddle (while the ant toils away), like the grasshopper, will be in trouble when "winter" comes (and we all know it's coming)!

**Contact Us:**

If you have any questions about the material in this publication, or if we can be of assistance to you or someone you know regarding estate planning or probate matters, feel free to contact us by phone, fax or traditional mail at the address and phone number shown below.

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