

# ORANGE COUNTY BUSINESS JOURNAL

WEALTH MANAGEMENT & ESTATE PLANNING

## Family Feuds: *Estate Litigation an Unpleasant Game for Unprepared Benefactors and Beneficiaries*

**T**hroughout Orange County and the state, court records have shown a substantial increase in trust and estate litigation. Many—perhaps the majority—of these cases involve family disputes among children, surviving spouses, siblings and/or other family members over the management and administration of the descendant's assets by his or her executor or trustee. Timothy J. Kay and David W. Evans, trusts and estates partners in the Orange County office of Snell & Wilmer in Costa Mesa, have a combined experience of more than 40 years in handling a wide variety of trust and estate litigation matters for their clients.

The following are some common problems encountered by Evans and Kay in their practices, and suggestions on how to potentially mitigate similar woes in developing an effective estate plan.

### Lifetime trust problems

**The issue:** Many who establish revocable living trusts often act as their own trustee, and frequently do not give a great deal of thought to the administration of their trusts during their lifetime. However, serious consideration should be given to the administration of the trust if and when the client becomes incapable of properly managing the trust assets.

**Example:** A mother names herself as trustee of her own trust and names her son as successor trustee. The son is also a beneficiary of his mother's trust. The mother later becomes incapacitated and son takes over as trustee. The mother has always lived well, and her estate is large enough to afford the highest quality accommodations and care. The son figures that his mother is "out of it," so why spend her money (i.e., his future inheritance) on a quality assisted-living facility or convalescent home, or on quality live-in help, when she won't know the difference

(so the son thinks). As a result, the mother spends the rest of her life in a dilapidated, low-end convalescent home rather than a clean, well-managed facility that she could easily afford.

**Alternative:** One possible way to avoid this problem is to include specific language in the trust stating that the trustee is to use the trust funds liberally to allow the mother to live in the highest quality facility, with a personal caretaker assigned to attend to her needs. Another approach would be for the mother to name a successor trustee who doesn't stand to receive any of her estate. That would eliminate the financial conflict of interest the son faces. For example, the mother might appoint a

corporate trustee or a private professional trustee or one of the mother's advisors such as her personal accountant, or another friend or relative who is not a beneficiary of her trust. Still another approach is to give some other person the authority to decide where the mother lives, and what level of care she receives, and then obligate the trustee to pay all expenses for such board and care.

**Example:** Significant risk and concern commonly arises for trustees when an elderly person has a live-in caretaker/housekeeper. Elderly people commonly become attached to their caretakers and it is not unusual to have a caretaker pressure or persuade the patient to include the caretaker in his or her trust.

**Alternative:** Design the trust in such a way that an amendment to the trust is valid only if it is reviewed and approved by the patient's estate planning attorney. After review by the attorney, the amendment would not become effective until 30 days after a copy of it is mailed to the patient's children and/or other family members. That is just one technique of avoiding so-called "deathbed amendments" or "deathbed codicils" leaving the patient's estate to the caretaker.

### Family dynamics/rivalries

**The issue:** There are a surprising number of estate plans designed on the assumption that the beneficiaries will all get along after the benefactor is deceased. This is not always a reasonable expectation. Experience has shown that longstanding sibling rivalries or other family resentments often come to the surface quickly after the parents are deceased. A disgruntled child or other family member will often use the court as a means of "retaliating" for perceived wrongs.

#### Examples:

1) A set of parents appoint their son as successor trustee and, after their passing, the stock market goes into a general decline. The son's sister

may use that as an opportunity to bring an action in the probate court for the removal of son as trustee on the ground that he breached his trust by failing to promptly dispose of the parents' securities and thereby avoid the loss, which occurred as a result of the stock market decline.

2) Another area of substantial litigation is second marriages where each spouse has children of a prior marriage. Without adequate forethought and planning, this can be a nightmare for the surviving spouse and the children of the predeceased spouse. There is often unstated resentment on the part of the children who secretly (and sometimes openly) blame the second spouse for having "broken up their parents' marriage." This can be a particularly troublesome issue where the second spouse is roughly the same age as the deceased spouse's children.

**Alternative(s):** Dealing with this issue requires careful consideration of the persons involved, their relationships with one another, and a clear understanding of what is community property and what is separate property. The situation often calls for a co-trustee arrangement and/or an independent trustee. In addition, it is often wise to consider an arrangement that might allow the predeceased spouse's children to receive some benefit from his or her estate rather than making them wait until the second spouse is deceased. By then, some of the children may be deceased or too old to enjoy their inheritance.

### Trustees

**The issue:** A major area of trust and estate litigation involves problems arising from the use of inexperienced or inappropriate trustees. The person appointed as trustee needs to be someone who is stable, mature, has good judgment, is trustworthy, and has some experience in managing assets.

**Examples:** 1) Benefactors who have always handled their own financial affairs often do not

TIMOTHY J. KAY  
DAVID W. EVANS

Attorneys Timothy J. Kay and David W. Evans are trusts and estates partners in the Orange County Office of Snell & Wilmer in Costa Mesa. The attorneys are available at (714) 427-7000 or by e-mail at [dwevans@swlaw.com](mailto:dwevans@swlaw.com) and [tkay@swlaw.com](mailto:tkay@swlaw.com).



KAY



EVANS

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appreciate the effort and expertise that will be required of the person named to act as trustee after they can no longer act. A casual appointment of a friend or family member as successor trustee can have a disastrous effect on the trust and its ultimate beneficiaries.

2) Parents will sometimes focus more on their feelings about a particular child than on the child's ability to properly manage their assets after they are deceased or incapacitated. Parents often don't want to offend any of their children by picking one over the others as trustee, so they may appoint all of them, which needlessly complicates the trust administration and can result in disputes among the trustees.

**Alternative(s):** If parents insist on appointing all their children as co-trustees, experienced estate planning attorneys will often recommend that they include a provision in the trust encouraging the children to select one child to act as sole trustee, and have the others decline to serve, or else delegate authority to one child so that the administration of the trust is not overly complicated.

Parents should be aware that appointing one child as trustee over another child's share of the trust is always problematic for both children. This strategy is guaranteed to generate tension and hard feelings between them, and possibly ruin their relationship.

## Courts have little tolerance for family disputes

The issue: The Orange County Probate Court incurs a huge volume of trust and estate matters being processed at any one time.

**Example:** When a family dispute arises in connection with a trust, the probate court has little time or inclination to determine who is right and who is wrong at the preliminary stage.

The court will readily appoint an independent trustee, such as a bank or trust company, or a private professional fiduciary, so that none of the disputing parties is acting as trustee. This tactic takes the issue of control out of the hands of the disputing parties and puts it in the hands of a trustee who has nothing to gain or lose by the outcome of the dispute. Unfortunately, this brings an added expense to the trust because the new trustee will charge a full fee and will have an attorney who will also be paid from the trust for his or her services.

**Alternative:** Given this policy of the probate court, it is often advisable to consider naming a corporate trustee or other non-beneficiary as one of the alternate trustees so that if litigation arises and the court removes the person you have named as trustee, an alternate trustee of your choice can be appointed.

**Example:** A mother was a widow with two daughters. One daughter lived out of state and the other daughter lived with the mother in her home. When the mother became incompetent, the daughter living at home took over as trustee. As trustee, she had full access to her mother's funds, which she used to buy meals for herself and her children (who were also living in the mother's home), buy a new car to drive her mother to and from the doctor, and make improvements to mother's home.

Because of a quirk in California law, the trustee daughter was required to account only to her mother since she was the creator of trust and

was living. But since the mother was incompetent, she was unable to protect her own finances. The daughter living out of state could see what was going on, but was unable to get specific information about mother's financial affairs because she was not entitled to information about mother's finances.

The out-of-state daughter's only option at that point was to seek a conservatorship for the mother, which is an expensive arrangement that would last for the remainder of mother's lifetime.

That was not a viable alternative.

**Alternative:** The problem experienced by the out-of-state daughter could have been avoided by designing a trust which requires that during any time in which the mother was not serving as trustee of her own trust, the successor trustee must provide semi-annual or annual accountings to all trust beneficiaries as well as mother.

## Seek good advice

Carefully selected, experienced advisors can have a wealth of experience, which can be very valuable in helping to develop the final design of an estate plan. Those advisors include an estate planning attorney, insurance broker, accountant, investment advisor and corporate trustee. There are many good corporate trustees in the Orange County area who are quite willing to meet with interested parties and discuss the pros and cons of a corporate trustee vs. an individual trustee, and answer general questions about trusts, estates and trustees.