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Minimizing Estate Disputes

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Introduction

What is it about an individual's death, most often a family member, that causes those who are left behind to quarrel with one another? Are there really legitimate legal issues that need to be resolved? The following questions come to mind:

- Is there something unique about the structure of a family that morally obligates its members to necessarily like or get along with one another?
- Does the death of a parent have any particular significance or impact upon the surviving family members' relationships?
- What is the motivating factor that causes someone to commence a family dispute?
- Are there clues that may make someone more sensitive to the possibility of a dispute at some point in the future?
- What safeguards may be taken in the course of planning an estate to minimize the risk of a dispute subsequently occurring?
- Do strategies exist that will facilitate the resolution of the dispute?

This paper will address some of these questions to help equip estate planning professionals with the necessary tools to help the client identify potential areas of conflict and develop an estate plan that minimizes the risk of those potential areas of conflict transforming into a family dispute.

The Family and the Estate Planning Process

The distribution of an estate often involves interpersonal family relationships, some of which existed from birth while others came into existence at a later point in life. Daily events will inevitably result in these individuals coming into conflict with one another. Conflict is a normative consequence of relationships by virtue of the often intense emotional elements involved. A fundamental issue is that of analyzing the reason why conflicts often become converted into disputes.

Disputes within families are unfortunately not uncommon. They arise equally within families in which the relationships among the members are perceived as very loving and close as well as within families in which those relationships are already strained; the disputes are evident in families with substantial wealth as well as in those with modest financial resources; the disputes will surface within families where the relationships span a significant number of years as well as in those in which the relationships are of relatively short duration.

Only through understanding and analyzing the peculiar and unique nature of relationships among family members can one better comprehend the possible reasons and explanations for the disputes that often arise. Once the underlying reason for the dispute is determined, it can be properly assessed and a process developed to resolve it.

The family unit is a particularly unique type of social structure for a variety of reasons. The relationships among family members are very different from those formed among professional colleagues, peers, or other social networks. Regardless of the theories behind this structure, many scholars believe that because of its uniqueness of character, the family is an entity that generates particularly highly-charged emotions and feelings from its members, whether caused by genetics, environment, or both. The family, therefore, is a social structure in which there is great potential for the relationships formed therein to be positive and healthy or negative and unhealthy. One might conclude that every individual's character and personality are greatly influenced by the family unit in which they are raised.

Increasing Variety of Family Relationships

Many different types of family units have emerged in the past few decades in addition to the stereotypical "traditional" family structure.

With a divorce rate approaching 50%, approximately one out of every two individuals is no longer married to their original spouse. New relationships are being formed between previously-married individuals and individuals who may or may not have been previously married. One or both of these individuals may bring with them a child or children from a prior relationship.

The ways in which children are added to existing relationships are also changing. More single people are investigating ways to become a parent without necessarily entering into a marital relationship. Common-law spouses are having children, and new reproductive technologies allow individuals to bear children "on their own". Adoption is a well-recognized way in which children are being brought into family relationships.

The mere fact that many varieties of family structures exist does not imply any evaluative opinion as to the advantages and disadvantages of each of them. Noting these changes is solely intended to illustrate the additional layers of relationships within many families today.

The simple point is this: if current theories on family structure and the relationships formed therein are based on the “traditional” family, there are bound to be many more theories on the nature of the family now that the varieties or types of families have changed and expanded. At a minimum, one can speculate that the potential for additional challenges within these families will increase significantly.

These “new” family relationships cannot be viewed in isolation. In many situations, the members are coming from, and may still be connected to, prior complex relationships. Therefore, it is often not merely a matter of locking the door on the old house and turning the key to enter the new one. Very often, both properties require continued and ongoing management and supervision.

Areas of Potential Conflict Among Family Members in the Estate Planning Process

The Will often serves as a document that evokes a tremendous emotional response in people, since it symbolically represents much more than simply a distribution of assets. The question is whether it is desirable, or even possible, to minimize some potential disputes that may ensue following the death of a family member and the disclosure of the Will document.

Individuals who are considering their estate plans rarely, if ever, think about anything more than the financial or monetary consequences of that form of planning. It is, after all, considered to be a form of “financial” planning. The same may be said about their professional advisors who rarely consider some of the non-financial issues that may arise following the death of a loved one. It is critical, however, to also consider what the emotional response of family members might be to the plan that has already been devised.

This is a field of professional work in its infancy stages and is also being picked up by those in psychology and social work. Some of these professionals are strongly advocating the need and desirability to work together as a team with lawyers and accountants to develop clients’ estate plans. This multi-disciplinary long-term approach is gaining in popularity, looking to minimize situations where the sophisticated financial aspects of the estate plan are thwarted due to the emotional hostility and fighting that ensues among the beneficiaries.

The increasing variety of family relationships emphasizes the additional need to address the non-financial issues involved in estate planning. How does one treat the stepchild who has been raised as a natural child? Is the adopted child treated any differently? How might each of them react depending upon the testator dealt with them in the Will? The “easy” route for testators to follow is that of equality of distribution of assets. What is equal or equivalent, however, may not be considered fair or equitable.

A variety of circumstances within a family may affect how the estate plan ought to be prepared. Some of these circumstances are created voluntarily and others involuntarily. Although it is

impossible to list all of the possibilities that may create concern or, at least, extra attention, the following are a few examples:

- mentally or physically challenged child;
- economic disparity among heirs;
- divorce and multiple marriages;
- inherited or other separate property;
- one child who is caring for a parent;
- a testator who is either very indecisive or dogmatic; and
- the existence of an entrepreneurial or closely-held business.[1]

Very few individuals will, on their own initiative, address the issues noted above in any meaningful way as part of the estate plan. The client relies on the professionals to guide and direct the process. Moreover, a proper examination and analysis of these matters often involves the family as a unit sitting down together and discussing the issues openly and honestly. Many families are simply uncomfortable in participating in such an exercise. They find the subject matter of death and dying to be an unpleasant one that is better off ignored. (This might account for the fact that approximately one-half of the population does not have a will.) Even in families where the discussion does ensue, one questions the extent to which all participants are truly honest and open in communicating their thoughts, desires, and emotions to the others in the group.

There do not appear to be many, if any, studies that have examined the estates of individuals who made a conscious effort to deal with these non-financial aspects of their family situation as part of the estate planning process. As previously noted, the use of non-lawyers to assist in this area is a relatively recent phenomenon. As well, lawyers have traditionally not made an effort to sensitize clients to the possible emotional and psychological consequences that may flow from an estate plan and the desirability of seeking other forms of professional guidance to advise on these aspects of the planning process. Perhaps times are changing.

The Power of the Will

One typically thinks of a Will as an exclusively testamentary document whereby the deceased individual disposes of their assets on death. The Will, however, is a much more powerful instrument in that, not only does it dictate the distribution of one's assets, it can greatly influence the lives and the relationships of the survivors.

The particular impact that a Will has on the surviving family members will often be dictated by the type of family structure that already existed. The Will of the deceased has the potential to reinforce either the positive or negative relationships that were formed during a lifetime. On the one hand, the

[1] Gromala, John A. (1996). The Use of Mediation in Estate Planning: A preemptive Strike Against Potential Litigation. In California Trusts and Estates Quarterly. State Bar of California Estate Planning, Trust and Probate Law Section, Fall 1996.

Will may be the instrument that simply reinforces and perpetuates an unhealthy family relationship that existed during that lifetime.

On the other hand, death and the tangible Will document that serves as the remnant of death can reinforce and perpetuate the family unit's positive attributes in situations where they existed during the lifetime. In other words, just as the nature of the family structure dictates how the relationships within it will continue to survive following the death of one of its members, the Will embodies the character and personality traits of that member and will continue to affect the survivors long after.

As noted earlier, most estate planning professionals have never considered the Will as a document that deals with non-legal and non-financial matters. Rather, it is generally seen as a piece of paper that simply dictates "who gets what". Professionals warn their clients about the risk of dying intestate (without a will) and all of the often unintentional circumstances that result. The consequences, however, are explained solely with reference to the assets that are being disposed:

- the assets will be distributed according to the provincial laws of intestacy;
- no opportunity will be available to minimize tax liability on death; and
- interests of minors will be managed by a government official.

None of these "evils" speaks about the opportunity that has been lost to reinforce family values and traditions. A written instrument known in some circles as an "ethical Will" has evolved in certain religious traditions whereby moral and ethical values and wishes are sought to be imparted to the next generation through the vehicle of a testamentary document. In this manner, more than just assets are being distributed to the surviving family. Whether these ethical words of wisdom survive the death of the deceased individual and become adopted by the survivors is a matter of some debate. Presumably, these values are more likely to become enshrined in families where a strong emphasis was placed on them during their lifetime. The point, however, is that, without a Will, the opportunity is lost forever.

For these reasons, the Will-planning stage in a person's life should be viewed with particular importance. It is essential that careful attention be paid to the emotional consequences resulting from the particular provisions within the Will and not just the financial consequences. Involving other family members in this process, realizing it might not be comfortable, will help alert the testator to relational issues lurking beneath the surface that, if not for this process, would only reveal themselves after the testator has passed. Optimistically, one hopes the testator, armed with this new revelation on the nature of the family relationships, might take the opportunity to reflect differently upon the provisions of their Will to minimize the negative consequences that could otherwise result following death.

Embarking on a process in the Will-planning stage that involves all of the "interested parties" might help eliminate or reduce the potential for future disputes. At a minimum, an opportunity will exist for the beneficiaries to ascertain the testator's testamentary intentions while still alive and for the testator to provide a rationale and explanation for those wishes. Occasionally, a mere lack of

information or explanation leads to suspicion and hostility. The disclosure of this information and an explanation by the testator may help minimize the suspicion and hostility.

While the focus of this section has been on the effect of the Will document on the surviving family members, one ought to consider, as well, the thought processes of the testator in going through the Will-planning process. How does a testator wish to be remembered? Is it easier to simply divide assets equally among offspring and to ignore differences in need, both financial and emotional, in determining the division? Is equal necessarily equitable?

The way a Will is drawn will often be a reflection of the testator's personality. The Will, after all, is not only the last opportunity to express in written form one's love and affection but also one's distaste of others. It is the last opportunity to "get back" at someone for wrongs perceived by the testator to have been committed during the testator's lifetime.

The Will, therefore, is a much more complex instrument than that usually considered. A Will is similar to a photograph in that they both display thoughts and memories of the deceased that will have everlasting life. The written word, however, is a much more powerful tool than a photo. Words are like swords and they have the potential to wound and maim. More thought needs to be put into the Will planning process, especially when one considers both the motivation on the part of the testator and the potential for good or bad that this testamentary document can impart to the survivors.

The Will can be a weapon as well as an embodiment of love.[2]

Predictors of Potential Disputes and Possible Remedies

Some examples of potential problem situations include the following:

- unequal division of assets among children;
- continued operation of a business where only one child has been actively involved in the business during the lifetime of the parent;
- disposition of the family cottage;
- non-disclosure of information to family members, and
- naming the eldest child as executor of the estate simply because he/she is the eldest.

These matters are certainly not exhaustive. However, they do represent situations that ought to at least make the testator/testatrix and his or her professional advisor sensitive to the potential for a dispute. In many circumstances, it may be most appropriate to divide the estate unequally among children or transfer all of the business assets to one child. One should not be restricted in the exercise of unfettered testamentary freedom in planning one's affairs. On the other hand, individuals who have had experience dealing with these types of potentially problematic situations

[2] Visher, John S. and Visher, Emily B. (1982). Stepfamilies and Stepparenting. In Walsh, Forma (ed.) *Normal Family* Processes. New York. The Guilford Press, 1982. p. 662

have an obligation to alert the testator/testatrix to the potential for problems to arise. It is then up to the individual to decide how they wish to deal with the situation.

It is not only the actual statement made in the Will that might cause the potential for dispute but, more accurately, how the surviving family members perceive that statement. Given that a Will is the last "word" made by a parent to a child, an unequal division of assets may be perceived by the child receiving less than another as simply a further reflection of favouritism on the part of the parent toward the other child, a form of treatment of the other child that the "victimized" child has perceived as having occurred for several years.

It is sometimes unfair, however, to place a significant obligation on the professional advisor to deal with these sorts of problems. Especially in situations where the advisor does not have a longstanding relationship with the client, they may simply be unaware of pre-existing conflicts and feel awkward asking about them. In other situations, the client may simply feel too embarrassed to share this private information with the lawyer, oblivious to the fact that the disclosure of this information is a critical component of the estate planning task. In still other situations, the client may be aware of the problem but may naively think that any difficulties in relationships will somehow magically be sorted out and resolved following the client's death. The most apathetic client may simply identify the problem as something that doesn't involve them and, therefore, show no concern whatsoever to the role that they may play in exacerbating an already difficult set of circumstances.

There may be good reason for treating children unequally or otherwise making a testamentary disposition that might come as some surprise to the survivors. This would certainly eliminate the element of surprise. On the one hand, it might be argued that having the opportunity to hear the explanation directly from the mouth of the testator/testatrix may encourage the "aggrieved" party to accept the intended plan more readily. On the other hand, some would argue that not all families are comfortable with holding such a meeting. Moreover, even where such a meeting might be organized, the true feelings and emotions of all those assembled are not going to be fully aired.

What is the Fundamental Underlying Dispute?

Often estate disputes arise out of a pre-existing history of problematic relationships among family members. The Will document often brings these issues to the fore after death. It is interesting to see how closely the stated legal issue formally raised by a disputant relates to the fundamental underlying cause of the dispute.

Based upon my experience as an estates litigation lawyer, I am firmly of the opinion that the legal action commenced by a disputant in the vast majority of estate disputes only serves as the vehicle through which an individual who feels aggrieved is able to publicly verbalize their emotions. This is not to suggest that certain legal proceedings are not necessary to deal with legitimate concerns that are definitely legal in nature, such as interpretation of unclear Will clauses or claims for support by dependants. Nor is this to suggest that, in some situations, people are simply greedy and wish to

claim every possible last penny to which they feel entitled. Even in this latter example, however, one questions the underlying reason for the feelings of greed. Are those feelings possibly connected to some relational issue that arose many years earlier?

Often, the longer the dispute has been ongoing, the greater the dissimilarity between the dispute's real origin and what cited as the cause. Over time, the individuals become positioned and are only aided by what is perceived as advice from so-called friends and others and serves only to solidify the surface-level legal dispute.

Sheer greed and feelings of entitlement are not the only reasons why people choose to pursue litigation. Very often, psychological issues dealing with the relationship between the disputant and the deceased may form the basis for the pursuit of a legal challenge. In some cases, the surviving family member is trying to deal with feelings of jealousy stemming from the way in which a parent treated a sibling. Starting a lawsuit against the sibling is the only way in which the claimant feels that those emotions of pent-up jealousy can be released and articulated.

If the underlying cause of the dispute is often something other than a legal issue, why is it that people pursue legal proceedings to deal with the grievance? In our western culture, the practice is such that grievances are dealt with using a tribunal, be it a judge, an arbitrator, or some administrative board. We have become conditioned for our grievances to be "decided" by someone else. Only in relatively recent years have alternative methods been proposed to deal with grievances. Initially, most of the alternatives still involved "decision-makers" such as arbitrators, peer group evaluations, community-based boards, labour tribunals, etc.

The thought of resolving a dispute between family members by facilitating dialogue between them, particularly through mediation, has been somewhat foreign until recently. No one would ever conceive of a dispute over an estate as being one that is rooted in relationship issues. Conventional "wisdom" is that one fights over assets through the judicial process. Relationship issues are within the domain of psychologists, psychiatrists, and social workers. The dispute over the division of Mom's personal effects has never been perceived as one motivated by an unresolved interpersonal conflict. "I don't need to have a social worker work this out. The problem is not with me, but it's with my sister."

Estates disputes have historically been pursued in the courtroom because no alternatives ever existed or, if they did, knowledge of the alternatives was rare. Resorting to the judicial process was the only available option.

Alternatives to the judicial process now exist and are becoming better known to both laypersons and to their professional advisors. In particular, mediation is being proposed as a useful alternative method to resolve disputes, particularly in cases where relationship issues are involved. For example, mediation has been used within the family context for some time. Supporters argue that, in addition to mediation being less costly, less time-consuming, achieving greater party satisfaction,

etc., it is particularly beneficial in situations where ongoing relationships are intended to be maintained, such as discussions between two divorced persons regarding the raising of their children through their infant years.

Proceeding through the judicial process only serves to deal with the surface issue, that is, the stated legal issue articulated in the formal documentation. A decision will ultimately be made and there will be a winner and a loser. The winner will often feel vindicated and pleased; the loser will often feel victimized and wronged. This result will usually only arise after years of emotional distress and great expense. A colleague of mine has often related the “advice” given to him many years ago by a law school professor teaching Estates: “Never squander the assets on the beneficiaries”. This is so true in all forms of litigation, and particularly so in estates litigation where, more often than not, the costs incurred in pursuing the litigation bear no financially reasonable relationship to the monetary value of the issue being litigated. This is simply because of the fact that the issue being litigated is most often not about monetary value but about emotional issues.

Estate disputes are similar to matrimonial disputes in that they both possess the common element of relationships between individuals that have soured for whatever reason. We think of divorce as commonplace, and statistics support that many of the population have encountered marital discord resulting in separation. Recall, as well, that the initial forming of a marital relationship is one that is entered into voluntarily. When comparing the similarities between marital relationships and blood relatives, is it therefore so surprising that we are witness to a multitude of estate disputes?

Conclusion

Estate disputes are unique in that they usually involve individuals who are involuntarily bound together by a family unit that has brought them into a relationship with one another. Relationships of all sorts are complex, and the family relationship, especially the “expanded family” relationship, brings with it a myriad of emotional issues.

It is precisely because of this unique characteristic of family relationships that disputes involving a family member’s estate often reflect pre-existing feelings and events that may have occurred many years earlier. Death serves as the catalyst in bringing these matters to the fore.

It is the legal profession's responsibility to ensure that clients are well informed of the potential areas of future dispute among their beneficiaries and that comprehensive discussions occur in the Will-planning stages to hopefully minimize the potential from becoming the reality.

For questions on this article, estate planning, or estate disputes and mediation, contact Howard Black at hblack@mindengross.com. Howard is chair of Minden Gross LLP’s Wills and Estates Group. His practice focuses on estate litigation and in-person and virtual mediation of estate disputes with extensive experience in all aspects of estate planning and administration. In addition to a busy estate litigation and mediation practice, Howard provides estate planning advice on wills and powers of attorney to middle and high net-worth individuals.