

How to Avoid Probate Litigation

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The first couple of months of the year are traditionally a time for setting goals, assessing where things stand, and preparing for the upcoming year. In January, gyms are full, resolutions are still fresh, and people map out when, where, and how they're going to clean out the garage/plant that garden/finally restore that boat that's been collecting dust.

One often-neglected topic that often merits attention is the state of a loved one's will, trust, or other estate planning documents. While admittedly nowhere near as tangible, or perhaps rewarding, as checking items off the household D.I.Y. list, addressing this topic can pay much bigger dividends—or more to the point, prevent big, family-damaging disputes. As trust and estate litigators, we know this firsthand. Lawsuits over who is entitled to what within a family can be irreconcilably destructive, and they can almost always be prevented. The beginning of the year is a perfect time to tackle this job.

How to Avoid Probate Litigation

Often, the trickiest part of creating (or modifying) an estate plan is finding out what the client wants, or needs, to begin with. This typically involves a frank discussion. What does your mother really want done with the vacation house? Who should receive how much of an IRA account? Who needs help with college, or a first house, or a new baby? What form should this help take? Understanding these goals, particularly when introducing these topics to perhaps unwilling parents or other family members can be difficult. Clear communication throughout the process is key.

What follows are a few tips to make these discussions go more smoothly:

Know What You Want:

Before even beginning the conversation, know what you would like to have happen. You may not get it, but your odds of a good result are vastly better if you think through your objectives from the outset. It also helps, if you can, to anticipate objections and think through how you'll handle them.

Remember Your Baggage

Every family has dynamics, relationships, issues, and complications. If your family always thought of you as the flighty, creative one, that's not going to change. Be prepared for baggage to influence the discussion. And be prepared for negative responses – if they've happened in the past, don't be surprised if they happen again.

Time and Place Matter

Is there a time and a place where everyone involved is likely to be more receptive and focused? The back porch at sunset? The kitchen table? Think ahead of time about where and when the best time is to talk candidly. A spontaneous discussion isn't anywhere near as useful as one that's planned for productivity. Select the right setting, then tell everyone you want to discuss something important. Sometimes asking them to choose the place and time works well, also.

Make it a Family Project

Enlist everyone's help and support. Even if they can't be there in person, there are all kinds of technical tools that can help involve the entire family – email, Facebook, conference calls, Skype. This isn't you demanding answers, this is all the concerned family members working together to arrive at a workable solution. This often depressurizes the discussion, and makes it everyone's responsibility to make it productive. Framing it as a group effort is likely to produce better results, and will help to dispel any future accusations of surreptitious or self-serving behavior (which frequently act as the seeds of litigation).

Suggest The Outcome You'd Like

Consider beginning the conversation by stating the goal: "I'm hoping that by sitting down and talking through it, we can come to an understanding of what Mom would like done with the summer house in the event she passes away." You don't want to be dogmatic or insistent, but setting out goals and expectations helps a lot.

Acknowledge that The Conversation Might be Tricky

Often, if everyone begins the discussion with the expectation of a challenge, they rise to the occasion. If, without dwelling on it, you make the point that the discussion is going to require everyone's flexibility and compassion, that may be what you get.

Comment on What's Going on/the Conversation

If you feel like things aren't going in a good direction (or if they are) then feel free to say so, if you can do it without sounding accusatory. If someone doesn't seem to be understanding you, point it out, for example. If the disagreement seems intractable, feel free to respectfully end the conversation, and say that you'll try again another time. When someone seems to seriously disagree with you, it's often a good idea to identify that, and honor it.

Active Listening

Another useful technique that helps a lot with difficult conversations is to listen to what someone else says, then attempt to paraphrase and repeat it back to them. Known as "active listening" this makes the topic clear, demonstrates respect, and prevents misunderstandings. It also informally means people are committing to what they're saying by agreeing to your assessment of it.

Offer Help

One of the surest ways to disincline family members to make a decision is to apply pressure. An alternative to this is to offer help – “I’d like to pay for an initial consultation with an attorney, Dad. He can do a lot, I think, to help you understand your options here.” By offering tangible support, you can often make a decision much easier. To the extent possible, the person undertaking to create or modify an estate plan should always select and meet with their lawyer (or other advisors) by themselves, as participation by others in this process can be construed (rightly or wrongly) as the exertion of “undue influence.”

Finally, it’s helpful to keep in mind that when family members make difficult conversations, well, difficult, it’s not personal. It’s not about you. It’s about their own challenges in grappling with topics that can be uncomfortable, intimidating, even frightening. The more you can avoid taking the conversation personally, the more productive it usually will be. Plus, it decreases the chances for hurt feelings down the road, or worse, costly, painful, and protracted legal disputes which can potentially damage family relationships.

Charleston Probate and Estate Litigation Lawyers

To speak with an experienced probate and estate litigation lawyer, contact Rosen Hagood today.