

The Law and You

Will Your Trust or Will be Contested?

The subject of this month's column was chosen because of my experience with several recent lawsuits over wills and trusts.

Some believe that having a trust will insulate their estate from probate and lawsuits. Wrong. In fact, I actually see more litigation over trusts than I do for wills.

Most folks believe that having a trust will avoid "probate." However, it is actually the Probate Court that deals with disputes over trusts. And these disputes can arise not only after death but also while the Trustor, or the Grantor, is still living.

If you have a trust, it likely provides for a successor trustee in the event that you become incapacitated and can no longer manage the assets in your trust. This means that while you are still living, your successor trustee will begin taking charge of your assets, including your home if it is part of your trust.

Children are usually named as successor trustees of a personal, living, revocable trust. And, it is common to name one child to be the first successor trustee with the other children named in succession if a child is unable or unwilling to serve.

Unfortunately, all children are not endowed with equal capabilities to administer the affairs of a trust. When a child does not possess the necessary skills to manage your trust, his or her siblings may begin to challenge the trustee. Or, if the child you named to serve as your successor trustee fails to cooperate with his or her siblings, distrust arises. Distrust can then lead to litigation.

All too often, bad feelings exist between siblings. Such feelings may arise when you become incapacitated or upon your death. Or, those feelings may have existed for decades.

I once had a client who had a very hostile relationship with his brother. After I observed the two of them arguing, I first asked my

client when he had last visited with his brother. He replied that it had been about 50 years ago.

I was stunned at his answer. I then asked him what had caused the hatred between the two of them. He informed me that it arose after an incident concerning his paper route. I had a difficult time holding back my laughter. These were two men in their seventies who had harbored ill feelings from more than 60 years!

When ill will exists between siblings, a trust can spell trouble. This is especially the case when the child named as successor trustee is unwilling to disclose financial details or is uncooperative with his or her siblings.

Litigation may be commenced by filing a petition with the Probate Court to determine if you are incapacitated. This is for the purpose of establishing whether your child can begin serving as your successor trustee. Or, a petition may be filed to remove a successor trustee for cause. The first petition is filed while you are still living; the second petition may be filed either while you are living or after your death.

Either way, trust litigation ensues and can become very costly.

You can include in your trust certain provisions that will act as a deterrent to such litigation. For instance, you could expressly disallow trust funds from being used to pay attorney fees during certain kinds of litigation. For fairness, however, you could allow payment of attorney fees to the prevailing party. This puts the litigious parties at risk.

The "certain kinds" of litigation may include litigation to remove an uncooperative or negligent child as trustee. But it might not include challenges to the terms of the trust. Such provisions should be discussed with a

competent estate or Elder Law Attorney.

To avoid such trust litigation during your lifetime, you can simply avoid a trust altogether. A simple will, or a simple will with a springing trust, is often sufficient.

Fear mongers often promote trusts by issuing dire warnings to avoid probate. Such fear and promotions are unfounded and do little to serve the public. Most such promotions are misleading and intended solely for pecuniary gain to the promoter.

In Utah, probate is quick and easy. The court costs are presently \$155. In most instances, the will is uncontested, provided that all prior wills are destroyed. Also, will contests are minimized if your will is properly prepared and witnessed.

You should consult with an Elder Law Attorney. To locate an Elder Law Attorney, check your local Yellow Pages or the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at www.naela.com.