

The Law and You

Protecting Your Trust From Your Children

You don't need a trust. But if you have a trust, you should consider protecting it from your children.

Far too often I see substantial assets of trusts depleted from legal battles between children.

Currently, I am involved in several litigation matters involving the administration of trusts. In each case, trust assets are being consumed for legal fees.

In one case, I represent three out of five children who are beneficiaries of a trust. The child who is trustee has so far incurred more than \$30,000 in legal fees fighting against his sisters. And more will be expended as the matter proceeds to trial. Equally disturbing, a like amount has been and will be expended by the children who are fighting the trustee's administration.

My clients represent 60% of the interests in the trust. Their brother, the trustee, represents only 20% of the trust. Yet, he is spending the trust's assets like a drunken sailor. The trust represents sort of a "war chest" with unlimited assets for him to fight his sisters.

Since he has unfettered access to all of the trust's funds, he can engage in legal battles without restraint. In effect, the trustee can freely squander the trust's assets.

What this really means is that the son chosen to be trustee is spending the hard earned money in the trust to fight his personal battles. I am sure that the parents never intended for this to happen.

Most trusts allow the appointed successor trustee to hire attorneys and defend against all claims against the trust. This may make sense for most claims against the trust. It may also make sense for most litigation commenced against the trust.

But it doesn't make sense when the

battles are between the beneficiaries over the trust's administration. After all, the purpose of the trust is to benefit the beneficiaries. Depleting assets of the trust for legal fees makes no sense at all.

Let me show how this problem arises.

Trustors, those creating a trust, most often name their oldest child or their son as the first successor trustee. But such child may not be the most appropriate one to administer the trust.

Choosing the right or best child to serve as trustee is not always easy. When your child of choice is eventually empowered to control the trust, he or she may begin to exercise unfair or inappropriate discretion to the disadvantage of your other children.

Avoiding discord between siblings is difficult, complicated, and may be impossible. And, you cannot predict how your children will treat each other when you have departed this life or when you become incapacitated.

Given this uncertainty, what should you do? What can you do?

Let me suggest a way that may mitigate the harm sibling rivalry and fighting may have.

First, consider appointing at the outset a third party as your successor trustee. This means appointing someone else or a business entity (like a bank or CPA firm) to serve as the trustee of your trust when you can no longer do so.

Appointing a third party will most often curtail or eliminate costly litigation. The reason is simple. When your children can't access the funds of the trust, they must pay legal fees out of their own pocket. That is a substantial deterrent to litigation.

There is a provision in Utah's trust Act that permits a court to award attorney fees for any party and against any other party, or

against the trust, but such awards are problematic. And, if awarded, they will generally not be paid until well after the child who engages in litigation has to pay legal fees from his or her own pocket.

Second, consider appointing a third party only if fighting begins between your children.

You may be reluctant to appoint someone other than your child as successor trustee. But if your children begin fighting and that fight spills over into the courtroom, consider appointing a third party as trustee. That is, appoint a third party only if and when your children begin fighting in court over the administration of your trust.

You can be creative in designing the trigger for the appointment of a third party. For instance, you might grant any majority of beneficiaries the power to appoint a third party as trustee. Alternatively, appointment could be triggered upon any beneficiary's request. Other arrangements are also possible.

Admittedly, appointing a third party may incur additional costs. But those costs may be dwarfed when compared with the costs of litigation.

In creating or amending your trust to protect it against your children, you should consult with an expert in trusts or 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.