LEGAL UPDATES

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Planning to Avoid Fiduciary Litigation

Services

Private Wealth

Trust, Estate, & Fiduciary Litigation

Professionals

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Introduction

When a loved one dies, the last thing you want to deal with is a lawsuit, or have your heirs inherit a lawsuit. After the death of a maternal or paternal figure that keeps the family together, tensions flare between siblings and other family members which can lead to accusations of incapacity, undue influence, mismanagement, and breach of fiduciary duties. Fiduciary litigation is broadly defined to include lawsuits challenging the administration of an estate by a personal representative or a trust by a trustee, along with challenges to the validity of a person's will, trust, or estate planning documents. This article talks about proactive steps you and your clients can take to avoid fiduciary litigation in the context of estates and trusts.

Have you updated your estate planning?

The best way to avoid litigation is to make sure your estate planning documents are current and up to date. For good reason, many people avoid thinking about death and about what will happen to their assets and families after they are gone. Aside from death, change is one of the only things guaranteed in life. People move, assets are sold, relationships change, and families grow or contract.

It is common for clients to put together a well-thought-out estate plan and then place the documents in a file drawer for 10 or more years without looking at them—let alone updating them. What happens when your kids find out their uncle (your brother) is still the named personal representative of your estate, even though you and your brother had a falling out seven years ago? Does your son who is deployed overseas think he is getting the family ranch you just sold? Does your estranged daughter still think she is going to get the house you left to your church? Did you sell a business? Have you moved houses? Have you had another child or grandchild? All of these scenarios can lead to legal

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disputes, which could have been avoided with a call to your estate planner to update your estate planning documents.

Moving non-probate assets

Whenever you open a new checking, savings, brokerage, or investment account, you have the potential to leave the assets in that account to a beneficiary outside of the probate process (i.e., a non-probate asset). In most states, nearly any asset, real or personal, cash or otherwise, can be a non-probate asset. A non-probate asset means an asset which passes to a named beneficiary or beneficiaries at the time of your death automatically via contract. If you had a checking account at Acme Bank when you prepared your will 10 years ago, your estate planner probably knew exactly where those assets were going after you died. However, when you withdrew your funds at Acme Bank and placed them in Main Street Bank four years ago because Main Street offered a better interest rate, you may have unknowingly changed the beneficiary designation for those funds – and changed your estate plan. Banks often have default rules which automatically make accounts non-probate accounts. While each bank is different, standard default rules leave all assets to your spouse or your children, rather than your estate. Most retail bank managers and tellers do not know the difference, and the details of the deposit agreement often go unnoticed.

Moving financial assets is the most common way to destroy a well-thought-out estate plan. Broken estate plans increase the risks of litigation. It is a good idea to check in with your estate planner every three to five years, along with any time you move or have a major life event take place in your family, such as the birth of a child, a death, or a divorce.

Talk to your family, beneficiaries, and personal representative(s)

Another way to avoid fiduciary litigation is to talk to your family (or whoever is going to inherit your assets) and let them know what your plan is for your assets after you pass away. Schedule a family meeting, outside of regular holidays, to visit with everyone about your plans. Set realistic expectations. Have clear goals. Don't tell people what they want to hear—tell them the truth. All family dynamics are different, and this advice may not apply in every situation. In addition to having a family meeting, here are a few thoughts, questions, and suggestions you can use to help your personal representative prior to your passing:

Does the person you have designated to serve as the personal representative (personal representative, trustee, guardian) know you have designated them? If not, why? Is it because you have simply forgotten to tell them, or do you not want the person to know prior to your passing? Can you trust them to serve as your personal representative? If you can't trust them enough to tell them while you're alive, why would you designate them to serve as your personal representative?

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Tell your personal representative and appointed agents where your original estate planning documents are located (e.g., will, trust agreement, financial power of attorney, healthcare directive, guardianship designation, etc.).

Let your personal representative know where your assets are located. Prepare an inventory with the location of your real estate, financial accounts, vehicles, collectibles, etc., so they are not left scrambling to figure out where your property is.

Does your personal representative have your passwords and login information for your digital assets such as cryptocurrency, or access to your social media accounts?

Do you have prepaid funeral arrangements, or have you spoken with your personal representative about where you want to be buried and/or what you want done with your remains?

Prepare a list of the current addresses and contact information for your beneficiaries.

For the agent under your healthcare directive, do they know who your doctor is, and do you have a living will explaining your wishes if you become incapacitated or go on life support?

Is there a beneficiary who you believe may cause problems with other beneficiaries after your death? If so, consider including a no contest clause in your will or trust agreement and leave the beneficiary with a meaningful distribution as an incentive for them not to challenge the will or trust agreement. If you include a no contest clause and only leave them one dollar, then they only stand to lose one dollar if they file a lawsuit—which has the opposite effect of a no contest clause. Leaving a problem beneficiary a meaningful distribution, such as an instruction for the personal representative or trustee to pay off the beneficiary's student loans, mortgage, or car, may cause the beneficiary to have second thoughts about filing a lawsuit.

Sometimes there is no way to avoid a fiduciary litigation lawsuit after your death. However, openly communicating with your beneficiaries, and leaving incentives for potential problem beneficiaries, is the best way to try to avoid litigation.

Planning to avoid fiduciary litigation as a fiduciary

If you are appointed to serve as the trustee of a trust or the personal representative of an estate, and you suspect that one of the beneficiaries of the trust or estate may cause problems in the future, there are steps you can take to reduce the possibility of a fiduciary duty lawsuit. All trustees and personal representatives owe fiduciary duties which include, but are not limited to, the following:

Duty to account

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Trustees and personal representatives are required to account to the beneficiaries. This includes a record of all assets belonging to the trust or estate, and records of all transactions where money has come into, or expenses have been paid out of, the estate. Be sure to keep and maintain detailed records of all transactions, and hold onto receipts, invoices, canceled checks, account statements, appraisals, loan payoff statements, and tax returns. Having this information ready, available, and organized, will help you reduce the possibility of a lawsuit.

Duty to inform

Trustees and personal representatives have a duty to inform and disclose to the beneficiaries all material facts and circumstances that might impact the beneficiaries' rights. For example, if the estate owns a rental house, the personal representative does not have to let the beneficiaries know if the renter called to ask for a routine plumbing issue to be repaired. However, if the renter refuses to pay rent and you, as personal representative, file an eviction proceeding, you should let the beneficiaries know.

Duty of care

Trustees and personal representatives have a fiduciary duty of due care, which includes fair dealing, good faith, and placing the beneficiaries' interest above the trustee's or personal representative's own interest. Included within the duty of care is a prohibition on self-dealing and personally profiting from the estate or trust assets (other than receiving reasonable compensation as defined in the will, trust, or by statute). The best example is to think of a trustee or personal representative as a secret service agent, whose job is to (metaphorically) protect the beneficiaries' rights.

Conclusion/next steps

If you find yourself in the position of not knowing what to do with your estate or trust assets, you are a personal representative or trustee "walking a tightrope" with difficult beneficiaries, or you simply need guidance on navigating this unique area of law, please contact Brooke Guerrero, Colin Byrne, or your Husch Blackwell attorney for assistance.

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