Fiduciary Succession and Family Harmony:

WILL YOUR CHILDREN STILL BE FRIENDS?

KAREN BRADY, JD - WEALTHCOUNSEL MEMBER SINCE 2004

Any attorney who has been doing estate planning for a while can tell many stories of the family feuds that can erupt after a death, especially the death of a parent. There are even scholarly articles written on the topic.[1] Our clients expect us to advise them on the legal implications of their choices. However, we can also counsel them to maximize the positive impact of their legacy and minimize the chance that resentment and conflict will cause a lasting family rift. As one attorney has written: "Estate planning in its broader context extends beyond the traditional confines of providing for the investment, management, and disposition of assets in the event of the owner's disability or death. Estate planning includes preservation of family values and traditions, not the least of which is family harmony."[2]

Many clients have a goal of treating beneficiaries equally. However, choices of "who does what" impact family harmony as much or more so than choices of "who gets what." There are plenty of unexpressed expectations in almost every family that can come to a head when family members realize who has the power to settle the trust or manage a parent's affairs during disability. Some people see the role as an honor; others as an unenviable chore. Some family members will assume that roles should be assigned based on age or birth order, rather than suitability. This article discusses the (i) estate planner's role in counseling clients on the choice of successor trustees, agents, and executors/personal representatives, referring to all of these roles generally as "successor," and (ii) potential effects of those choices on family relationships.

I'LL JUST NAME MY SPOUSE

When the clients are a married couple, the inclination may be to name the spouse as successor, with a contingency if the spouse has predeceased or is otherwise unavailable. The assumption that the surviving spouse is appropriate for the role is everywhere in our statutes and our culture, so it is natural that clients and their lawyers will start from that premise.[3] However, in some families, careful consideration may indicate that naming the surviving spouse as successor will cause or exacerbate rifts in the family.

Most attorneys, and even many clients, recognize the pitfalls inherent in naming a surviving spouse who is not the parent of all of the client's children. Children can doubt that the stepparent is giving appropriate consideration to the children's interests, particularly when the spouse is a beneficiary of a marital trust which pays out to the children only if there are funds left in the marital trust when the spouse is deceased. There can also be difficulties when the spouse has children of his own, causing even greater suspicion on the part of the client's children that the spouse's loyalties will lie elsewhere. It doesn't matter whether the spouse actually has any divided loyalties; it can be enough that the children perceive the possibility.

Even a spouse that is the parent of all the couple's children can be the wrong choice of successor. Sometimes a spouse may be inclined to play favorites among the children, or simply cannot resist the pleas of one child who consistently seems to need more money than the others.

There are also the issues of experience and temperament that can make a spouse an unsuitable choice for successor. Most estate planners have encountered their fair share of widows who have had no involvement in the couple's financial affairs while the husband was alive. Asking her to step in and take over during a time of great loss is probably asking for disaster, and can cause missteps or miscommunication that puts the entire family at odds with each other.

Regardless of how much experience the spouse has with the family's finances, the role of successor is one of great detail and perseverance. Using advisors, both

formal and informal, and delegating duties can help. But the mantle can be heavy on the spouse who is not well-suited to the role.

In counseling the client about the choice of any family member as successor, the attorney can remind the client that dynamics often change when a parent dies. The parent, or the children's desire to spare the parent's feelings, may be the glue that has been holding a family together. The client should consider how relationships within the family will change when the parent is gone.

I'LL NAME THE ELDEST CHILD

Another cultural remnant that comes up in naming successors is the assumption that the role should fall to the eldest child. Yet the concerns about experience and temperament that can sometimes make the spouse the wrong choice also apply to choosing a child based merely on birth order. And sibling dynamics also play a role.

In my view, the attorney should ask multiple questions about the oldest child's suitability for the role as "President of the Family Business." How does the child handle his own finances now? Is he good at follow through and attention to detail? Do the other children look up to him as a leader in the family? Is he tolerant of the life choices made by others in the family? What is his leadership style? Does he solicit input or issue autocratic mandates? Have any of the other children expressed frustration or concern about his ability to communicate with or relate to the other members of the family?

I'LL NAME THEM ALL

Clients often believe that the way to avoid any perception of favoritism is to nominate co-successors. This can work, especially if it is done with careful thought to the strengths and weaknesses of the parties involved. But it can also be an exponential multiplication of the problems inherent with naming a successor. Naming the spouse from a second marriage and a child from the first may seem like a way to ensure both sides are treated fairly. It is more often a recipe for disaster.

Clients often have an unrealistic view of the way disputes are handled in estates, thinking that there are immutable rules for every decision. This view of estate and trust settlement as a series of overriding formulas leaves clients with the impression that their successors will have no discretion and thus there is no real need for cooperation among the successors. As attorneys, we know this to be far from the truth.

Some clients think that naming multiple children will force them to get along, as they will all have a vested interest in seeing the estate managed fairly. Almost every probate or trust attorney has multiple stories of children who demonstrated that settling old scores in the family was more important to them than preserving the estate or even their own financial self-interest.

If, after careful counseling, clients still wish to name co-successors, the attorney should ask additional questions to determine how this "committee" will make decisions. Is a unanimous decision required? Can any co-trustee act without the cooperation or agreement of the others? Can a person or process be built into the plan to break a tie if the committee members reach an impasse.

Attorneys and their clients should be made aware of the increasing difficulty in getting financial institutions to accept accounts where the trust or estate is managed by multiple fiduciaries. I have heard from several attorneys of banks balking at any requirement that co-fiduciaries must act together. Gone are the days where banks would allow an account to be designated as "two signatures required." Unwilling to

take on the responsibility to ensure that fiduciaries are acting unanimously, or even by majority action, financial institutions carefully review even revocable trusts to determine if there may come a time where the signature of more than one trustee may be mandated by the trust terms.

SHOULD I NAME A BANK?

A third-party fiduciary can keep family infighting to a minimum. Sometimes the third party can prevent the situation where a family member must say "no" to an unreasonable request of a loved one and risk the resentment that can ensue. Using a third-party fiduciary can separate business from family, allowing a brother to still be a brother without being perceived as a boss or a jailer.

SOME BASIC PRINCIPLES TO CONSIDER

Nomination of a third-party fiduciary is not very common in my practice. More than once, I have heard a grieving family member express gratitude about the way another family member has managed the estate and communicated with the family. Many children will rally around the surviving spouse and help him or her fulfill the role of successor in a way that is respectful and loving. So, family members can and often do fulfill their roles in a way that keeps the family relationships intact, maybe even stronger than before.

How can the attorney help increase the odds that that will be the case? First, be prepared to ask a lot of questions and challenge a client's assumptions. Take on the role of "devil's advocate" when it is appropriate. Tell clients about situations where you have observed a successor's role as a positive influence and others where the naming of the successor contributed to long-lasting bitterness in the family. After all, clients are paying for the benefits of the attorney's experience.

Second, warn clients of the risks of naming unsuitable successors, or of naming multiple successors who don't have a history of working well together. It can help to have a handout explaining the various successor roles and what tasks and responsibilities are involved.

Third, encourage communication within the family. Ask the client if he has expressed his choice of successor to family members and how they have reacted. Has the client's preferred successor agreed to serve in that role? Perhaps the party the client thinks would be best in the role can foresee problems with that choice and would recommend someone else.

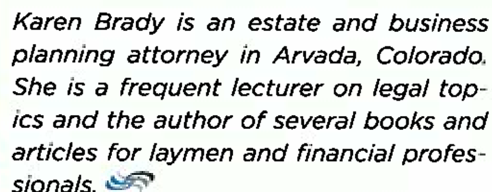
While writing this article I have personally suffered the loss of a parent and I have been navigating the shoals of family expectations and emotions. As attorneys, as parents, and as children, we can offer our clients the benefit of our legal and human experience to help them understand that more important than managing the assets is managing the delicate balance of family relationships at a time of grief.

(ENDNOTES)

1 *O'Sullivan, Timothy P. (2007) "Family Harmony: An All Too Frequent Causality of the Estate Planning Process," Marque e Elder's Advisor: Vol. 8: Iss. 2, Article 4.*

2 *Id., at 255.*

3 *This is not a modern trend. A survey of wills in 18th century England showed a majority of men named their wives as executors and co-executors of their estates. Ottaway, Susannah R. THE DECLINE OF LIFE: OLD AGE IN EIGHTEENTH CENTURY ENGLAND, Cambridge University Press (2004), p. 135*



ABOUT THE AUTHOR

Karen Brady is an estate and business planning attorney in Arvada, Colorado. She is a frequent lecturer on legal topics and the author of several books and articles for laymen and financial professionals.