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LITIGATION

Probate battles: Where there's a will, there's a relative

By Elaine Rushing

Imagine this hypothetical situation: A mother dies, leaving her daughter 75 percent of her estate. Her son, who believed he was to receive 50 percent, contests the will. The daughter claims that their mother must have changed her will to compensate the daughter for caring for her during her last illness. The son, who was geographically distant, contends daughter alienated his mother from him and is now taking his inheritance. The daughter feels her brother abandoned her. And now, the son and daughter, who were once close, have turned on each other.

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An "unnatural" disposition in a decedent's will can cause intra-family conflict, and will contests are often expensive and lengthy. More alarming, the litigation usually results in estrangement among family members. In the example, not only have son and daughter lost their mother, but now they may also lose each other. What can legal professionals do to prevent such a tragedy? Here are four strategies.

Draft the testamentary instrument to explain "unnatural" dispositions. You are the attorney who prepared the mother's original will, which left her estate equally to her children. Now imagine that not long before death, mother asks you to prepare a codicil. She says daughter cleaned, shopped and cooked for her. Also, son has prospered, whereas daughter has not. She now wants to leave daughter 75 percent. With no explanation, son is hurt and angry. So why not explain the facts?

"I, Mother, love both children equally. However, acknowledging daughter's recent assistance with my personal care, and because son is well off, I have decided to leave daughter 75 percent and son 25 percent. Daughter and I have never spoken of this and she knows nothing about it."

Additionally, encourage the mother to hold a family meeting and explain her estate plan and reasoning.

Include alternative dispute resolution provisions in trusts and wills. Resolving probate disputes using ADR is not new. Under English common law, a decedent's executor had the power to arbitrate most estate controversies. Even President George Washington included an arbitration clause in his will, directing all disputes to be decided by a panel of three arbitrators who "...shall, unfettered by Law, or legal constructions, declare their sense of the Testator's intention." Nevertheless, mediation and arbitration clauses are seldom found in current will and trust drafting forms. Given the numerous benefits of ADR in probate, the reason for this omission is unclear. Consider the following thoughts for estate planners on including ADR provisions in testamentary documents.

Mediation: Testators do not want their passing to spark a family feud. Thus, ADR should be routinely suggested, if only in a precatory fashion. The instrument can provide that the estate or trust pay for mediation, name the site for the mediation and identify suitable mediators — all issues that can be difficult to resolve once a conflict has begun.

An example: "I have no desire to have this trust provoke an expensive and bitter lawsuit among my heirs. Therefore, it is my wish that any disputes arising under this trust shall first be mediated. The trust shall bear all costs of the mediation. The mediation shall take place in San Francisco, California. I recommend that the following mediators be considered: AA, BB and CC."

Binding arbitration: The law is clear that a contest over the validity of a will is not a proper subject for arbitration, because a probate proceeding is *in rem* and binding on persons who are not parties to the proceedings. "A few individuals claiming to be the heirs cannot, by stipulation, determine such controversy,..." wrote the California Supreme Court in *Carpenter v. Bailey (*1900) 127 Cal. 582, 585-586, cited with approval in *Diaz v. Bukey* (2011) 195 Cal. App.4th 315, review granted Aug. 11, 2011.

However, an alternative to *trust* litigation might be binding arbitration. I use "might" because the most recent case to construe a trust clause requiring binding arbitration held that such clauses are unenforceable. In *Diaz*, the court ruled that a trust beneficiary was not contractually bound to arbitrate a dispute with the trustee concerning trust administration.

Because the Supreme Court granted a petition for review in *Diaz*, the enforceability of binding arbitration clauses in trusts is questionable. However, there might be a way to draft an arbitration clause that passes muster. The provision in *Diaz* reads: "Any dispute arising in connection with this Trust ... shall be settled by arbitration." But what if the arbitration clause required arbitration as a *condition* to becoming a trustee or beneficiary?

Consider the following: "It shall be a condition to acceptance of any trusteeship or any beneficial rights under this instrument that all disputes among beneficiaries or trustees shall be resolved in a binding arbitration." Here, one does not acquire any rights or benefits as trustee or beneficiary unless one signs a contract to arbitrate any disputes. Once the contract is signed, the arguments against enforcing the arbitration clause vanish.

Finally, nothing prevents trustees and beneficiaries from voluntarily entering into arbitration agreements, binding or not.

Maximize mediation by expanding the "issues": In the example, what are the issues? Did the daughter exert undue influence over her mother? Were all will formalities complied with? Did the mother lack testamentary capacity? These are all important. But limiting ourselves to rule-driven issues in probate mediation is not only counter-productive, but wastes a valuable opportunity to help a family restore its trust and community.

Other issues that can be addressed in mediation but would not be appropriate in litigation include mother's love and acceptance; the hope for family accord for future generations; an apology; a thank you; and so on. If the son is satisfied that his mother loved him equally and that daughter eased their mother during her last years, he may relinquish his claim.

Stipulate to arbitration: Suppose you have mediated without success. Are you only relegated to litigation? A trial may not fit your client's needs. There may be a significant wait for trial because in many counties, there is no such thing as a firm trial date. Because of crowded court dockets, a trial that should only take a few days might last several weeks. Additionally, if a party is well known or averse to discussing personal matters in public, probate trials can be embarrassing. For these reasons, arbitration might be more efficient. Moreover, one can stipulate to either binding or non-binding arbitration, each of which has its advantages and disadvantages.

One distinctive aim of a testator is the preservation of the family. Another might be to avoid the loss of bequests to attorney fees. In Charles Dickens' novel "Bleak House," the recipients of the testator's largesse wound up with nothing. Using any of these suggested tools, we ultimately can do much better.

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