Barris, Sott, Denn & Driker, PLLC
Estate & Financial Planning Insights

Keys to Achieving Peace and Harmony When Settling an Estate

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Settling an estate too often brings out the worst in people. While some poor relationships may never be healed, in our experience there are a number of issues which repeatedly give rise to problems when settling an estate. Proper handling of these issues may help reduce points of contention.

If you are still in the "planning" mode, steps can be taken to address them in your estate plan. If you are settling an estate, it's not too late to become aware of these issues, and we offer pointers on how to deal with them when you are in what we call "clean-up" mode.

Major Causes of Friction

Every family situation is unique, and there are probably causes for friction that we haven't seen. Here are the most common reasons families fall apart when settling an estate:

Family members aren't happy with whoever has been selected to settle the estate. They feel slighted – even though they may not want the job themselves. This may stem from personalities, sibling relationships, or other factors affecting family members that have absolutely nothing to do with the task of settling the estate. Someone may be having marital problems, be unemployed, or may have just had his 401(k) account disappear before his eyes. He is an unhappy person, and he isn't satisfied with whoever has been nominated to get him his share of Mom or Dad's estate.

Sometimes family members don't get what they want or expect. Whatever this person gets was the decedent's decision, but he may not have known about it and is surprised – and miffed.

This dissatisfaction with their share of the estate translates into unhappiness with whatever is being done to settle the estate, including sale of assets, for example, which can't happen fast enough, and the price will certainly not be high enough. Heaven forbid the Executor decides that now is not the right time to sell and that everyone should wait a couple of years for the market to improve!

Having someone else handle the estate is enough of a reason for a "control" person to grumble. Those who aren't directly involved in settling the estate feel things aren't going fast enough. (Can things ever go fast enough for anyone who is just waiting for money?)

Family members are suspicious of those who are handling the estate. They are concerned that some property will be taken, or bought at a low price, or fees taken which they feel are unjustified. Sometimes they feel that any fee at all is too much.

Family members harbor bad feelings from decades of poor relationships that have nothing to do with settling the estate. Parents may have kept a lid on it, but now they are gone and the children can act out their jealousies and anger.

Some family members may have been treated better than others over the years – larger gifts, loans, big wedding, college expenses, houses, and so on. Others may feel that now's the time to whine about how they have been treated unfairly, and perhaps put a guilt trip on those who were favored and get a larger share of the estate to even things up.

It is also possible that there is friction due to valid grounds for dissatisfaction with whomever is charged with handling the estate:

They may be acting too quickly, without following the documents, disregarding their legal obligations, or not obtaining valuations. They may even be abusing their authority.

They may not be acting quickly enough because they don't have a sense of urgency and there is no mutual expectation of how long it should take to get things done.

They may be acting without proper legal, tax and accounting advice, just bumbling along as if they were just organizing a garage sale when, in fact, much more may be involved.

They may be totally unaware of the strict standards which apply to them in their new job and the fact that they may be held liable for doing the wrong thing, or for not doing whatever they should have done in a timely manner. For example, they may sit on a stock portfolio without getting independent investment advice, while the stocks slide in value.

Finally, we are seeing an increase in probate litigation due to various factors, which are not necessarily avoidable: (a) multiple marriage situations with half-siblings who don't particularly like each other; (b) our society's increased focus on material wealth; and (c) a depressed economy and unemployment, resulting in heirs looking wherever they can to improve their own economic situations.

If You Are Still in Planning Mode

If you are still doing your estate planning, then there may be ways to address some of these issues within the estate plan to avoid or minimize friction and unhappiness in settling the estate. At least you can try to get it right.

The All Important Choice of Executor. The choice of executor seems to give rise to many of the problems seen in settling estates.

The executor is the person to whom you give the responsibility to settle your estate. This person may be called your Executor or Personal Representative if under your Will, or Successor Trustee if you have a revocable living trust. (In the rest of this Special Report, we'll just refer to that person as your "Executor" and may also use the word "fiduciary" to refer to this role.)

By the way, if you don't have a Will or Trust, then the law provides an order of priority as to who should be named your Executor. You should find out who that is and see if you are satisfied with that person being named to handle your estate.

While some people might consider it an honor to be named an Executor and handle an estate, it's a real job which can be quite time consuming and frustrating, and can also involve legal liability. Who should you saddle with that job, and what are the implications of choosing one person or group over another? Let's assume we are dealing with a family with children and no surviving spouse, so the children would be the prime candidates.

Should You Name One Child? What if you pick one child out of several? One advantage would be that this person would have the legal authority to get the job done without having the others vote on every decision. That could also be a negative. Why are you picking one over another? Is it just because this person is the oldest or perhaps lives closest to you? Is he or she more qualified than the others?

Ideally an Executor should be well organized, trustworthy, and make decisions in a thoughtful way. A smooth personality would help. Someone who realizes that everyone's opinion has value, but who can make a decision to get the right outcome even if it is not in his or her own interest. Someone who can reach out to others who have more experience in a given area would be a better choice than a know-it-all.

What If You Name All the Children? Some parents feel it is offensive to the other children if one child is appointed Executor. So they simply appoint all of the children, to serve together. That way, they feel, no one is offended.

Whether this is a better decision depends on the number of children and the personalities. Also, if you provide that they must act by unanimous decision, any one of them will be able to veto decisions of the others. This could result in a stalemate and absolutely nothing getting done.

Some parents rationalize that this situation will force the children to agree on something, because without "working things out" nothing will happen and no one will get anything. That may be true, but it may also empower the bully or the one with more staying power. If some of them are more needy or have weaker personalities, they may just concede on major issues because they want the estate settled so they can receive their share and/or so they can avoid conflict.

This is merely an adult variation of schoolyard politics. If the children have had problems getting along their entire lives, why assume that they will be able to cooperate in settling an estate when the senior generation is no longer there to act as referee?

Most parents will either pick one child or a group of children to act as Executors, or even all the children. In some cases if a group is involved, they will allow them to decide by majority rule, rather than requiring a unanimous decision. They feel that one should not be allowed to veto a decision on which the majority has come to an agreement. However, if there are existing alliances, some parents feel that majority rule will allow one group to govern. The "odd man out" will always be outvoted and this will be a source of frustration.

What About a Third Party? In some cases, faced with the disadvantages of either selecting one person or a group, a decision is made to select a third party. That could be another family member, who is not a beneficiary, or perhaps a professional such as a bank or trust company, attorney or accountant. In some cases the executor role is given to the third party alone; the children are not named at all. In other cases, the third party is named as one of the group, or perhaps just given special powers with regard to certain decisions only. For example, the third party may be appointed Special Trustee with the right to veto certain important decisions such as sale of property or a business.

Numerous Factors Come Into Play. The decision on choice of an Executor should not be taken lightly, and should consider the realities, not just simple concepts like "she's the oldest" or "she lives close by and it will be easier to handle things."

What is the history of this person in handling difficult, sensitive tasks? Will he or she be mindful of the rules, or just charge ahead and get the job done without thinking about the implications of his decisions? If naming several people to serve as a team, will they be able to work together?

Even if you feel that your nominees will be able to work together, consider the possible influence of their spouses. Though they may not have a legal role, they may have influence as a practical matter and get things off track.

Do your nominees have different situations such that some may need money sooner than others, which could make group decisions difficult with regard to sale of property? (Some may be willing to wait to get a better price, others may feel that things should be sold as soon as possible, regardless of price.)

What About Executor's Fees?

A Probate Judge once told me that people consider the Letters of Authority of an Executor a license to steal. What she was saying was that once a person is appointed Executor, and receives the document from the Probate Court evidencing that official appointment (Letters of Authority), that person often feels that with the estate's checkbook comes the right to write checks for Executor's fees in whatever amount he or she feels is reasonable. We have even seen Executors write themselves checks for $50,000 the day after their appointment, for services they had clearly not rendered yet.

It is true that an Executor is entitled to reasonable compensation for services rendered on behalf of the estate. The problem is that there may be very different views of what is "reasonable," and some beneficiaries may be incensed that a family member is taking any fee at all. The entire subject of fees should therefore be approached with great caution. This is an area which can definitely tear the family apart.

Do you expect your Executor to be compensated for his or her services?

In most cases, a family member does not expect to be paid for services in settling an estate, and will not accept a fee. This doesn't mean that you should never consider paying a fee. Depending on the size and complexity of the estate, a fee may be in order. People often underestimate how much time it takes to settle an estate, and in fact it may amount to a second job which could last from several months to several years.

However, for those who are not working on the estate, seeing a family member paid a fee for settling the estate may be hard to accept. They may consider it a boondoggle.

Whatever your feelings on the subject, it is best that you spell out your intentions in your documents. If family members are not to receive compensation, then say so. If you don't mind if they receive compensation, then you should either make it subject to a written agreement with the beneficiaries, which they can then negotiate between themselves, or specify the basis on which compensation will be determined.

For example, you could specify a flat dollar amount, a percentage based on the total value of the estate, or an hourly rate base on time spent.

If compensation will be based on time spent, specify that the Executor must keep contempora-neous written time records so that the beneficiaries (and possibly the Court) can see what was done and how long each task took. If an Executor merely submits a bill for a number of hours at a certain hourly rate, that will not go over well with the beneficiaries. It is also unlikely to be approved if the Probate Court is asked to review the fees for reasonableness.

What is a Reasonable Rate? If you do not specify in your Will or Trust how your Executor will be compensated, then you are leaving it up to the Executor, at least in the first instance. Under Michigan law, an Executor has the right to pay himself or herself compensation without prior Probate Court approval. However, the Court has the right to review compensation to determine whether it is reasonable based on all the facts and circumstances. If the Court later determines that it was excessive, then it will have to be paid back.

Absent clear instructions from you in your Will or Trust, the Probate Court will probably allow only a very low hourly rate for someone who is not a professional fiduciary. This means that even though the person you appoint earns $200 per hour in his or her normal job, that will probably not be a reasonable rate for a person whose profession is not settling estates.

Make it clear that whatever can be done by lower paid people should be done by them, and not by the fiduciary, e.g., lawn cutting, or arranging for an estate sale. The fact that your fiduciary is giving up time that he or she could spend on his or her main job does not justify paying at the same rate as the main job.

If a person isn't happy working without compensation, or on the basis you prescribe, that person should consider declining. Better yet, you should talk to the person in advance and see if he or she will agree to do the job for the compensation you intend, or for no compensation, if that's what you want. If you have different views on this and can't resolve them, you should consider appointing someone else.

In the past, it made sense to pay fiduciary fees even to family members, where the estate was subject to estate tax, the fees were deductible in computing that tax, and the estate tax rate was higher than the income tax payable on the fee. Today, however, with a $5 million estate tax exemption, most estates are not subject to estate tax. Therefore, the fiduciary should also consider that whatever is received as a fee will be subject to income tax, while if received as an inheritance it would be received free from income tax.

Non-family fiduciaries may be paid based on their normal hourly rates, such as generally apply for accountants and attorneys, or based on their normal fee schedules, as would be the case for a bank or trust company.

Personal Property

How are you allocating personal property? Personal property generally refers to everything except real estate, cash and marketable securities. Furniture, furnishings, clothing, jewelry, collectibles, art work, cars, boats, planes, fishing and hunting gear, and even family memorabilia are personal property.

According to one Probate Judge, this is the "stuff" that gives rise to most disputes.

Consider making lifetime gifts of sensitive items to avoid people squabbling about it when you are gone.

Alternatively, make out a signed, dated list of who should get what, so that it is clear that you are making the decision. There will be less to gripe about if they don't have to decide among themselves. Make sure your lawyer has the latest list.

Consider soliciting preferences from your beneficiaries. Relative value of the items may not be the source of a dispute. It may be that someone is emotionally attached to an item, and you may be totally unaware of that when you leave it to someone else or put your beneficiaries in the position of having to fight over it.

Do not rely on yellow sticky tags on the back of items. They are not legally binding, can fall off, get switched, etc.

Bad attitudes among beneficiaries can translate into heated disputes over who gets the gun collection, golf clubs, oriental rugs, jewelry, etc.

If there are items of particular value, consider establishing a procedure to allocate them fairly, including appraisal and a way of deciding who gets to choose first. Consider putting this procedure in the hands of third party such as your attorney.

Leaving the Family Business or Farm

Be careful how you leave major assets.

Should the child who is active in the business or farm get it, while the other gets cash or marketable securities?

How will the one getting cash or marketable securities feel?

How is the business or farm to be valued?

Are you assuming that a thriving business or farm will always be profitable?

What if the securities plummet in value?

If your estate will be subject to estate tax, how are the taxes being allocated? Sometimes the business or farm is left as a specific bequest (for example, "I leave my interest in ABC Company to my son, John..."), with the other child getting the balance or "residue" of the estate. If the taxes come out of the residue, then it is possible that the residue will be wiped out by the taxes.

Should you consider life insurance as an equalizer?

You may have to decide what is really important: Value, or keeping someone in the business, family farm, family compound, or horse farm that they have been running.

Coordinate Your Plan

Many people do not realize that an estate plan needs to be coordinated to work properly.

Often a Will or Trust will say one thing (for example, "I leave my estate equally to my three children..."), and the assets are titled jointly with one child. Or a beneficiary designation on life insurance or retirement plans may be inconsistent with the overall plan.

Joint ownership and beneficiary designations will usually be given effect, or "trump," whatever you have in your Will or Trust. There are certain exceptions, but as a general rule your estate planning should not stop once your Will or Trust is signed. You must also check any joint ownership and beneficiary designations, and make sure they are consistent with your intent and the overall plan.

If they are not consistent, that could lead to disputes, and maybe even the wrong people getting the money or other property, depending on your intent.

Forfeiture Clauses

Consider a forfeiture or "no-contest" clause in your Will or Trust if you anticipate that some of your beneficiaries may be unhappy with what you are leaving them and may challenge your plan. This type of clause provides that if a person challenges your estate plan, they will lose whatever has been provided for them. The intent is to discourage frivolous challenges.

These clauses are frowned upon by the law and the courts, and will not always be enforceable. However, discuss your situation with your attorney and determine how best to implement your objectives.

Legacy Statements

Consider some type of "legacy" statement, outlining your hopes and dreams for your family, and the values which are important to you. These are sometimes also referred to as "Ethical Wills," and are not the same as "Living Wills" which deal with end-of-life care.

A legacy statement could elevate the discussion and get them to think about more lofty objectives. If they are involved in its creation,, they may feel some obligation to avoid clawing.

Should You Discuss the Plan While You Are Alive?

Many clients ask whether they should discuss their estate plan with their beneficiaries while they are alive. There is no right answer to this question, only issues to consider, which will vary in each situation.

If you discuss the plan it will let them know what's coming and avoid surprises. You may be able to change the plan if it seems advisable to do so.

On the other hand, you may hear about it the rest of your life, and you may, in fact, be pressured to change your plan.

Also, consider that you are free to change your plan at any time, so long as you are competent. So why get them involved in your plan when it might change anyhow?

If an estate is being divided evenly and there is no reason to suspect unhappines on the part of anyone, then perhaps there will be no problems if you share the plan with your beneficiaries. But if you are allocating the estate unequally, or cutting someone out, you may find it better to keep your planning private, and it is certainly your right to do so.

If You Are In Clean-Up Mode

If the person has already died, and hasn't had the benefit of this Special Report to fine-tune the planning during lifetime, and you are faced with settling the estate, you are in what we refer to as "clean-up mode." It may be too late to change the documents, but there may be some ways to avoid or minimize friction and unhappiness, even if the documents are already in place.

Communication is Key

Communication is an important part of avoiding suspicion and dissatisfaction.

The best defense may be a good offense: Provide beneficiaries as much information as you can, as often as reasonable (even more often than the documents or the law may require).

Make sure they get copies of the relevant estate planning documents, as soon as possible, unless there are reasons to provide them only the relevant portions. Give them information about assets and liabilities, unless they are to receive specific items or dollar amounts. Discuss with your attorney exactly how much financial information they should receive.

It is important to establish mutual expectations, so they won't be constantly nagging you. Identify the relevant issues relating to the administration of the estate so they know why things may take some time. Establish a written time line so you all have the same expectations as to what has to be done, by whom, and when.

Decide if some of this should come through your attorney to keep the focus on the task and off the personalities. It may be important to have the attorney do most of the initial communication to set the tone, keep it business like, and steer clear of personal issues you may have with the beneficiaries or they may have with you. (You may want to have subsequent communication on important issues come from the attorney as well.)

After an initial meeting on the estate, and a comprehensive letter outlining what there is and what has to be done, let them know how often you expect to be able to provide updates.

Strive for Consensus

Solicit input and attempt to obtain buy-in on important decisions. It is harder for someone to second guess a decision with which they agreed.

If they just will not agree, then you can rely on your authority as fiduciary to do certain things.

In certain cases you may want to seek Probate Court approval to make sure you are not second guessed. This will give everyone an opportunity to express their views and allow a third party (the Judge) to make a binding decision. In case of sale of an asset, for example, a third party appraisal may be required.

Try to limit meetings to direct beneficiaries, not spouses of beneficiaries (i.e., in-laws), and not grandchildren (unless the grandchildren are the beneficiaries). Keeping the discussion to the true "interested parties" will avoid people with no direct interest fomenting discord. Let the interested parties deal with their own family members.

Use Third Parties

Consider using third parties for certain types of decisions, as appropriate, and if possible solicit input on the process and the selection of these types of professionals: Investment advisors (interview several if the assets warrant it, and consider having the beneficiaries attend the meetings); appraisers; specialty dealers in certain items (e.g., collectibles); atttorneys as to legal options and ways of resolving issues; and accountants for tax return work and to help lay out a proper accounting system.

In each case, seek someone with expertise who is independent, who will have the respect of all parties, and has no axe to grind.

Protect Yourself

In agreeing to settle an estate, you are taking on an assignment that can result in legal liability. You should become familiar with the rules you must follow in exercising your fiduciary duties. Have your attorney explain the guidelines you must follow as a fiduciary.

No one will thank you if you handle things well and everything turns out fine, but if you stub your toe they will not hesitate to let you know, and you may be personally liable.

Consider getting a Release and Indemnification Agreement from the beneficiaries when you make a distribution or when you take a certain course of action that you have discussed and with which they agree.

Alternatively, consider having the Probate Court approve your actions.

If you are distributing assets before being absolutely sure that all liabilities (including back taxes) of the estate have been covered, get a Refunding Agreement from each beneficiary. Otherwise, you could be personally liable.

Conclusion

Settling an estate requires skill, tact, and a willingness to deal with beneficiaries who often don't realize the effort required. Before you accept this responsibility, or give it to someone else for your estate, make sure you are aware of the challenges. It can be done, and without getting you in trouble, but you should not naively assume that all will go well. Don't hesitate to get professional advice. Sometimes that's the least expensive way to handle the situation.◆

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