

## **HANDLING PROBATE CASES WITH TOXIC FAMILIES**



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“All families are psychotic. Everybody has basically the same family, it’s just reconfigured slightly different from one to the next.” - Douglas Coupland

While probate<sup>1</sup> cases can involve banks and charities, most often they involve family members and friends. When a family member dies or becomes incapacitated, there is a risk that one or more members of the family will become a curse upon the rest. When family dynamics erupt, litigation frequently makes it crisis worse. The litigation process causes parties to become entrenched in their positions.

Many of the disputes that arise in probate matters can be avoided or lessened in their intensity by advance planning. A good estate planner can sometimes anticipate potential trouble and make provisions in the planning document to prevent it. For example, in cases of sibling rivalry, naming one sibling to be in charge of the estate can generate resentment among the other siblings. Naming a professional fiduciary to act will likely prevent it. In the context of mediation however, advance planning is not an option so a solution needs to be identified to resolve disputes. Here are some of the common disputes that arise in probate mediations and how to address them.

### **TRUST ADMINISTRATIONS:**

- a) One child is named as the trustee and has been holding the trust assets for over two years. His two siblings are furious that they have not received their inheritance and believe the trustee is trying to wear down his siblings because he wants to buy the family home himself, for a discount.
- b) Sibling B believes that sibling A unduly influenced their father to amend his trust to favor A over B. The dispute raises issues of who was the favored child and why.

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<sup>1</sup> “Probate” is used broadly to refer to probate estate administration, trust administration, conservatorships, elder care issues and litigation involving the same.

- c) A late life marriage to a younger person who will benefit at the children's expense. This type of dispute is often accompanied by claims of undue influence, mistreatment of the older spouse, theft of property, and occasionally, causing the death of the older spouse.

**PROBATE ESTATES** have many of the same issues:

- a) A favored child placed in charge of the estate over the others;
- b) a larger distribution to one child over others;
- c) a distribution to a charity, or a non-relative, over a family member;
- d) the manner in which the administrator/executor child has spent money and otherwise managed or mismanaged the estate.

**CONSERVATORSHIPS:**

These cases not only involve the management of finances of an impaired family member, they often involve the care of the family member. Issues arise such as:

- a) Placement in a nursing home (is it necessary? Which one?);
- b) One family member moving in to provide the care and being paid for it;
- c) One family member isolating the family member, preventing others from visiting, leading to suspicions about the care being provided;
- d) The amount of money being spent on care;
- e) Abuse claims.

Because so many of these probate, trust, and conservatorship disputes are driven by intense emotions experienced by the parties, which often have their roots in dysfunctional family dynamics going back many years, if not decades, the emotions often interfere with the business of settlement. The lawyers in the case may buy into their clients emotion or urge the clients to "set the emotion aside" and engage in logical legal analysis in order find resolution. We can identify the problem, but what is the solution?

The goal to get the clients look forward, not backward. The human brain can't focus on the past and the future at the same time. Two tools are valuable at this point: communication and recognition. The client frequently needs to express his or her displeasure to someone who acknowledges the difficulty of their situation. It is inefficient for a mediator to devote hours to this venting process, but it is worth devoting an hour to actively listen to the parties and express enough sympathy to allow them to feel heard, enabling them to set aside the emotions. At that point, we can ask the parties to take a more business like approach with a focus on making proposals to resolve the conflict. Proposals should contain the basic three "W" elements: WHO does WHAT and WHEN. In the negotiations continually remind the client that the goal is to extricate themselves from a nasty situation in a manner that is fair.