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ESTATE PLANNING TO PRESERVE FAMILY HARMONY

How Can Family Harmony Best Be Preserved and Protected in the Estate Planning Process?

Happy families are all alike; every unhappy family is unhappy in its own way.
-Leo Tolstoy, Anna Karenina, Chapter 1, first line

The post mortem squabblings and contests on mental condition…have made a will the least secure of all human dealings.
-Lloyd v. Wayne Circuit Judge, 23 N.S. 28, 30 (Mich. 1885)

You never know people until you have shared an inheritance with them.
-Tom Campbell, co-founder, Family Business Institute

Introduction

In its broader context, estate planning extends beyond the confines of the investment, management and disposition of an individual's assets during a disability and following death. It also includes ensuring intangible family values, not the least of which is family harmony, are protected in the estate planning process. The need for clarity, accuracy and comprehensiveness in estate planning documents in addressing the many technical tax, asset protection, governmental resource, and other goals involving the disposition and management of a client's property following a disability or death have been a long-standing cynosure of an estate planning practice. However, their achievement bears only a tangential relationship to the achievement of family harmony goals.

When asked, most clients readily conclude that preserving family harmony in the estate planning and administration process is a very important goal. It is not all that atypical for clients to go as far to say that they would rather give their property to a charity than have their children fight over their estates. Given the prominence parents normally would place on this estate planning goal, it would seem to ineluctably follow that addressing family harmony issues would be commonplace in the estate planning process. Unfortunately, that has not been the case, underscored-and compounded by-the virtual absence of such discussion in estate planning textbooks, legal seminars and articles. It is further attested to by the relative paucity of provisions in wills and revocable trusts, as well as in counseling rendered by estate planning attorneys, that would serve to undergird its preservation.

However, this goal is not likely to be raised by clients, who, as one might expect, are typically uninformed of the impact estate planning decisions can have on family harmony. Unlike other professional fields such as medicine and financial planning, with respect to which most individuals have become quite aware from their environment, the media and their education of their complexities and the corresponding need for professional advice when making health decisions, clients seeking estate planning advice, unaware of its nuances and complexities, tend to be predisposed to simplistic, many of which are errant, preconceptions. It is thus left to their legal counsel to importune the consideration of this aspect among other estate planning considerations.

The author submits that the general failure of estate planning attorneys to appropriately address this issue, including that of the author for a substantial portion of his practice, has been a major factor in the very high incidence of family disharmonies during the estate planning process, following a client's disability, and in the post-death administration of a client's estate. For estate planners, such high incidence is enough to render the term "nuclear family" a double entendre.

The main factors for such inattention appear to be: an absence of professional sensitivity to the importance of this issue; the mistaken view that this subject matter is more appropriate for family counselors and advisors; an enduring practice inertia centering on the technical aspects of estate planning; and a lack of expertise on strategies, and accompanying form provisions, that have the capability of adroitly address this issue.

Family harmony is not the only resultant casualty. If family harmony is lost following the disability or death of a family member, the goal of reducing costs in the administration of an estate is likewise put at a high risk of failure. Although such failure concomitantly increases the need for attendant legal services, the author in no way believes this is a significant factor in such failure. Without question, estate planning attorneys would be expected to pursue what is in their clients' best interests, devoid of any consideration of their own economic interests.

Although by far the most frequent, family relationships among adult siblings of a parent are not the only relationships vulnerable to family disharmony in the estate planning process. Also vulnerable are relationships between a parent and adult child, a parent and a child's spouse, adult siblings and stepsiblings, and between stepchildren and a stepparent. The impact family disharmony has on estate planning and administration issues are quite familiar to most estate planning attorneys, although the impact their estate planning practices have-or fail to have-on such adverse consequences would be expected to have a much lesser familiarity, the only logical reason extant such issue is not already being duly addressed.

The discussion that follows addresses estate planning issues adversely impacting family harmony and presents salutary strategies the author has found efficacious in enhancing its preservation. Such strategies are practical in nature and the legal principles involved for the most part well known to estate planners for which few cites are needed. It will be assumed in such discussion that parents have more than one adult child, for there obviously would be little to no risk of family disharmony in a multi-child family currently having only minor children or a single child family relating to a parent's estate plan, save that in such latter circumstance which may result, as discussed infra, from a parent's disclosure of the estate plan. For ease of reference, any references herein to a "testamentary instrument" or "instrument" of a parent are intended to include both wills and revocable trusts; to the estate and its administration to both probate estates and revocable trust estates; and to the fiduciary or financial fiduciary of the estate to a trustee of a revocable trust estate or executor or personal representative of a probate estate, unless the context should indicate otherwise.

Choosing the Appropriate Fiduciary

He who represents himself has a fool for a client.
-Abraham Lincoln

Death is not the end. There remains the squabbling over the estate.
-Ambrose Bierce

The estate planning decision likely to have the greatest impact on family harmony is the choice of financial fiduciary to serve during a client's disability (agent under a financial power of attorney and trustee of a revocable trust) and following death (the trustee of a revocable trust and executor or personal representative of a probate estate). Although clients have an understandable propensity to prefer an adult child serving in such capacity (following their death if unmarried or normally after the death of a surviving spouse excepting second marriages), the all too frequent acquiescence of estate planning attorneys in this preference, sans a meaningful discussion with clients such decision's potential adverse impact on family harmony, presents a very high risk of its loss in the plan's implementation.

Estate planning clients are no more prepared to make an informed decision concerning the appropriate fiduciary of their estates in the absence of objective professional advice than are individuals in determining medical choices without the advice of a physician. The same is also generally true regarding individuals lacking knowledge in investment matters making investment decisions bereft of the advice of knowledgeable experienced investment advisors.

Based on practice experience, professional inquiries, and the polling by the author of estate planning attorneys and certified public accountants at professional seminars, the author has determined that there is an approximate one-third to forty percent risk of significant family discord in the post-death administration of an estate attributable to a child or children serving as a financial fiduciary of a parent's estate when a parent is survived by more than one adult child. Irrespective of the exact percentage, there is little question but that such risk is quite high. As one might expect, there appears to be a direct correlation between the number of children and number of in-laws and the degree of such risk. Interestingly, however, the size of the estate appears to be a lesser factor. As estate planning attorneys well know, a high percentage of such family disharmony extends well beyond the closing of the estate, often for the remainder of affected children's lifetimes.

The risk of family disharmony increases to some extent should a child additionally serve as financial fiduciary for a disabled parent either as agent under a financial power of attorney or as trustee under a revocable trust. It increases to an even greater extent should a child serve as fiduciary not only of a parent's estate, but also of a trust created under the instrument benefitting another child or a stepparent. This latter circumstance creates a very high risk of disharmony extending beyond just the normal conflicts and tensions occurring between the child named as fiduciary and such child's siblings, but also those between such child, the stepparent and stepparent's children, and between such child and siblings with respect to decisions regarding the stepparent's beneficial interest in the trust should such child's siblings have a remainder interest in the trust following the death of the stepparent.

A misconception among children is that serving as a financial fiduciary is some sort of "plum" or parental honor bestowed upon them. It is also often viewed by a child as their final parental "grade card" of filial merit. This perspective is a major cause of disgruntlement among siblings not chosen. However, the appointed child usually comes to a quick realization such appointment presents a significant burden with little offsetting benefit. In addition to incurring any resultant family disharmony, such child typically has to take time away from work and family to undertake a time-consuming task for which the child is normally ill-prepared, inexperienced and for which the child may not be in receipt of even a modicum of sibling appreciation.

The reasons for the high frequency of such adverse family harmony consequences are myriad. First, beyond obvious sibling jealousy, resentment, past conflicts, and avarice, parents are the family's "emotional glue" which becomes abruptly absent following their passing. Upon the death of the surviving parent, grief and "orphan syndrome" often combine to create a highly charged emotional cauldron adversely impacting the harmonious administration and distribution of the parent's estate. It is not all that unusual for the mindset of adult children in this environment to revert to a level rivaling prior prepubescent sibling rivalry. In-law involvement typically only serves to increase family tensions.

If parents believe such tensions can be avoided by appointing more than one child or all children as co-fiduciaries, they are likely to be mistaken. For in addition to posing administrative hurdles depending upon the number of children appointed, this strategy typically serves to create other friction points, as children frequently are not of like mind on the various issues impacting the administration of an estate. In that context, most any issue can become material, including those which in other contexts might be considered quite inconsequential. Further, children serving as co-fiduciaries who ultimately end up having to do a disproportionate amount of the estate administration, without compensation or appreciation from their siblings serving in the same capacity, can become resentful. Should an odd number of children be appointed, children holding a minority position can quickly accrue a high level of resentment. Conversely, having an even number of children as co-fiduciaries may result in a contentious deadlock.

Compounding the problem, a child serving as financial fiduciary not infrequently assumes an arrogant "I'm in charge" posture, thereby disaffecting siblings. The author has learned that a child most desirous of serving as a fiduciary may be the child especially prone to possessing a divisive imperious attitude if named as financial fiduciary of a parent's estate. Frequently, communication problems with siblings, both as to content and frequency, can occur regarding the administration of a parent's assets, be they real or perceived. Other children feeling there is an information vacuum tend to presume the worst, often garnering a suspicious "I wonder what my [brother or sister] is doing" perspective.

Parents should also be made mindful that a child serving as financial fiduciary can have a significant financial conflict of interest. Many decisions a child makes, or has the discretion to make, as financial fiduciary in the administration and distribution of the estate, may be exercised at the edge of such discretion to such child's benefit. Even when such decisions are impartially made, siblings can have a far different subjective perspective.

Compounding family disharmony opportunities is the complexity of a financial fiduciary's tasks. Mistakes can be made in investment, management and tax decisions, especially if family fiduciaries make decisions without benefit of competent professional advice. Even when making sound fiduciary decisions, other family members are often prone to "second guess" their decisions. Compared with experienced third parties, children serving as fiduciaries tend to be much less diligent and compliant with the provisions of the testamentary instrument and statutory requirements governing the management of an estate, beyond simply being a reflection of their lack of knowledge and appreciation of the subject matter.

Rather than viewing their fiduciary role from an objective perspective, children often feel that other family members should simply trust them, even sometimes to the extent of not expecting an inventory or accounting. A request by another family member for an accounting or other information is often viewed by a family fiduciary as questioning their veracity. Administrative mistakes, both real and perceived, can engender ill will and heighten the level of disagreements, all too frequently resulting in substantial family discontent. Other children also commonly disagree on the family fiduciary's management determinations on a plethora of administrative matters for which they are devoid of knowledge as to their legal requirements. Many administrative tasks are rife for disagreement simply because they rest upon the personal judgment of the fiduciary applied to the facts at hand.

As estate planning attorneys well know, such matters include: (1) the distribution of tangible personal items (jewelry, furniture, pictures, clothing, family heirlooms, etc.) among children for which there was no specific disposition in the testamentary instruments or documents of the decedent; (2) the distribution of assets in kind in satisfaction of proportionate shares of the estate based on their fair market value; (3) the timeliness in completing the administration of the estate; (4) whether to make interim distributions to family members prior to the termination of the estate; (5) whether a sibling serving as a fiduciary sufficiently consulted with them on administrative matters, even if not legally required to do so; (6) whether accountings of administration expenses and receipts were timely furnished and accurate, a frequent problem due to children often failing to keep adequate financial records; (7) decisions regarding whether estate property should be sold, when it is to be sold and at what price during the post-death estate administration process, often with little concern, awareness or appreciation by other children of their sibling's fiduciary responsibilities in that regard; (8) whether the child fiduciary properly sought or chose appropriate legal and tax counsel for the estate; (9) whether the assets of the estate were accurately reported by the fiduciary on an inventory; (10) whether claims against the estate were properly settled; (11) whether claims on behalf of the decedent were settled properly; (12) tax elections during the administration of an estate having a disparate impact upon beneficiaries and whether a corresponding equitable adjustment which should be made in favor of adversely affected beneficiaries; (13) whether a child serving as a fiduciary should take an administrative fee and its reasonableness; (14) whether any transfers by the decedent to a family member during the parent's lifetime were appropriately considered as loans or gifts in determining the family member's share of the estate; (15) whether a child who cared for a parent in a non-fiduciary capacity during the parent's lifetime has a legal or equitable basis for seeking compensation for such services from the parent's estate; (16) whether property passing outside the estate to a child through joint tenancy or a beneficiary designation should be taken into account in determining a child's share of the estate; and (17) the appropriate time for the closing of the estate. Ameliorative strategies regarding the first and last four above matters are addressed below.

Of particular note, when a child serves as financial fiduciary, siblings are often of the view that their sibling should not be entitled to a fee, notwithstanding being legally entitled thereto in the same manner as a third party, even if the instrument specifically provides for compensation for the family fiduciary. This position often is the result of other family members being of the opinion that the administration of the estate by a sibling is strictly a "family matter." This view typically will be resented by the child serving as financial fiduciary as indicating a lack of appreciation for their efforts and services as fiduciary. Even if family members are accepting of a fiduciary fee being taken by a sibling, they frequently take objection to the amount, particularly if their sibling has not assiduously kept records of time expended and matters addressed as a fiduciary, a quite common situation.

The foregoing problem areas abound even in circumstances where the family fiduciary is diligently trying to exercise fiduciary responsibilities in an objective, even-handed manner. When such is not the case, other serious consequences can ensue. Less than impartial child fiduciaries are tempted to manipulate the decision-making process for their own economic gain. They also may go to the extreme of ignoring the dictates of the testamentary instrument in favor of exercising their own judgment as to what their parent "really intended." Although certainly isolated occurrences, most estate planners having any significant tenure have experienced incidences of the purloining of estate property or embezzlement of estate funds by a child serving as a fiduciary

Such problems are compounded in a "blended family" situation where a parent is leaving property to both children and stepchildren. This is one of the most potentially divisive and contentious of all family estate planning situations. As opposed to naming a child as sole fiduciary, which can be quite incendiary, the all too frequent unwise strategy of balancing competing family interests by naming an equal number of children and stepchildren as co-fiduciaries is even less worthy of consideration. It has the inverse effect of engendering frequent and costly disagreements between family factions on both sides and among family members on each side, all too frequently resulting in a costly stalemate. In discussions with clients, the author has likened this ill-advised strategy to tying the tails of two cats together.

Beyond the negative family disharmony consequence all too frequently occasioned by having a child serve as financial fiduciary, there is also potential personal liability resulting from errors in the management of the parent's estate. This can be both emotionally and financially devastating to a family fiduciary. It often occurs due to a family fiduciary "winging it" regarding the administration of the estate without seeking legal advice, from oversimplifying the process, sheer ignorance, or simply to avoid incurring accounting or legal professional fees. Any resultant emotional damage to family harmony can be exacerbated where the testamentary instrument has waived fiduciary liability for actions by individual fiduciaries which are merely negligent rather than intentionally errant. Although such provisions are designed to not penalize a child for unintentional mistakes, such exoneration does little to assuage, and may even worsen the rancor of other family members, who are thereby left with no means of redress for damages incurred by a sibling's mismanagement of their parent's estate.

Due to the foregoing formidable risks to family harmony posed by a child serving as financial fiduciary of a parent's estate, there is rarely a family situation in which the risk to family harmony in having a child serve as financial fiduciary of a parent's estate is insignificant, no matter how harmonious the family during the parent's lifetime. Because such situation does not present itself during a parent's lifetime and the factors affecting family harmony are both complex and multitudinous, it is simply not feasible for parents to be able to properly evaluate and predict this risk in their own family with any reasonable degree of certitude.

The confluence of the foregoing factors can result in naming a family member as a financial fiduciary being the ultimate "acid test" of family harmony, taxing it to its limit. Any resultant damage will obviously tend to be much greater in more harmonious families, for such families have "more to lose" by such an occurrence. In situations where significant family disharmony is already present, naming a family member as fiduciary carries with it a much higher risk of discontent and attendant administrative costs.

Interjected into such breech is a parental proclivity to name a child as financial fiduciary of their estate. At first blush, parents quite understandably tend to view the administration of an estate, as do their children, as simply a "family matter," thus, unless there is an estranged relationship with their children or they are otherwise held in disfavor, instinctively concluding a child who "knows the family" is best suited to carry out their intent. However, simply put, the administration of a parent's estate is not a "family matter." It is a legal and financial matter which only happens to involve the administration and distribution of parental assets, the objective administration of which is not furthered, but in fact normally impeded, by the impact of family dynamics. Family dynamics should play absolutely no part, legally or otherwise, in the interpretation to be given an estate planning document or the proper administration of an estate. The term family dynamics refers to the way family members interact with each other, with its inherent emotional aspects, and thus its impact is independent of any objective aspects. When family dynamics impact the administration of a parent's estate due to a child serving as financial fiduciary, any semblance of objectivity by family members can quickly become evanescent.

Even if such family harmony risk was objectively determinable in the abstract, parents would not be expected to be objective in determining this risk in their own family. The understandable natural tendency is for parents to have a rather Panglossian view that their children possess the better elements of human nature, presenting little to no risk of failing irrespective of the circumstances. Consequently, prior to having a full discussion with counsel of this issue, parents are likely to dismissively conclude that family disharmony resulting from the appointment of their child as financial fiduciary simply "won't happen in my family."

Beyond the family disharmony risk, naming a child as financial fiduciary is accompanied by an administrative burden. A child must devote significant attention away from their family and personal or work schedule to attend to estate matters with which the child typically has no prior experience. Such burden is increased if a child is geographically challenged with respect to administrative duties requiring such child's physical presence, such as inventorying and distributing tangible personal property, overseeing estate sales and meetings with other family members and professional advisors.

Naming a child as a financial fiduciary of a deceased parent's estate is analogous to an owner of a highly technical and complex business employing a manager having no prior experience or expertise in the business, potential financial conflicts of interest in such capacity, and who is at high risk of incurring divisive personality conflicts with employees. Obviously, such hiring would normally be ill-advised, posing a significant economic and employee morale risk to the business. A child having inherent financial conflicts of interest who is at high risk of being resented by, and having disagreements with, siblings, and who has no prior experience as financial fiduciary of a parent's estate, similarly puts the estate at a substantial economic and family harmony risk.

Just as parents cannot be truly objective as to the risks in naming a child or children as fiduciary of their estates, a child serving as fiduciary cannot be objective as fiduciary vis-a-vis such child's relationship with siblings in the discharge of such child's fiduciary duties. Siblings in turn similarly cannot be objective about their sibling's exercise of such sibling's fiduciary duties. Even attorneys, notwithstanding their legal training to be objective, as Abraham Lincoln aptly noted, have a "fool for a client" should they choose to represent themselves. Emotions, family dynamics, conflicts of interest and inherent partiality severely impair the objectivity of all siblings involved in such situation to a degree normally far beyond that which would be expected to adversely impact the objectivity of an attorney favoring self-representation.

Unfortunately, the parental propensity to name children as fiduciaries of their estates is at least acquiesced in, if not actually shared by, a high percentage of estate planning practitioners who fail to provide objective fulsome advice to their clients in making this momentous decision. The rationalization that an estate planning attorney is simply following a client's wishes as to a financial fiduciary is unacceptable. Only through a comprehensive and extensive objective discussion with clients, disabusing them of any misconceptions and preconceptions, fully informing them of its inherent significant risks to family harmony, and providing viable alternative strategies, will clients even have the opportunity to make the informed decision on this issue they deserve and which estate planning attorneys are professionally ordained to provide.

Parents who have gained an appreciation of the high risk to family harmony engendered by their appointment of a child as financial fiduciary of their estate have a natural tendency to shift to preferring a more distant relative to serve in such capacity, such as a parent, brother or sister. However, prior to doing so, they should be advised that: (a) normally no estate administrative experience will be gained by such appointment; (b) depending upon the nature and degree of such relationship, such relationship will at least to some degree impair the such relative's objectivity in the administration of the estate; (c) they may be placing a burden on a relative at a time in their lives (such as during retirement) which can be quite inconvenient and obtrusive; (d) such appointment and resulting administrative actions with which a beneficiary may disagree, as well as administrative errors, can result in damaging relationships between such relative and the beneficiaries of the estate; and (e) there will be a probable expectancy by estate beneficiaries that such relative will perform fiduciary services for no fee.

NAMING A CHILD TO SERVE AS CO-FIDUCIARY WITH A THIRD PARTY

Such foregoing family harmony risks when a child serves as fiduciary are only partially assuaged by naming a child and an independent experienced third-party fiduciary, such as a bank or trust company, as co-fiduciaries. Although having such third party as a co-fiduciary should substantially reduce the administrative burden on the child fiduciary, other children may still be resentful in not having been named to serve in such capacity and may nonetheless blame their sibling for administrative decisions with which they disagree. Further, the lack of objectivity of a child may adversely impact the decision-making process. Finally, having a child and third party as co-fiduciaries may increase administrative costs. Consideration thus should be given instead to the alternative strategy discussed below of naming a child or children as "fiduciary discharger(s)" and appointing an independent experienced third-party as sole fiduciary.

Prior to concluding discussion on this option, it should be mentioned that such strategy nonetheless is worthy of consideration under a family business succession plan involving a farm or other closely held business. Parents are understandably quite reticent in reposing the management of their family business in a third-party fiduciary during the estate administration period. A family member thus could be named as co-fiduciary with an independent fiduciary for the sole and exclusive purpose of such child managing the family business or voting the interest in the business entity, either solely or as co-fiduciary with an independent third party, during the period of administration of the estate prior to its termination. The independent fiduciary would solely handle all other aspects of the estate administration, thus preserving family harmony in the more volatile aspects of the administration of the trust estate. However, this strategy is probably only viable with revocable trusts, for there is no statutory authority for a bifurcation of fiduciary responsibilities between or among executors.

NAMING AN INDEPENDENT THIRD-PARTY FIDUCIARY

A viable alternative strategy to naming a child or other relative as financial fiduciary is naming a financially astute, experienced and objective third party, such as a certified public accountant (preferably having no relationship, business or otherwise, with a family member) or corporate fiduciary (bank with trust powers or a trust company), to serve in such capacity. Such appointment unquestionably serves to greatly reduce internecine family stress and attendant risks to family disharmony, as well as provide a much greater assurance that the estate will be properly and objectively managed.

This is not to say that estate planning attorneys also are not proper candidates worthy of consideration as third-party financial fiduciaries. However, depending upon the situation and attorney under consideration, and notwithstanding the fact that an attorney would be expected to be quite competent as to all legal matters in the administration of an estate, several factors can militate against an attorney being the appointee. First, a high percentage of estate planning attorneys simply do not enjoy serving as financial fiduciaries of estates, many facets of which involve non-legal matters they tend not to find enjoyable. Estate planning attorneys are by nature estate planners, not administrators. Attorneys less than comfortable or enthusiastic with the administrative aspects of managing an estate would naturally have a lesser predilection to focus on attending to such task at the highest level of their ability. Naming an estate planning attorney as fiduciary would be analogous to asking an architect who designed a building to also supervise its construction, a request with respect to which the architect would likely demur, for similar reasons.

Secondly, an attorney may not have the experience, adequate support staff, or internal controls and procedures necessary to competently and efficiently handle the investment, accounting, and other ancillary administrative aspects unique to estate administration. Having the authority and legal ability under the instrument to delegate such facets to a third-party fiduciary may only serve to increase overall costs. Third, many administrative tasks of a financial fiduciary requiring less expertise can be performed quite satisfactorily at a lesser cost than at average hourly attorney rates or perhaps even at paralegal fee rates (e.g., supervising distribution of tangible personal property items, meetings with family members and other professionals involved in the administration, etc.). Fourth, although there certainly is no ethical conflict in an estate planning attorney serving as a financial fiduciary under the testamentary instrument the attorney drafted, provided the attorney has adequately informed a client of other alternatives and their risks and benefits vis-a-vis appointing the attorney as fiduciary, estate beneficiaries nonetheless may have a negative perception of an attorney who drafted the estate planning documents also serving as fiduciary of the estate. They may view an attorney assuming both roles to be purely self-serving, question whether any exculpatory clauses in the testamentary instrument to protect individual fiduciaries, including the attorney, from simple negligence were proper or fully understood by the decedent, or believe the attorney would not admit to any deficiencies or errors in the testamentary instrument the attorney drafted. Finally, attorneys serving in such capacity would need to confirm their fiduciary duties are covered by malpractice insurance. The foregoing considerations lead many attorneys to have a standard practice of dissuading clients from naming them as fiduciaries, notwithstanding the remunerative aspect of such an appointment.

Competent third-party fiduciaries, such as certified public accountants having significant experience as financial fiduciaries and corporate fiduciaries, are impartial and can draw upon a wealth of practical and professional experience in managing estates. In addition to their family harmony enhancing benefits, they tend to make far less administrative mistakes, achieve on the average a better investment return, keep better records, provide more accurate and informative accountings, and have more knowledge of the complex laws governing the administration of estates (e.g., Kansas probate statutes, the Kansas Uniform Prudent Investor Act, and the Kansas Uniform Trust Code) than would a child serving in such capacity.

For obvious reasons, an estate planning attorney is likely to receive a greater economic benefit if a family member, rather than a third party, is named to serve as financial fiduciary. Family members usually tend to select their parents' estate planning attorney as fiduciary counsel to assist them in administering the documents the attorney drafted. They also typically need far more legal advice, assistance and support than would a third-party fiduciary experienced in handling estate matters. The enhanced risk of significant family disharmony agreements when a family member is serving as a financial fiduciary additionally can significantly foster increased legal costs. Thus, when an estate planning attorney advises clients to consider the family harmony and estate administration benefits in naming an independent financial fiduciary, clients can be assured that their attorney is advising them solely as to what is in their best interest, not that which might benefit their personal financial interest.

COST/RISK VERSUS BENEFIT ANALYSIS IN NAMING AN INDEPENDENT TRUSTEE

Clients, particularly those with modest estates, have an understandable fear that the costs of an experienced third party serving as financial fiduciary may significantly deplete their estates. Such fear is normally unfounded. Such costs can substantially reduce other administrative costs, for, as noted above, experienced third parties are possessed of the knowledge in the aspects of their administrative duties that family members must, and should, otherwise glean from their engagement of attorneys and accountants or risk economic damage to the estate should they not do so. It can also lessen, if not avoid, potential legal expenses that otherwise might have arisen from family squabbles due to the appointment of a family fiduciary. Finally, such administrative fee is deductible against the income or any estate tax liability of the estate, thereby normally resulting in a reduced "after tax" cost. I.R.C. §§67(e)(1); 2053(a)(2).

Individual professional third-party fiduciaries, such as certified public accountants and attorneys, normally charge their services at hourly rates. Corporate fiduciary fees, depending upon the size and complexity of the estate and the corporate fiduciary named, are typically based on a percentage of the estate ranging from one to three percent of the size of the estate, the larger the estate, the smaller the typical percentage fee. If the property is income producing real property, the fee is typically a percentage of the income, say 10% of its annual net income. Such fee will normally be somewhat greater with respect to probate estates. Obviously, such cumulative fee would be greater should the corporate fiduciary also be called upon to serve as a fiduciary during a period of disability.

The fees for individual fiduciaries charging hourly rates are harder to compare, not only with respect to corporate fiduciaries, but also among themselves. Their total fee will be dependent upon their hourly rates, as well as that of their paraprofessionals, and the total time expended. Such total time in turn will vary among such individuals based upon their efficiency, knowledge, experience and sophistication and efficiency of their form systems. Also, as compared to bonded corporate fiduciaries, such services may or may not be covered by malpractice insurance, an important consideration. Nonetheless, such fees, when converted to a percentage fee "after the fact," would likewise only be expected to exact a very small percentage of the estate. By way of comparison, clients often routinely find acceptable a fee of perhaps one percent per year on their investment assets for financial and investment advice, and perhaps a six percent commission on the sale of their personal residence.

Certainly, when factoring in the risk of fractious family disputes resulting from the appointment of a family fiduciary, the net administrative costs in having a competent third-party serve as fiduciary can actually result in a net savings to the estate as opposed to a family member serving as a fiduciary. When the foregoing aspects are fully and objectively explained to clients under a comprehensive risk versus benefit analysis, clients normally will conclude that such fiduciary fees associated with the post-death administration of their estate are acceptable, and may well result in an economic benefit, particularly when the salutary aspects of enhancing family harmony and relieving children from bearing such administrative burden are also factors meriting consideration.

Such decision may be best posited with clients as analogous to that of taking out property insurance. Individuals insure against risks they have determined they can't afford to take based on a risk versus benefit analysis. In the author's city of

Wichita, for example, there is an approximate 1 in 400 risk of a tornado or high wind destroying or seriously damaging a personal residence over a 40-year period. Nonetheless, despite such extremely low risk and the highly likely prospect of wasting casualty premium payments over an entire lifetime, most residents choose to insure against such loss. They do so having determined that such possibility, however remote, of such a major economic loss is a risk they simply can't afford to take when balanced with the relative cost of insuring against it. By way of contrast, when individuals name a child as financial fiduciary of their estates, they are incurring an exponentially higher risk of damaging or destroying what they nearly typically view as a much more valuable intangible asset, family harmony, and a possible attendant high economic cost as well. Moreover, in contrast to property insurance, minimizing such risk is simply a matter of comprehensively addressing it in the estate plan, with no subsequent periodic premium payments being required.

Following comprehensive discussions of this issue with clients, the author has found that approximately three-fourths of clients will choose to not name a child in favor of an independent third party as financial fiduciary of their estates. Prior to engaging in such extended discussions with clients on the issue, the experience ratio approximated the inverse ratio.

THE ROLE OF A FIDUCIARY DISCHARGER

By naming an independent financial fiduciary, parents need not abjure any input of their children in the estate administration process. The family member who would otherwise have been the client's choice as financial fiduciary may be named as "fiduciary discharger" in the testamentary instrument, possessed of discretionary authority to discharge a non-family party serving as fiduciary and name as successor fiduciary another third party (usually preferably limited to another third party such as a certified public accountant or corporate fiduciary). More than one child also may be named to serve in such capacity, with decision-making by a majority or unanimity of such children.

The author has found it normally preferable, depending upon the number of children and their individual attributes, for both family harmony reasons and to avoid children feeling "left out" of the process, to provide that all children serve as fiduciary discharger. Further, it is also typically advisable to provide that such decision be made by unanimity rather than by majority in recognition of the major import of such decision, to avoid children taking umbrage at being outvoted, as well as not risking the possibility that a majority decision was motivated by only a segment of the children in furtherance of their personal subjective interests. The tenure of a fiduciary discharger would end upon the termination of the estate and not extend to any sub-trusts created under the instrument.

As above discussed, family disharmony is minimized when family members are not directly involved in the estate administration process, whether as a fiduciary or even as a co-fiduciary with a non-family member. The role of fiduciary discharger puts the desired family member(s) in control of the party who or which is to serve as fiduciary without having the burden or any "family baggage" which can accompany a family member being named as sole financial fiduciary or co-fiduciary with an independent fiduciary. The inclusion of such provision normally satisfies the preference clients often express for family input to be involved at least in some respect in the estate administration process. Such authority also may enhance the responsiveness of third-party fiduciaries to the beneficial interests of family members in the estate. Having a family member or members serve as "fiduciary discharger" additionally permits them to negotiate the lowest fiduciary fee possible. Consequentially, a high percentage of clients conclude that this approach achieves the "best of both worlds," and due to its remoteness from actual fiduciary decision-making, carries little risk to family harmony in its operational phases.

Under the provisions of a revocable trust, to the extent not reposed in a fiduciary discharger, authority could also be reposed in a Trust Protector or Special Trustee to discharge any trustee, other than the grantor or grantor's spouse, thus possibly also including a child serving in such capacity, and appoint a corporate fiduciary or a successor corporate fiduciary, as the case may be, in the event such party has determined that same was merited by family disharmony or was otherwise desirable under the circumstances to ensure the proper and efficient cost administration of the trust estate.

However, because the provisions appointing executors are statutory, any change in the executor or personal representative in a probate estate, even that which could possibly be effectuated by a fiduciary discharger, is subject to judicial approval. K.S.A §59-701, et seq. Thus, such provisions under are of lesser efficacy than if reposed under the provisions of a revocable trust, where such parties possessing such authority would be termed "trustee dischargers."

NAMING A CHILD TO SERVE AS FINANCIAL FIDUCIARY ONLY DURING A PERIOD OF DISABILITY

Although naming a child to serve as a financial fiduciary during a parent's disability (financial agent or trust of a revocable trust) carries with it some risk of family disharmony, particularly should the child charge a fee for services, the much greater risk is normally during the post-death estate administration period. Thus, many clients may desire naming a child to serve as financial fiduciary in the event of their disability, when the need for professional advice in the administration of their assets is of lesser importance, while appointing an independent fiduciary to serve as fiduciary during the post-death administration of their estate. At that time, such child's role could transition to that of a fiduciary discharger. Clients making such choice, particularly those having modest estates, also may do so out of a concern that substantial third-party administrative costs would be incurred should there be an extended period of disability.

Nonetheless, a parent should be reminded of the burden that such fiduciary responsibility places on a child and be cautioned that there still is some degree of risk that the other children will question such child's management of the parent's assets, be suspicious of their influence on a parent, question any fees they take, and disagree on the child's management of parental assets. Further, a child serving in such capacity may conceivably access the parent's testamentary instrument and attempt to influence a disabled parent to amend the estate plan in the child's favor, which may even occur in circumstances where the disabled parent has questionable legal capacity to execute a testamentary instrument.

AUTHORIZING CHILD FINANCIAL FIDUCIARY TO APPOINT SUCCESSOR CORPORATE FIDUCIARY

Those clients who nonetheless choose to appoint a child or children to serve as a financial fiduciary of their estates typically further name other children as successor fiduciaries, perhaps followed by a corporate fiduciary in the event there is no child willing and able to then serve. In that circumstance, the parent should be counseled that it may be advisable to consider providing in their testamentary instrument for a child serving as fiduciary to resign at any time and appoint a corporate fiduciary to serve in such child's stead, thereby superseding the otherwise applicable fiduciary succession provisions.

Not infrequently, another child named as successor fiduciary, who may resent not having been named by the parent to serve as initial financial fiduciary, will unduly criticize or challenge a sibling's fiduciary decision-making, perhaps in the hope such fiduciary will resign and open the door for the disgruntled child to become the successor fiduciary. Including such provision has the beneficial aspect of mollifying any further damage to family disharmony and avoiding the child financial fiduciary having to make the Hobson's choice of either continuing to serve in a disharmonious family environment or resigning as fiduciary, only to have a disgruntled sibling serve as such child's successor and continue the aggravation of family harmony.

It also allows a child serving as fiduciary to foster family harmony at the outset by informing siblings that such child did not ask for the appointment (assuming that is factually correct), did not consider such position to be other than a strictly financial matter to be handled professionally and objectively according to the provisions of the parent's testamentary instrument, and does not intend to take a fee for serving as a financial fiduciary if the estate administration proceeds smoothly without family rancor. However, should such administration become disharmonious, such child would indicate such child would intend to exercise such option, given by a parent in furtherance of family harmony, to resign and name a corporate fiduciary to serve in such child's stead. In a revocable trust, such provisions could also be made applicable when a parent is under a disability.

This option, in conjunction with the foregoing statement to siblings, should: (a) disabuse siblings of any notion that such child is on a "power trip;" (b) serve to disincentivize all siblings from fomenting family disharmony in view of the additional administrative costs they likely will perceive to be significant should their sibling resign in favor of a corporate fiduciary; and (c) remove the incentive of a successor sibling to unduly criticize the child serving as financial fiduciary or seek such child's discharge in the hope of succeeding as financial fiduciary.

As with the aforementioned inclusion of a fiduciary discharger provision, this option is of lesser efficacy under the provisions of a will than a revocable trust. Foe unlike wills, such appointment of a successor trustee is not statutorily subject to judicial approval.

It's tough to make predictions, especially about the future.
-Yogi Berra

Clients' decisions in naming a financial fiduciary should only be made after due consideration of all its relevant aspects with their estate planning attorney and what such decision portends for the future of their family and estate plan. Unfortunately, a very high percentage of individuals executing financial powers of attorney and testamentary instruments are unlikely to have been sufficiently apprised of the foregoing factors to be able to make an informed decision. Far too often, there is only a brief superficial discussion of this issue, limited in essence to legal counsel inquiring of the client as to the client's preference, and if the nominee is a child, perhaps follow up inquiries as to whether such child is mature, financially responsible and "gets along" with siblings.

Devoid of a comprehensive understanding of the complex issues involved and viable alternatives, a parent is typically predisposed to select a child as fiduciary of their estate or successor fiduciary following a spouse. Conversely, as noted above, in the author's experience a strong majority of clients who have been comprehensively and objectively informed of the foregoing factors will decide instead to go outside the family in selecting a financial fiduciary. Even more telling, the author has experienced situations in which children who have been similarly informed of the potential risk to family harmony and the burden they will likely bear if named as financial fiduciary have indicated to parents they prefer declining such role in favor of the appointment of an independent third party fiduciary.

Nonetheless, whether resulting from a lack of thoughtful analysis, instinctively concluding that disharmony simply "can't happen in my family," or having decided that the benefits they perceive by naming a child as financial fiduciary outweigh the risks, a minor percentage of well-informed clients nonetheless will choose to name a child as financial fiduciary of their estate. In the end, such decision ultimately must rest with the client. The role of estate planning attorneys is not to proselytize, recommend or otherwise try to persuade clients one way or another in such determination, but simply to objectively inform them of all appropriate considerations, as well as alternative fiduciary strategies. In short, the financial fiduciary "pros and cons balance sheet" should speak for itself. From the perspective of an estate planning attorney, whatever decision duly advised clients ultimately make in their choice of financial fiduciary should always be considered the appropriate decision for that client.

Disposition of Tangible Personal Property

Following the selection of the financial fiduciary of the estate, the disposition of tangible personal property among children probably incurs the second greatest risk to family harmony. Such risk is clearly at its zenith if a child is serving as financial fiduciary. Consequently, this aspect of estate administration is worthy of more than a brief discussion. The goal of most parents is to provide for their distribution among children either as equally in value as possible or provide for an equitable method in their distribution, or a balancing thereof. The various methods in doing so have wide variances not only in their ability to accomplish such goals, but also in their impact on family harmony.

At the outset, it should be acknowledged that the import of this risk varies considerably based on the nature, quantity and value of such property in any given estate. Frequently, such facet has little import on family harmony due to most of a decedent parent's property of significance to children having been previously distributed by parents to them prior to their death. In other situations, it may consist of a houseful of such items, many of substantial economic and emotional value. Thus, the important aspects of the distribution methods outlined below should be considered in that vein. That being said, as most estate planning attorneys well know, even items of little economic value often take on great emotional significance in the process of their post-death distribution among children.

The high risk of family disharmony in the disposition of the tangible personal property is primarily due to the emotionally-charged environment in which it takes place, replete with competition among siblings for the possession of personal property items imbued with sentiment, nostalgia and which often serve as an enduring emotional touchstone to parents the children have lost. In such complex environs, the problem areas are legion, including parental approaches in discussions with their children eliciting their preferences in this regard, the failure of parents to specifically delineate their personal items disposition in lists, the selection of the financial fiduciary, the discretion reposed in the financial fiduciary in making such distribution, the provisions in the testamentary instruments governing their definition and distribution, and the prospect of children intentionally violating the applicable distribution process.

The last above problem area is of initial concern in the distribution process. Irrespective of the process, steps should be initially taken by the fiduciary following a parent's death to ensure that the process is not compromised at the outset. A child may "jump the gun" and employ "self-help" by surreptitiously taking items from the parent's residence. This is not that infrequent an occurrence, particularly when a child has a key to the residence and, with respect to larger items, a ready means of transporting its contents, such as a pickup. This possibility has been termed by the author's partner as the "pickup doctrine."

A propitious avoidance strategy is for the financial fiduciary to timely secure the parental residence following the parent's death by changing the locks. This action also protects against the residence being entered by third parties who also may possess a key. Nonetheless, this protective action, if undertaken by a child serving as fiduciary is likely to meet with immediate umbrage by siblings. Other children tend to distrust a sibling's motives, can be in high dudgeon in being "locked out" of their parent's residence by their sibling, and may even have suspicions of their own that such action was taken by the sibling for the purpose of purloining residential items for the sibling's personal benefit.

Another problem area is provisions in the instrument either failing to clearly define tangible personal items to be distributed to family members or which are too inclusive. Overly broad definitions exacerbate family harmony problems by unnecessarily increasing the types of items, particularly those of high value for which children typically have little sentimental attachment. Thus, consideration should be given to limiting the definition to specified categories of sentimental personal property items (e.g., jewelry, scrapbooks, pictures, clothing, heirlooms, etc.) or items of interest for perhaps personal usage (e.g., furniture, recreational and yard equipment). This normally excludes such "big ticket" items as cars, airplanes, and boats, as well as valuable paintings, artworks and collections (such as coins, stamps, and figurines). Such items not only typically have little sentimental value, they are often more in the nature of investment property. When having substantial monetary value, they tend to greatly destabilize family dynamics in their distribution.

A more limited definition also favors estate planning objectives. Tangible personal property items having little sentimental or personal use value to children, particularly when they are of significant monetary value, are usually best distributed under the residuary clause of the testamentary instrument among family members in the same proportions as the parent's other remaining assets.

DISPOSITION OF TANGIBLE PERSONAL PROPERTY BY LIST

As estate planning attorneys are well aware, Kansas law assists in the disposition of tangible personal property items by providing, without need of following the formalities of wills, for an individual to dispose of tangible personal property not used in a trade or business by simply leaving a written list (hereinafter referred to as a "Personal Effects List" or simply "List"), provided there is a specific reference in the testamentary instrument to the possibility of leaving such List. K.S.A. §§ 59-623; 58a-418. The law requires that the List either be in the handwriting of-or signed by-the testator. Id. Further, the List must describe the items with "reasonable certainty" so that they are identifiable. *Id.* Such disposition would have been able to be effectuated even in the absence of such specific statutory authority in revocable trusts simply by drafting the List in the form of a trust amendment. Quite obvious to estate planning attorneys, identifying the beneficiaries of furniture and household effects items by referencing numbers or names attached to the back of the item, rather than by a description on the List, although a time-worn technique employed by many parents, is inherently flawed due to their "mobile" nature, a facet well appreciated by children disapproving of a specific disposition.

If parents duly provide for the disposition of all significant tangible personal property items of interest to children either in their testamentary instruments, or usually much more efficiently and desirably, under the provisions of a Personal Effects List, the potential resentment by children of parental choices in their disposition aside, family harmony would not be adversely impacted. However, given the normally significant number of such items, their changing makeup, the vicissitudes of parental desires regarding their disposition, procrastination, and simply the reluctance of many parents in undertaking this task, this is understandably far from a normal occurrence.

Nonetheless, rather than leave the post-death disposition of tangible personal property to methods discussed below, none of which are completely without family harmony risks, parents should be strongly encouraged by their estate planning attorneys to prepare the List. The List should, at a minimum, include items the parent perceives to be of the most significant sentimental or personal use value to children. At a minimum, its preparation should also reduce the possibility of contentious, and frequently baseless, assertions by a child that a parent "told me that [a particular item] would be mine." If true, such item obviously likely would have been included in the List. It would also bring into question the location and possession of any item that was on the List but absent from the residence.

The preparation of a Personal Effects List is especially important in second marriages where, unless the personal residence and its furnishings are to pass to the decedent's children, the default provision in the testamentary instrument should normally provide for the disposition of household furniture and furnishings to the surviving spouse, with the remaining items going to children, typically in as equal shares as practically possible. This avoids children and a stepparent engaging in divisive arguments over the ownership of the parent and stepparent as to the typically numerous tangible personal property items in and about the personal residence that are in such categories. In that situation, the parent should ensure the List directs the disposition of any items that the parent desires to pass to a surviving spouse or to their children in the event such items would have passed otherwise under the foregoing provisions of the testamentary instrument if not on the List.

Unfortunately, Personal Effects Lists sometimes have a habit of coincidentally "disappearing" when kept in an insecure place, such as in an unlocked cabinet or drawer in the parent's residence, or even in a secure place, such as the parent's safe deposit box, when a disapproving child is named as successor financial fiduciary or otherwise has access to the box. Thus, to best protect against an unintended disclosure of the List during the parent's lifetime, as well as its protection following the parent's death, the List should be placed with the parent's original documents in a sealed envelope in a safe deposit box. Irrespective of whether a child is a signatory on the box, a copy of the most updated List should be sent to the parent's estate planning attorney and so noted on the List, to protect against its "disappearance."

The List should be revisited periodically, removing any items which may have been lost, sold, or destroyed in the previous year, and adding more recently acquired items which parents believe might be of sentimental or personal use value to their children. The parent also may find it desirable to make a video of such items for identification purposes. It would also be informative to include in the audio component of such video the provenance and relationship of any such items to family heritage.

PARENTAL DISCUSSIONS WITH CHILDREN IN PREPARATION OF LIST

Prior to preparing a Personal Effects List, it is advisable for parents to discuss with children their preferences in the devolution of tangible personal property items. Rather than leave clients to their own devices in that respect, it is preferable for estate planning attorneys to outline methods for parents to garner sufficient information for them to make informed and equitable distribution decisions (from the parent's perspective) that are least hazardous to family harmony. The discussion that follows analyzes the effectiveness of various strategies in achieving that objective.

Parents should preface such discussions by advising children that the distribution method chosen following their deaths will be designed to maximize family harmony, the parent's most important estate planning goal, while avoiding any significant monetary disparities among children in their disposition. Children should be advised such method is thus designed to encourage preferences based solely on an item's sentimental or personal use value rather than its actual value. To that end, children would be further advised that any substantial inequality in the value of personal items of significant value they select and which are left to them on the List, or which are otherwise distributed to them following their death, are subject to a possible value adjustment to the extent their value is over a relatively modest amount, affecting their share of the remaining assets in their estate.

Each child would then be instructed to prepare a list of items they would like to receive following the parent's death, listing them in order of their preference. Children would be informed that in preparing the List, the parent would consider both the priority placed on items by mutually interested children and the overall number and priority of requested items of each child. Further, children would be informed that also for family harmony reasons, their submitted preference lists would not be shared by them with their siblings, nor would the List be disclosed to any child prior to their death. This also would avoid any possibility, however perceived to be remote, of any child attempting to persuade them to make changes to the List, seek current distribution of any items, or object to their disposition to a sibling.

The List would then indicate whether any items distributed under the List are, or are not, to be subject to any such value adjustment. In order to preserve confidentiality, the List should not be stored in a place accessible to a child. Rather, as noted above, it should be kept in a secure location.

DISTRIBUTION OF REMAINING TANGIBLE PERSONAL PROPERTY NOT DISPOSED BY LIST

Unfortunately, as noted above, only a minority of parents even prepare a Personal Effects List disposing of their tangible personal property. Those that do usually leave a List that is far from comprehensive. As such, it is a requisite that the testamentary instrument appropriately address this situation by providing a mechanism for the disposition of remaining items that is facilitative to the maintenance of family harmony. Placing too much discretion in such disposition method in the financial fiduciary incurs the risk of the financial fiduciary choosing a method not conducive to its maintenance, which is particularly hazardous when a child is serving in such capacity. Thus, if not otherwise articulated with some particularity in the testamentary instrument, it would be advisable for parents to leave a precatory document, perhaps as an attachment to the testamentary instrument, suggesting the appropriate method consistent with the nature of their assets, and which are not disposed of by List, with their estate planning documents.

The distribution procedures discussed below applicable to items not on a Personal Effects List are designed in varying degrees to satisfy the predominant family harmony prerequisite, i.e., not providing an incentive for children to choose tangible personal property items based on their economic value as opposed to their sentimental or personal use value. For should a child in such process end up being in receipt of personal property items having a value significantly greater than such child's share, the parent's overall intended proportions of their estate passing to children will be skewed. Even more importantly, it can result in significant family disharmony not only as a result of any significant resultant economic disparity, but by placing children in competition for the more valuable items in the process, thereby fostering resentment when a sibling chooses items perceived by other siblings to be based strictly on their economic value.

In all such processes, it could be provided that a minor child could be represented in such distribution process by the trustee of any sub-trust created under the instrument for such minor child, or if none, the guardian appointed under the instrument for such child, irrespective of whether such appointment had then judicially occurred.

INITIAL PROCEDURE REGARDING SUBSTANTIVE ITEMS

As an initial procedure, following the death of the parent it would be advisable for the financial fiduciary to seek a list from each child with respect to any remaining property of the parent not on the List that the fiduciary has determined has a potential value in excess of a modest threshold amount (e.g. $200 or more). Such threshold amount avoids the process as to all items being fully tied to economics and allows for some offset should an asset be overvalued. The fiduciary would inform the children preparing the list that such property, if professionally valued for more than such amount, will result in such excess being offset against such child's proportionate share of the parent's residuary estate should such child receives such asset. Consequently, pursuant to the wishes of the parent, they should select such item primarily on its sentimental or personal use value, not its economic value.

The fiduciary would then seek a "walk through appraisal" by an experienced estate salesperson as to the value of all such selected items by children which are over the threshold amount, hereinafter referenced as Substantive Items or Items. A professional appraiser may need to be sought for selected unique category Substantive Items such as jewelry, collections, antiques and heirlooms that were not disposed of by the List. Such valuations would then be made known to all children listing a Substantive Item, with any child who is then informed of an Item's valuation, being able to withdraw any such child's preference as to an Item prior to its actual distribution.

If only one child was desirous of an Item, the fiduciary would distribute the Item to that child. If more than one child desired an Item, the Items in which the children desiring such Items would be chosen by a random sequential lottery method, with the sequence being reversed in each subsequent round having the same participants. Such process would continue until all such Items in which a child had exhibited a preferential interest were distributed.

The overall differential among children in the value of Items each child received in the process over the threshold amount of each such Item would then be an advancement as to each respective child's share of the residuary estate. All remaining personal property items would be distributed between or among children under one of the procedures below without having any advancement aspect, excepting a Substantive Item in which no child received under the foregoing preference procedure.

DISTRIBUTION BY AGREEMENT OF CHILDREN

At first blush, it would appear reasonable and consistent with most parental desires for the testamentary instrument to give children a reasonable amount of time, say ninety days following a parent's death, to agree among themselves on the disposition of remaining tangible personal property items for which any child has an interest. Such approach is quite common and the period for its expiration need not extend beyond the expiration of the time period delineated in the testamentary instrument for the List to be located or be of no force or effect, say 90 days. In the event the distribution of items in which children have an interest cannot be agreed upon, such items would then be distributed among children under one of the remaining methods below. However, this procedure normally should not be authorized if there is a minor child not represented by another party as noted above so as to be unable to have sufficient maturity to meaningfully participate in this procedure.

However, clients should be counseled at the outset by the fiduciary that such authorization for agreement by children is fraught with a high risk of contentious arguments in seeking an agreeable resolution, with each child often having a subjective reason for receipt of individual items (e.g., "I gave it to Mom and I should get it back," "Mom promised it to me," or "Mom already gave it to me"). Moreover, a family harmony enhancing request which normally should be made by the financial fiduciary that in-laws not be present at such discussions, may have the opposite effect if made by a child serving as financial fiduciary.

If the initial Substantive Item procedure was utilized, such agreement procedure would appear to have limited efficacy. For in that situation, there would be no remaining Substantive Items in which a child expressed an interest and none of the remaining items would be of significant economic interest.

DISTRIBUTION BY AUCTION

One distribution method for the remaining tangible personal property items would be by auction, either by public or private bidding, or the use of "virtual money" in a private auction. In a public auction, the attendees would be children and the general public. Children ostensibly would be equally treated from an economic standpoint, as the proceeds would be allocated to the residue of the estate and distributed along with other remaining assets proportionally among children as provided in the testamentary instrument.

However, this may not be the substantive result. Children, when competing against each other and the public in the bidding process, may have paid in excess of the fair market value of items, thereby proportionately diminishing the share they otherwise would have received in the estate. Nor is a public auction procedure without significant family harmony pitfalls, principally because it pits children against each other in the bidding process. Children having to bid beyond the market value of an item to secure an item may resent other children who drove up the bidding price. Children who were outbid by other children may resent other children to whom items were lost in the bidding process. It can also have the possible deleterious consequence of a high-bidding stranger walking away with family heirlooms, notwithstanding the benefit of the proceeds passing to children. Thus, the economic equality of a public auction must be balanced against the not insignificant risk of family disharmony and potential distribution of family significant assets to strangers in the process.

If a closed bid silent auction is held, which may or may not have non-family invitees as well, the bids would remain sealed until all bids were in. If a child is serving as financial fiduciary, unless the bids are all opened in the presence of the other children at the close of the auction, there can be suspicions they may have been opened by the financial fiduciary prior to the financial fiduciary also making a bid. A sealed bid silent auction has the benefit over an open auction in avoiding confrontation in the bidding process, but it does not avoid the anxiety of children having to determine the purchase price necessary to outbid siblings who may have an interest in the same item, as well as possible third parties who may be additional invitees. Further, there still may be a high degree of resentment by children who have been outbid, particularly with respect to items of high sentimental interest to them, including possibly by a third-party invitee.

In a "virtual money" auction process, each child is given an equal amount of "virtual money" with which to bid on personal property items. The use of "virtual money" in the auction process is even more problematic and normally should be avoided in comparison to the foregoing auction approaches for several reasons. Although each child in this process is given an equal amount of "virtual money" to use in the bidding, it creates additional tensions in children having to strategize and compete among themselves in using their limited amount of allocated "money" to ensure they have enough left to secure remaining wanted items, thus leading to a questioning of the entire process. Moreover, although designed to put each child on an "equal monetary playing field" as opposed to an actual bidding process, there is no certain nexus between the amount of "virtual money" used in bidding and the market value of items received. Consequently, economic parity is not automatically obtained regarding the value of the items received due there being no auction proceeds to allocate to the residue. It would only have been obtained if the fiduciary had the right to adjust economic differences among children in the items received having significant value as an advancement against their shares of the residue.

In short, even if economic parity is achieved among children regarding the proceeds of a public or private auction, the tendency of the auction process to cause anxiety among children, the potential inequity in substantive economic benefits conferred among children by the bidding process, the possible resentment of children who were outbid by siblings or a member of the general public, and the confrontational nature of the proceedings if an open bidding process is chosen, are aspects of the auction procedure that are unavoidably antithetical to the maintenance of family harmony. For the foregoing reasons, the use of the "virtual money" auction procedure appears to have even less to commend it.

Finally, if the Substantive Item initial procedure has been employed, either in conjunction with a Personal Effects List or otherwise, there would be little efficacy in the implementation of this strategy, for all items of significant financial value in which a child has an interest would have already been distributed. In that event, the lottery method below would likely be considered the more appropriate.

DISTRIBUTION BY LOTTERY

Another distribution method is by lottery. A common lottery method is the use of a random number selection process determining the sequence of each child choosing a desired tangible personal property item during every round of the selection process. Under the basic application of this method, there is typically no monetary adjustment among the children for any disparity in the values of items distributed. This method is frequently preferred by estate planning attorneys and their clients due to its simplicity. However, unless the sequence is reversed in each subsequent round, such method would continue to favor the parties having the earlier preferences in each subsequent round.

Although a lottery procedure is equitable in its sequential random selection, absent the implementation of the initial preference procedure regarding Substantive Items by the fiduciary prior to the inception of the auction procedure, it nonetheless retains the aforementioned aspects inapposite with family harmony in both not dissuading children from selecting property based on its economic value and the possible resultant significant disparity of the value of the tangible personal property items each child receives in the process.

DISTRIBUTION BY FINANCIAL FIDUCIARY PURSUANT TO TESTAMENTARY INSTRUMENT GUIDELINES

The final distribution method is for the testamentary instrument to provide for the financial fiduciary to distribute remaining tangible personal property items not disposed by List as fairly as practically possible, and/or as equally as possible, among children regarding their value as the fiduciary determines to be fit and proper. This is a quite common default provision, following a failure to of children to agree to their distribution among themselves under the aforementioned agreement procedure delineated in the instrument. Its popularity is probably attributable to its simplicity, typically being in the estate planning attorney's standard provisions with little to no discussion with clients as to their potential adverse import on family harmony or alternative strategies. However, from several perspectives it can be the most hazardous to family harmony, as well as the most arbitrary, when a child serves as family fiduciary.

First, a child having a financial conflict of interest would have to agree to the distribution of all items in the initial "agreement phase," compounding the family harmony detriments of its inclusion in the first instance. Second, such child is also given broad discretion as to the distribution of the remaining items between or among such child and a sibling or siblings, further compounding such negative aspects and conflicts of interest in the process.

Conversely, in the hands of an experienced and competent third-party financial fiduciary, it is probably the most protective of family harmony, for it removes a child totally from having import in the final determination of the disposition of any such items with respect to which more than one child is desirous of receiving. Moreover, if such method follows the initial Substantive Items procedure, there will be a significant amelioration of its negative aspects. Further, if the initial Substantive Item procedure had been followed, there would be no need for the "agreement phase" and the lottery procedure for the rest of the items would tend to be the more appropriate. However, independent financial fiduciaries would not be expected to welcome being burdened with this degree of discretion and attendant responsibility and the discretion accorded the fiduciary is rife with potential disagreements among children as to the final distribution. For irrespective of the party serving as fiduciary, in the absence of a prior Substantive Item preference procedure, it is very difficult to divine a method of distribution in most such circumstances that would result in property having relatively equal value being distributed between or among children and at the same time balance children's preferences in that regard.

DISPOSITION OF UNDISTRIBUTED OR UNWANTED ITEMS

Following application of the foregoing procedures, it is desirable for the testamentary instrument to include a provision for the disposition of all remaining items. This includes the discretion to sell such items (e.g., at an estate sale) and distribute the proceeds under the residuary clause of the instrument, as well as the discretion to donate items having a de minimis value to charitable institutions or dispose of them in any other manner the financial fiduciary should deem appropriate.

PHYSICAL DISTRIBUTION OF TANGIBLE PERSONAL PROPERTY

The testamentary instrument should also address the financial fiduciary's responsibility in the delivery or storage of tangible personal property items. This issue can come into play when children who are not in the same geographic area as the decedent parent, either temporarily or permanently, request that items be shipped and the subject property is of a size, weight or value that such costs (including insurance) is significant, particularly in relation to the value of the property (e.g., a couch or refrigerator). Temporary absences can arise when the child is currently incapable of picking up the property (e.g., in the military service overseas, temporarily disabled or in ill health, or possibly even under detention) and such child requests that the child's portion of the tangible personal property items be stored until such child is able to pick them up. The obvious issue is whether the estate is to bear the burden of either such costs.

This issue should not be left open or entirely at the discretion of the fiduciary, for as is the case with many matters involving the administration of a parent's estate, it can result in a level of family disagreements far beyond that merited by the relatively small amount of value involved. If the financial fiduciary pays such costs without authority in the testamentary instruments to charge the residuary estate share of the child directly benefiting with an advancement equal to such costs, such costs would be borne by all children, often to their consternation. Thus, the governing instrument normally should make it clear that the financial fiduciary is not required to pay the costs for the packing, shipping, or storage of such tangible personal property items passing to children. The child receiving the item would be required to either pay such costs or pick up the item within a reasonable period, say forty-five days of being notified, or the fiduciary would be authorized to sell the item, including to another child, and distribute the net proceeds to the child.

Regarding the disposition of tangible personal property items to a minor child, the testamentary instrument should provide for such items, in the discretion of the fiduciary, either to be held in any residuary trust created for such child under the instrument, by the child's conservator, or by a custodian named by the financial fiduciary under the Kansas Uniform Transfers to Minors Act, which permits such property to be held until such child attains age twenty-one. K,S.A. §§38-1706; 38-1721.

ELECTRONIC DUPLICATION OF FAMILY PICTURES, RECORDINGS, LETTERS, RECORDS AND OTHER DOCUMENTS

The increasing ease and efficiency of electronic reproduction has reduced the importance of actual possession by children of significant parental tangible and intangible personal property items consisting of family pictures, family video and audio recordings, letters, personal records and other similar type of instruments or property. Consequently, the testamentary instrument should specifically authorize the financial fiduciary to electronically duplicate any such items subject to copying and other duplication for dissemination among all children who desire them, with any attendant costs being borne by the estate. This avoids any disagreement in the bearing of such costs and mollifies potential resentment among children who did not receive the original item in the distribution process.

CONCLUSION

The death of a parent is an emotionally tumultuous event for children. The administrative task of distributing tangible personal property items among children in such environment is particularly problematic and delicate, involving items of great familial interest and emotional significance to children, as well as competition for their possession and ownership. Most estate planning attorneys are aware of numerous instances in their practice in which family relationships have suffered irreparable damage in this process. Correspondingly, their clients have often had such instances in their own families. If this quite precarious administrative task is not properly and comprehensively addressed by legal counsel in the estate planning process and testamentary instruments, an enduring legacy of family disharmony can be left in its wake.

Planning Bequests to Children of Farms and Closely Held Businesses

This land is your land, this land is my land...
-Woody Guthrie

As the initial estate planning consideration involving a farm or other closely held business, a parent must determine whether the closely held business should be maintained following the parent's death or whether market conditions and family considerations discussed below militate in favor of selling the business before or after the parent's death. If it is determined that the business is to be continued by family members following the parent's death and a business succession plan put in place, a parent must carefully consider which family members will receive business interests, how the business is to be maintained, when and how family members should receive the business interest, and how the estate is to be divided among family members, particularly if there are family members who are not active in the business.

In the decision-making process, it is of first importance that parents fully understand that closely held business interests are difficult to maintain from generation to generation. The stress on family harmony in the transition of the ownership of a family farm or business can adversely impact business operations due to the conflicting values and needs of a family versus a business. The focus on family values tends to be inward, whereas the focus of a business mandates a focus on external factors in the marketplace. Compensation in a successful business tends to be based upon performance and skill level, whereas the family tends to desire equality of remuneration irrespective of these factors. Such predilections need to be carefully addressed if the success of the business succession plan is to be enhanced and family harmony preserved in the process.

Part of the tension placed on family harmony when transferring a business to descendants is also due to emotional and psychological considerations. The older generation's natural reluctance to "turn over the reins" of the business needs to be addressed. For business succession to be successful, the succeeding generation best gain practical experience in business operations prior to the death of the older generation. Additionally, sibling rivalries should be observed in the operational phases of the business by the parent so that they can be properly considered and addressed in the parent's estate planning and business succession plan.

Improper or inattentive estate planning in the area of business succession can not only increase the risk of failure of a business succession plan, it can destroy family harmony and greatly increase operational costs. The prominent issues which frequently arise in this context are the orderly transition of the management of the farm or closely held business to a child or children and the division of the estate between or among a child or children who are active in the business with those who are not. From the outset, a parent must appreciate that there is a substantial risk of disagreements that will arise between active and non-active children (hereinafter also referenced as "active" and "passive" family members, respectively) regarding business decisions if both classes succeed to the ownership of a closely held business enterprise.

This aspect results in an extremely high incidence of family disharmony, often leading to resentment, arguments, and not all that infrequently, costly litigation.

Although active children can be given voting control of the enterprise for continuity of business management purposes, from a family harmony standpoint this serves to aggravate such tensions. The selection of a few family members to manage a business places risks on family harmony greater than that of naming children as financial fiduciaries of a parent's estate. For the former situation, however perilous it may be to family harmony, is transitory in nature and does not place sibling fiduciaries in an on-going superior economic position.

Passive owners may "second guess" aspects of such management decisions, including management decisions, the salaries of active owners and the amount of cash in the enterprise which should be distributed to them versus the amount to be retained for future business needs. In addition to disagreements among themselves in management decisions, active family members may overvalue their contributions to the business enterprise, their merited compensation, and view passive family members as being unappreciative of their efforts in the business. In short, neither faction is likely to be totally objective, and are often far from objective, about their respective positions and how they are viewed by the other faction.

With such axioms in mind, one of the most perplexing issues attendant to a parent's transfer of an ownership interest in a closely held business to family members lies in the distribution of estate assets between active and passive family members. Frequently, active children are given a greater share of the total proportionate value of the estate, usually in the form of business interests, in consideration of their efforts. This disparity may be due to a parental view that such children have received below market compensation for their efforts during the parent's lifetime or that their expertise or creativity has enhanced the value of the business enterprise. It also may be simply due to a child choosing to stay on the farm or in the family business enterprise. In such situation, if in conversations with clients it appears such child was paid the same approximate amount as would be paid to a third party possessed of the same experience, did not add significant economic value to the family enterprise than would otherwise have been expected from another individual performing the same duties, and did not give up better economic opportunities to assist a parent in the enterprise, it would be advisable for their estate planning counsel to inquire of the client the basis for such additional allocation to ensure such decision was well thought out in the face of an apparent lack of economic undergirding.

Whatever the rationale for such additional allocation, it is at high risk of triggering resentment and disharmony between the active children receiving such additional allocation and passive children receiving a lesser share of the estate. Passive children tend to be less than objective in their assessments of the merits of any such additional share allocation and, as noted above, active children tend to overvalue their contributions to the business enterprise and feel they should be so compensated simply for assisting a parent in its management irrespective of any accompanying economic benefits. One way to help mollify such situation is to place the parental reasons for such additional allocation in the testamentary instrument, preferably in a revocable trust, rather than a will, due to the former not being a matter of public record. An even better way is to avoid it altogether by adequately compensating active children for their efforts during the parents' lifetime to avoid such disparity in the allocation of the parent's estate.

Even if such allocation of business interests between active and passive children is proportional based on their respective percentage ownership interests in the business, the fact that active children have a controlling voting interest will substantially increase the personal value of their proportional interests over the proportional interests of passive children. It can also increase their fair market value as well, dependent upon whether the active children alone have voting interests, their percentage voting interest, and most particularly if an active child has a controlling voting interest in the enterprise. This realization also can result in significant additional family disharmony and dissension, for parents are unlikely to increase the proportional interests in the business interests going to passive family members in consideration of such increased value.

Because active and passive children owning a closely held business are at a very high risk of incurring family disharmony, a strategy to avoid such problems, yet provide for equal shares of the estate passing among children, is to include provisions designed to balance out the equal shares of the non-business assets passing to passive children with the equal shares of the business interests passing to active family members. Nonetheless, a serious problem is presented if there are insufficient non-business assets to equalize shares of the estate going to passive children. Here, one such approach is for the parent to require active family members receiving a business interest to purchase any business interest in excess of their shares that otherwise would have been allocated to passive children, perhaps under a prescribed installment purchase method with a reasonably small interest rate so as to ease any economic burden that would otherwise by be imposed on active children. Another more family harmony friendly strategy not putting active and passive children into such debtor/creditor relationship is for the parent to purchase a life insurance policy on the parent, if economically feasible and not prohibited by the parent's current state of health, to provide both estate liquidity and sufficient assets to balance the shares of the estate such that the business assets may all pass to the active children.

In situations where it is determined that there is no foregoing viable alternative but for a parent to give business interests to both active and passive family members in satisfaction of their proportionate shares, parents must first select a method of providing for the management of such business assets by active family members. If the business is not already an entity, the parents would typically form a limited liability company with perhaps both voting and non-voting interests to hold the business assets. If it is already in an entity such as a limited liability company or corporation that does not have voting and non-voting interests, the entity could be recapitalized to create such interests. Passive family members may be given "put" rights such that a dissatisfied passive family member could compel the business entity (or perhaps at the option of the entity, active family members on a pro rata basis) to purchase their ownership interests in the entity, often also on an installment basis, perhaps secured by the entity or the active owners' interests in the business. Perhaps also, the purchase price may take into account a prescribed lack of marketability and lack of control discount which reduces the purchase price of the passive owners' interest in the enterprise from its otherwise pro rata fair market value. Such discount is normally appropriate, both given that the exercise of such put right places an economic burden on the active family members, such interests have a lack of marketability and fractional ownership interests in an enterprise having a fair market value significantly less than their pro rata interest in the underlying business would otherwise dictate.

However, unless the implementation of the foregoing strategies leaves passive family members with no interest in the business, it is likely only to reduce the frequency and severity of disagreements between active and passive family members. It is highly unlikely to totally extinguish them. Thus, it may also be desirable to include provisions in the governing testamentary instrument mandating mediation and binding arbitration of all disputes involving family member owners of the business enterprise. Such non-judicial proceedings are private and not a matter of public record, are typically faster in resolving such disputes, tend to be far less family harmony destructive and less adversarial than in judicial proceedings, and can be less costly as well.

Provisions implementing "put option" strategies and mandating mediation and binding arbitration of business disputes between or among family member owners are best placed in the provisions of the governing instruments of the partnership, limited liability company or corporation owning the farm or other business enterprise.

It should go without saying that without proper comprehensive business succession planning in this most sensitive family situation, irreparable and costly family schisms are a frequent result.

Addressing Gifts and Loans to Children

We make a living by what we get. We make a life by what we give.
-Winston Churchill

Another estate planning aspect causing frequent disagreements among family members and the fiduciary of a parent's estate is the determination of whether a lifetime transfer by a parent to a child was intended to be an outright gift for the purpose of benefiting the life of a child or simply a loan. In the absence of provisions in the testamentary instrument specifically addressing this issue and the presence of ancillary instruments such as promissory notes documenting parental intent, family members and estate fiduciaries will often disagree on the amount of the transfer, whether the transfer was a loan or gift, the terms of any loan transfer (e.g., payment and interest terms), and whether the parent intended the gift or loan to have an effect on the child's share of the parent's estate, notwithstanding the absence of any authority for inter vivos gifts having any legal effect on dispositions under the testamentary instrument and loans being a part of the estate when legally unenforceable. One child's characterization of a parental transfer as a gift is often another child's characterization of the same transaction as a loan. Consequently, in the absence of provisions in the testamentary instrument addressing the issue or there is written evidence of the nature of the transaction, there can be fractious family disagreements, substantial legal expenses, and a skewing of the intended estate plan in the event the eventual legal resolution of the transaction should fail to comport with the decedent's actual intent regarding the transaction.

With respect to parental transfers that are clearly gifts or resolved as same, discord can sometimes arise when prior gifts are unaddressed in the testamentary instrument. Children can take umbrage when the shares of a parent's estate passing to their siblings under the testamentary instrument fail to consider substantial unequal prior gifts passing to them which either have occurred or which children believe may have occurred. Although prior gifts to estate beneficiaries do not normally legally affect the disposition of the donor's estate unless clearly stated in the testamentary instrument they were intended as advancements, other children may argue that such legal outcome is unfair, could not have comported with the parent's intent and its omission was an oversight by the parent or an error by the attorney drafting the instrument.

Thus, it is beneficial from a family harmony perspective for the parent to state in the testamentary instrument whether any gifts the parent may have made to a child are to be considered in determining such child's share of the estate. If such is the case, which normally comports with the parental intent, such provision would be generic in nature, not referencing any specific gifts, only stating that any gifts the parent may have made to a beneficiary of the estate are not to be considered in the division of the estate.

Conversely, if prior gifts to a child are to be taken into consideration in determining the child's share of the parent's estate, the parent should state in the testamentary instrument that a specific gift or an amount representing a total of such gifts to a child should be treated as an advancement against a child's share of the estate (possibly with an interest component to take into account inflation and time value of money). Going forward, the parent could also provide in the testamentary instrument that any future transfers to a child by check which are noted thereon as gifts similarly are to be considered as advancements.

By so addressing any parental gifts in the testamentary instrument, parents can avoid family acrimony and potential litigation, notwithstanding the weakness of the position, on the issue of whether parental gifts were intended as advancements against a child's share of the estate. Absent a standard practice of addressing this issue in the estate planning process, it is typically overlooked by estate planning attorneys.

With respect to loans, verbal loans to children tend to result in much greater family disharmony than the issue of whether parental gifts should be treated as advancements. The promissee, i.e., the child receiving the loan, as above noted, will often contend that the transaction was a gift, not a loan. Such child's siblings will often contend to the contrary. In short, one child's gift can be another child's loan. There are also issues frequently surrounding the amount of the loan and whether any interest on the loan was intended or nonetheless legally chargeable. Verbal loans are also more likely than written obligations to have become legally unenforceable due to having a shorter statute of limitations, i.e., three versus five years. K.S.A. §§58a-511(1); 58a-512(1).

Consequently, as a general rule the testamentary instrument normally should generically forgive any verbal loans, specifically providing that any such loans are not to be taken into account under the dispositive provisions of the testamentary instrument. If there are any outstanding verbal loans at the time of execution of the testamentary instrument which the client desires to be considered in determining a child's share of the estate as to any outstanding balance, such loans should be reduced to promissory notes, which can be simple demand notes, having the parent or the trustee of the parent's revocable trust as promissee. Normally, when requested by a parent, children will execute a promissory note as evidence of a prior verbal loan due to parental disfavor or potential adverse consequences in the parent's testamentary disposition to them should they decline. In the unusual circumstance where a child should refuse to do so or a parent does not wish to confront a child to whom money has been lent, assuming the parent does not want to include testamentary provisions reducing such child's share as a result of such child refusing to execute a promissory note, the amount owing could be specifically forgiven in the testamentary instrument at death and a specific amount in its stead treated as an advancement against such child's share of the estate.

With respect to written loans to a child, assuming same comports with parental intent, the provisions of the instrument should provide that any loans evidenced by a written instrument are to be fully taken into account in determining the promissor's share of the trust estate at their full unpaid balance and allocated to such beneficiary in satisfaction thereof up to the full amount of such share. Further, the provisions of the instrument should additionally provide that such consequences will ensue irrespective of whether the note is legally enforceable at the time of its disposition (e.g., the statute of limitations has run on the note) and place the burden is on the promissor child in establishing any prior payments. The client would then be best advised not to make any future loans to children that the client wants taken into account in determining the child's share of the estate unless similarly evidenced by a promissory note.

Such statements of parental intent regarding verbal and written loans in the testamentary instrument and the use of promissory notes when loans are to be considered in determining a child's share of the estate can reduce strains on family harmony, lessen administrative costs and legal fees, and avoid a distortion in the intended estate plan should the legal treatment of loans to family members be inconsistent with actual parental intent. As with the treatment of prior gifts, this issue likely does not commonly arise in estate planning conferences and even less frequently receives proactive treatment in the testamentary instrument.

Gift-giving itself can also serve as a basis of family disharmony during a parent's lifetime. Parents may wish to make gifts to their descendants yearly to reduce the size of their taxable estate, to satisfy an economic need of a child or other descendant, or merely for their sheer personal satisfaction in seeing a descendant's enjoyment of the gift. Regardless of motive, when parents give money to both children and grandchildren, it is difficult to devise a method perceived to be fair and equitable by descendants. For example, gifts or distributions made outright to all descendants (children and grandchildren) on an equal per capita basis designed to maximize the benefit of the annual gift tax exclusion for federal estate tax purposes frequently results in a family unit consisting of a child and such child's descendants receiving a greater amount than other family units having a lesser number of descendants. If the parent wishes to have a cumulative equal distribution among family units considering both lifetime gifts and post-death transfers under their testamentary instrument, adjustments can be made to achieve this goal under its provisions. In the event of any such adjustments, the provisions of such instrument should also state the rationale therefore for family harmony purposes. However, either method of eventual distribution of the estate (equal amounts of the estate to each child or equally to each child with cumulative gifts to family units being treated as an advancement against each child's share of the estate) may leave a child feeling that such child or such child's family cumulatively was being unfairly penalized by a parent merely due to having more or less descendants than a sibling.

There are other potential family harmony drawbacks to making outright gifts to children. Depending on the size of the gift, a parent may experience more than minor disappointment should there be unwise or excessive expenditures of the gifted property or its management by the donee. A parent also may become dismayed by the lack of appreciation of the gift by a donee or a child's expectancy that such gifts are of a routine nature.

Gifting substantial amounts for other than medical or educational purposes also can have a negative impact on the personal ambition and financial independence may be adversely affected by such outright gifts. As a rule, descendants that receive significant gifts in their formative and early adult years tend to be less financially responsible, underachieve, and possess less self-esteem than those that financially achieve on their own initiative. A parent can become quite disenchanted with a child's lack of ambition fostered by such gifts. Two books which trenchantly discuss this dynamic are The Millionaire Next Door, authored by Thomas J. Stanley, Ph.D. and William B. Danko, Ph.D. and Estate Planning for the Healthy Wealthy Family, authored by Stanley D. Neeleman, J.D., Carla B. Garrity, Ph.D., and Mitchell A. Baris, Ph.D.

Also, should the parent ever cease or significantly reduce periodic gifts to a child or grandchild, particularly if the donee has come to financially rely on such gifts, the donee may become resentful or pressure for their continuance. This risk is increased by a periodic routine pattern of gifting which can create an enhanced air of expectancy (e.g., gifts made in a specific amount every Christmas). The child may begin to feel entitled to the gift, perhaps even having incurred expenditures in anticipation of its receipt. Finally, a pattern of gifting may also lead a donee to consider the inheritance of the donor's assets as an entitlement, often leading to unwise expenditures in reliance thereof. Such an expectancy can heighten intra-family tensions and disharmony during the donor's lifetime, as well as following the donor's death.

Rather than make a substantial outright gift (or series of gifts) to a child or other descendant and potentially present such adverse consequences, including family disharmony, it thus may be advisable for a parent to instead make such gift in trust for the benefit of the donee. In a properly drafted trust, although the specifics are well beyond the scope of this article, governmental benefits such as Medicaid can be maximized for beneficiaries, assets protected against creditors and beneficiary mismanagement, and a "sprinkle clause" can be included to allow trust income distributed to beneficiaries to be taxed at their income tax brackets. This option also is often not considered sufficiently in the estate planning process.

Many of the foregoing factors applying to lifetime gifts are equally applicable to outright bequests under the testamentary instrument. Large bequests liberally benefiting children or grandchildren in early adulthood can similarly stifle maturational development, personal ambition, and their achievement of financial independence. As with lifetime gifts, leaving such bequests in a properly structured trust can obviate these undesirable tendencies and consequences.

The loaning of money by a parent to a child can likewise foster family disharmony during a parent's lifetime. Adverse consequences can quickly arise if the child breaches the agreement. Not surprisingly, such loans are frequently in default. This may occur because the child lacks the ability to repay the loan or the child views its obligation under a loan from a parent far less seriously than it would with a commercial loan. Parents can quickly become dismayed and feel they are being taken advantage of when children fail to timely make loan payments having no rational basis for a default.

Addressing a Child's Potential Claim for Parental Care

It is not all that uncommon for family disharmony to also result from disagreements surrounding whether a child who assisted with the elder care of a parent in a non-fiduciary capacity (not as a trustee of a revocable trust or agent under a power of attorney) should be compensated by the parent's estate. With respect to fiduciary services, for clarification of parental intent purposes, the governing instrument should specify whether payment for such fiduciary services was intended, notwithstanding such services were otherwise entitled to be compensated under the law, particularly for services authorized thereunder when the parent was not under a disability, and the manner in which payments are to be determined outside of a trusteeship, e.g., in the same manner as a guardian or conservator with respect to services as an agent or attorney in fact under a health care or financial power of attorney, respectively.

In many circumstances, a child has spent considerable time in a non-fiduciary capacity caring for a parent (e.g., providing transportation, assisting in household care, cooking meals, paying bills, etc.), often in residence with a parent. Following the parent's death, in the absence of a specific bequest in the testamentary instrument in consideration for such care, the child may claim that the parent intended for the child to be compensated for such care, that the parent owed the child a specific amount for such care, that the parent promised to provide for a bequest under the testamentary instrument for such care, that the child is otherwise entitled to be compensated for such care from the parent's estate, and sometimes even that fairness demands that the child should be allocated a greater amount of the estate than otherwise provided thereunder in consideration therefor or their siblings should simply agree to such greater share. Such assertions sometimes even manifest themselves in a legal claim for compensation against the parent's estate. Even in the absence of a legal claim, considerable strain can be placed on family harmony resulting simply from such assertions, with the child seeking compensation often considered by siblings to be motivated strictly by greed and such child in turn considering such siblings to be quite unappreciative of the care such child provided their parent.

To avoid such family imbroglio, if a parent intends to prefer such child in appreciation of such care, the parent should preferably make transfers to the child during the parent's lifetime outside the observation of such child's siblings and note such purpose in the parent's records that such transfers were strictly gifts to benefit the child and not intended as wages or compensation (to rebut any implication that such payments were taxable in nature). If this is not financially feasible, the parent may provide for an additional bequest to the child in the testamentary instrument in consideration of such care, noting preferably under the provisions of the parent's testamentary instrument, as opposed to under a separate writing, the reason for such additional bequest.

In the vast majority of situations in which the parent would not want a child to be compensated over and above any compensation paid, or gift made, by the parent during lifetime, the parent should generically state in the provisions of the testamentary instrument that in the absence of a written agreement so providing, it was the parent's assumption that any such care or services not provided by a child in a formal fiduciary capacity were made purely out of generosity and affection, not in anticipation of any economic benefit.

Nonetheless, in order to create a chilling effect against any possible claim of such nature by a such child against the estate, the provision would further provide that should any beneficiary (i.e., intentionally not singling out children) make a claim against the probate estate of the decedent for any care or service the beneficiary may have provided to the parent, any amount actually allowed on such claim would result in a "dollar for dollar" reduction of the beneficiary's share that would otherwise have been the case in the absence of such claim. Such beneficiary would also be out legal fees expended in pursuit of the claim and such claim in that context would likely be considered compensation subject to income taxation. In short, such provisions should result in a "poison pill" in the event a child makes such a claim, for whether such child prevails or not, such child will have received a net diminished share of a parent's estate than would otherwise have been the case in the absence thereof.

As noted above, while a parent may want to avoid a caregiver child bringing a claim against the estate, the parent may still want to give a specific bequest to such child in the testamentary instrument in appreciation for that care. In that event, the parent's bequest should indicate such was the reason for such bequest and such decision was the parent's alone. Otherwise, a caregiver child is more likely to be blamed by a sibling for having influenced such parent to make the bequest and the Internal Revenue Service might conceivably take the position in any audit of the caregiver's income tax return that the parent and child had an agreement that such bequest was meant to be in lieu of compensation during the parent's life.

Minimizing Adverse Effect of Intended Disparity in Children's Shares

Children have no legal right in any state to inherit property from a parent. Lawmakers have long decided that as children normally have had no role in the accumulation of assets in a parent's estate (other than, of course, diminishing it by parental support during their formative years), they should have no inherent right in its disposition. Consequently, viewed objectively, children should be appreciative as to any amount they receive under a parent's estate plan as purely a gift. However, this expectation often proves to be unrealistic under concrete circumstances. Thus, if a parent is conferring unequal monetary or economic benefits between or among children under the parent's estate plan, the impact upon family harmony engendered by such disparate treatment should be considered.

Notwithstanding being devoid of an inheritance right to a parent's estate, children nonetheless often view it as an entitlement right, or at its most basic level, that a parent simply "owes it to me." As with the appointment of a child as fiduciary of a parent's estate, they also tend to view what they receive in relation to siblings as their parents' last full measure of their merit as a child. Thus, should parents provide for an unequal economic benefit among children under their estate plan, to ameliorate any resulting family disharmony, it is normally advisable for the parent to provide in the testamentary instrument the reason for such disparity and unequivocally state that the decision was the parent's alone.

By not leaving such rationale in doubt, such statement may help reduce, albeit probably not totally avoid, a disaffected sibling's feelings of resentment. For example, if the parent states his or her desire to give a child a larger bequest due to a greater economic need than other children, such intention should be so expressed, although unless perhaps if it was due to a disability, other children may nonetheless view this as a penalty for their personal ambition and success. If such greater benefit to a child is due to the child having been of much greater assistance or comfort to the parent, as discussed above, such intent should also be delineated.

On the other hand, there certainly are converse situations where a parent does not wish to make a bequest to an estranged or disaffected child due to such circumstances as a perceived failure in ambition, unacceptable lifestyle, or a poor or detached relationship with the parent. In that situation, a parent may be inclined to threaten to disinherit such child absent a substantial change toward more desired behavior. However, such threatening is unlikely to effect a positive change in the child's behavior. Instead, the relationship between the child and the parent, as well as with such child's siblings, is more likely to become even more hardened as a result and the disparate treatment of the child will be the last enduring memory such child will have of the child's parent. Nonetheless, even such acknowledgement by the parent is understandably not likely to dissuade a parent from disinheriting such child held in disfavor as being undeserving.

If the only reason for reducing a child's share is the parent's belief that such bequest would be imprudently managed by the child, which is often the case, parents often choose to simply reduce the child's share or totally disinherit the child. In doing so, they frequently have failed to consider the normally better alternative, both from a family harmony and property management perspective, of making a bequest of an amount in trust for the benefit of the child to ensure that the money will be distributed to the child by the trustee, in the trustee's discretion, to satisfy specific health, education, maintenance and support needs of the child after considering the child's other resources, including even the child's ability to engage in gainful employment prior to attainment of a certain age (e.g., 65). Moreover, the trust provisions can provide incentives for desirable changes in the child's behavior (e.g., very conservative for maintenance and support needs prior to reaching a certain age, providing for "matching provisions" for the child's earned income, or a bequest upon attaining a college degree). For family harmony reasons, a competent third party, such as a corporate trustee, rather than another family member, would best be named to serve as trustee of such trust, even more so if the family member to be so named holds a remainder interest in the trust upon the child's death.

If a parent, after considering the foregoing nonetheless decides to provide for a disparity in shares going to children or in the manner such shares are going to children (e.g., the parent is having one child's share being held in trust and managed by a third party trustee), the parent should consider strategies which minimize both family disharmony and an unwarranted challenge by the adversely affected child or children. First, as noted above, the rationale for doing so should either be included in the testamentary instrument or in a separate written statement signed by the parent. If a revocable trust is chosen as the primary testamentary instrument, the statement should be included therein, for revocable trusts, as opposed to wills, do not have to be filed of public record. Such clear and unambiguous statement should assist in rebutting any claim by a child that such disparity was inadvertent, a mistake, or did not reflect the true intent of the parent. Moreover, the parent should additionally state that such decision was not influenced by any other person to militate against any undue influence allegation.

Second, the parent may include an in terrorem or "no contest" provision in the testamentary instrument, providing that certain legal challenges by a child to provisions of the instrument would result in a lapsing of the child's share under the testamentary instrument. Their efficacy is beyond the scope of this article. However, such provision could only be effective if the bequest to the child is large enough such that the child is unwilling to risk such a lapse. In any event, such provisions should be narrowly drafted to accomplish the client's objectives. For example, if the goal is to create a substantial disincentive to a child challenging the child's share of the estate or the manner in which it is being distributed to such beneficiary (e.g., in trust rather than outright to be managed by a third party trustee for an extended period and possibly for the lifetime of the child), such provisions should not extend to any other matters, such as seeking a judicial resolution of ambiguities in the instrument or challenging a fiduciary's fees or any other action in the administration of the estate.

Unfortunately, such provisions are typically overbroad and used routinely as a singular "one size fits all" elixir in avoiding family disharmony. Used in that capacity, they are not well served. They are designed only to dissuade specious challenges to the estate plan in the foregoing limited types of situations and serve no general purpose in furthering family harmony in the administration of the estate. To the contrary, when they incorporate overbroad language in their application and are utilized to also apply to administrative decision-making, they serve to both exacerbate family disharmony when a child is serving as financial fiduciary and can distort the intended estate plan by stultifying legitimate challenges in the administration of the estate.

Avoiding Unintended Disparity in Children's Shares

There are also frequent situations in which a child may inadvertently receive an amount by virtue of a parent's death in excess of that intended by a parent. For example, property a parent owns in joint tenancy with a child or with respect to which a child is named the primary beneficiary passes to such surviving child as joint tenant or beneficiary outside the provisions of the parent's testamentary instrument. This typically results in the child who is the surviving joint tenant or beneficiary on an asset receiving amounts in addition to the child's share of the parent's estate.

This may simply result from parents not understanding that their testamentary instrument does not govern joint tenancy or beneficiary property (unless the beneficiary was the revocable trust or estate of the parent), a quite common misunderstanding. There are numerous other situations prone to this result. A parent may name each child as a beneficiary on separate accounts or assets of relatively equal value, without realizing that a child would be disinherited if the account was cashed in, a circumstance which may occur should the parent subsequently incur a disability and money is needed for the parent's care. Another example is a child who is named as a beneficiary on an asset which has all children named as beneficiaries predeceasing the parent, with the asset, in the absence of also having named contingent beneficiaries, devolving to the other children listed as beneficiaries, thereby disinheriting the predeceased child's descendants in the process. It may further result from a child being named as a joint tenant on a parent's account for the sole purpose of assisting the parent in the payment of bills, without the parent realizing that the account would pass outright to the child upon the parent's death and not under the provisions of the parent's testamentary instrument. Finally, it may occur simply due to the parent not properly changing beneficiary designations or joint tenancy ownership after executing their testamentary instrument to comport with their estate plan or having passed away prior to their effectuation.

When any joint tenancy or beneficiary designation property passes outside the provisions of a testamentary instrument to a child, issues of parental intent and a potential resultant distortion of the estate plan can create substantial family disharmony as well as administrative and legal costs due to challenges by disenfranchised children. The child benefiting from such succession in ownership is likely to argue that such succession was intended by the parent, e.g., to benefit them for having cared for, or attended to the needs of, the parent. The other children, most stringently if the parent's testamentary instrument provided for the children to receive equal shares of the estate, are likely to argue that such disposition was not intended and thus the joint tenancy or beneficiary asset should be considered an asset governed like all other parental assets under the provisions of the parent's testamentary instrument. Absent evidence of a constructive trust, the surviving joint tenant or beneficiary so receiving property outside the testamentary instrument clearly has the legal upper hand, as the beneficiary designation or survivorship property right of joint tenancy would obviously otherwise govern the disposition of the subject property. Whatever the legal consequence, family harmony, as well as preservation of the value of the estate, are likely casualties.

To avoid an unintended consequence and family disharmony whatever the parental intent, such intent should be expressed in the testamentary instrument. Thus, if the intent of the parent is that all property in which the parent has ownership passes upon the death of the parent as provided under the delineated shares of their testamentary instrument, which is normally the case, its provisions should provide that any property passing outside its provisions to a beneficiary of the estate, whether by joint tenancy or beneficiary designation, is to be treated as an "advancement" against the joint tenant's or beneficiary's share of the estate in the same manner it would have been treated had it been held in the estate of the parent at the time of the parent's death and passed to them as part of their share of the estate. In the less common converse situation where the parent does not intend for joint tenancy or beneficiary designation property to be considered in determining a beneficiary's share of the estate, the testamentary instrument provisions would provide, in conformity with the normal legal consequence, that any property, or perhaps only specific property, passing outside its provisions through joint tenancy or by beneficiary designation to a beneficiary is not to be given any consideration in determining a beneficiary's share of the estate.

Consideration of Mediation and Arbitration Provisions

An ounce of mediation is worth a pound of arbitration and a ton of litigation.
-Joseph Grynbaum

Conflict is inevitable, but combat is optional.
-Max Lucado

The inclusion of mediation and arbitration provisions in the testamentary instrument can avoid publicly litigating family disputes, particularly disruptive if the estate and controversy involves a family business, and thus greatly assist in preserving family harmony. While binding mediation and arbitration provisions in testamentary instruments are not advisable in every circumstance, they unquestionably are worthy of consideration in issues and controversies involving a family member on each side of an estate issue. Due to adverse effects on both privacy and family harmony, such litigation can be even more deleterious in the estate planning context than it is in business contexts which frequently include such provisions. Yet, mediation and arbitration provisions in testamentary instruments are quite rare.

As mediation and arbitration must normally be by agreement of the parties, unless such provisions are statutorily authorized to be enforceable, it can be questionable whether they are enforceable. There has been a split among the relatively few appellate courts, none in Kansas, that have looked at the issue of their common law enforceability when included under provisions of a testamentary instrument. The better argument would appear to be that by accepting an interest in the estate, the beneficiary impliedly has contractually accepted the enforceability of such conditions as well. Moreover, a descendant has no legal right to a share of the parent's estate and a parent should be able to place conditions on a receipt of a child's share of the estate. Further, mediation and arbitration provisions further desirable public policy goals of preserving family harmony and reducing public expenditures in the judicial process. Such factors buttress the legal position that such provisions should be legally enforceable notwithstanding the absence of any statutory authority for their enforcement.

Fortunately, Kansas is one of a minority of states that now statutorily recognize the enforcement of mediation and arbitration provisions in revocable trusts. K.S.A. §58a-205. Nonetheless, to further enhance their enforceability, particularly with regard to such provisions in wills in which they have not been similarly statutorily sanctioned, a specific provision should be included in a revocable trust that mandates mediation of disputes involving family members, which normally have a high success rate, followed by binding arbitration if mediation should fail to settle the dispute. A Special Trustee or Trust Protector could be authorized under the provisions of a revocable trust, as generally sanctioned by provisions of the Kansas Uniform Trust Code, to amend the trust provisions to reduce a non-consenting beneficiary's share of the trust estate by a certain percentage (e.g., say one-third), in the event a beneficiary should knowingly ignore such provision and institute a judicial resolution of the issue. K.S.A. §58a-808(c). Such authority would also best be extended to the selection of the mediator and arbitrator(s), and the number of mediators, if the parties cannot agree, as well as any procedural rules to be applied in any such proceedings to the extent not otherwise dictated under the provisions of the testamentary instrument.

The alternative dispute resolution (or ADR) approach is less formal and contentious, can be much less costly, normally achieves a faster result, and avoids the subject matter and proceeding being of public record. It is particularly valuable as a required alternative in resolving family disputes in the administration of trusts and estates due to its assuaging effect on potential family disharmony. The potential downside is that an arbitrator's decision constitutes a binding and final resolution of the issue and there are few grounds for appeal. Picking a knowledgeable and experienced mediator or arbitrator is key, e.g., a highly knowledgeable, reputable and experienced estate planning attorney. It also is typically wise to exclude contested matters involving a family member and a professional third party, such as a corporate fiduciary, except at the option of a affected family members. A non-judicial procedure in many such circumstances tends to favor a third party that typically would prefer a contested matter not being of public record.

Whether to Advise Children of the Estate Plan

It's not me who can't keep a secret. It's the people I tell that can't.
-Abraham Lincoln

The considerations involved in a parent's decision as to whether to advise a child or children of the estate plan extend far beyond whether children will subsequently inform aspects of the plan to others the parent does not want to know, such as another child, in-laws or grandchildren. It is much more dependent upon the specifics of the estate plan, the particular family situation involved, a proper evaluation of the benefits and detriments in making such disclosure, and most particularly, its impact on family harmony.

For estates holding farms and closely held businesses which are passing to children, it is normally advisable to involve children in the business succession part of the estate plan. As discussed above, this allows family harmony issues to be appropriately discussed and effectively tested while the parent is living. In the absence thereof, there would be no opportunity for parents to make appropriate adjustments to the estate plan. It also minimizes the risk of crafting a business succession plan based on certain assumptions about children's strengths and weaknesses that might prove to be incorrect.

However, despite advice to the contrary disseminated "on line" and that rendered by many financial and other professionals, including a large segment of estate planning attorneys, the author believes for the reasons discussed below a parent is normally ill-advised in disclosing the estate plan to children in almost all other situations. Rather than "clearing the air" and "avoiding surprises," the oft-purveyed aphorism for such disclosure, for a legion of reasons it will almost certainly instead carry with it an immediate and severe risk to family harmony.

First, children are usually ill-suited by their background and experience, normally not even having a comprehensive estate plan themselves, to be able to analyze, understand or appreciate the elements of their parent's estate plan. Nor, typically possessed of at least some semblance of emotional conflicts of interest with siblings, along with the impact of family dynamics, sibling rivalries, and potential financial conflicts of interest regarding their desired or expected share of their parent's estate, can children be expected to be objective in evaluating a parent's estate plan in any material respect.

Moving to the substance of such disclosure, if a parent is going outside the family for a financial fiduciary to administer the estate due to family harmony considerations, a child may question parental motives in so doing, greatly underestimate the family harmony risk in having a child serve in such capacity, greatly overestimate the cost of a third party administering the estate, grossly understate the burden such role places on a child, incorrectly view the administration of the estate as a family member, and thus lean toward cajoling or pressuring parents that a child should be appointed as financial fiduciary. This usually engenders a disagreement among siblings as to which child should serve in such capacity.

The better strategy is to include a provision in the testamentary instrument, as discussed infra, providing that the parent: (a) was not going outside the family for a financial fiduciary due to any concern that a child could not properly manage the administration of the estate, but strictly due to family harmony being the parent's most important goal; (b) did not want to take any risk in that regard by naming a child to serve in such capacity; (c) did not wish to impose a burden upon a child in serving in such capacity, including taking time away from the job or personal or family life in fulfilling their duties with respect thereto; and (d) did not want to have to choose which child or children to serve in such capacity. Absent such provision, children are also likely to conclude that the failure of a parent to name any of them as a financial fiduciary was based on mistrust.

Alternatively, if a parent has chosen instead to name a specific child or children to serve in a fiduciary capacity, disclosure of such decision may immediately result in discontent among, if not blatant jealousy by, other children.

A parent's decision to give more of the parent's estate to one child in recognition of such child's contribution to the farm or other business enterprise, or due to a greater economic need, is often unappreciated by other children, sometimes even if the economic need relates to a disability. Should the estate plan include a significant charitable bequest, children may object, concluding in essence that "charity begins at home." Also, it is not an isolated instance in which children even inquire about intentionally omitted aspects of their estate or estate plan in the disclosure, including the size of the parent's estate.

Further, by choosing to discuss an estate plan with children, a parent may enhance a child's feeling of entitlement to the parent's assets. Following such disclosure, a child may request "a part of my inheritance" during the parent's lifetime, when "I can enjoy and use it." Additionally, such disclosure often inadvertently opens the door to a full panoply of "pressured requests" by children to exact changes in the parent's estate plan, often designed, as one might expect, to benefit themselves, which suggestions typically contravene the interests of other children, all the while placing considerable stress on family harmony. Occasionally, even in-laws have been known to have the temerity to make impertinent inquiries, such as inquiring as to any provisions for them in the estate plan or their net worth. If the assets of the parent's estate plan are significant, such disclosure may change a child's spending and saving habits, perhaps becoming less prudent, relying instead on their future "inheritance" for retirement funds, notwithstanding a surviving parent may live well beyond a child's attainment of retirement age with no certainty as to the nature or value of their assets or testamentary intent at that time.

Also, married children frequently express a desire that should they predecease a parent, they would prefer "their share" to alternatively pass to their spouse. This desire runs contrary to that of most all parents. As estate planning attorneys well know, parents normally desire for a predeceased child's share to pass instead to the predeceased child's children, or if none, to their other children. They have the obvious concern that if a deceased child's share passes to an in-law, it is likely to be to the substantial economic detriment of such child's descendants. For in addition to expenditures of such assets by an in-law, such assets are exposed to the creditor claims of such spouse and possible distribution to, or subject to the divorce or inheritance claim of, a subsequent spouse or pressure of a subsequent spouse to also provide for their children. Nor do parents normally want to incur additional attorney fees in providing for a distribution to a child's spouse under their estate plan in the highly unlikely event a child should predecease them. Finally, parents tend to be of the view that it is the responsibility of their child, not them, to provide for a son-in-law or daughter in-law. Nonetheless, the pressure exerted upon a parent by a child to make such provision can cause significant family disharmony should a parent decline to do so. Such disharmony would then tend to redound to the affected in-law, even sometimes resulting in the withholding of contact with their grandchildren in the subject family.

Children also may pressure a parent to prefer the child over other children regarding the shares of their estates due to a provincial view that they are "more deserving" or a sibling "doesn't need the assets" due to being of greater wealth. Further, knowledge of a parent's desire to protect assets from mismanagement by a child or undesirable spousal influences by retaining assets in trust for them with third party trust administration can be expected to result in an immediate estrangement with the affected child.

In the event assets are being left in trust for the benefit of a child solely to protect trust assets from the claims of third parties (e.g., estate taxes, spousal and creditor claims), with the child serving as sole trustee, the disclosure of even this aspect of the estate plan can adversely affect family harmony, although typically to a considerably lesser degree. Once again, this can be the subject of considerable consternation by an in-law if informed of such aspect. A child simply may not fully appreciate that the plan was devised solely for the purpose of protecting the child from third party claims or minimizing taxes. The child may suspect ulterior motives or feel they do not have unfettered access to trust funds. The child may even disagree that such protection is necessary and thus desire an outright distribution. Should a child inform their spouse of the intended asset protection benefits in the event of a divorce, the risk of such potential disharmony is likely to be even greater with the child's spouse, with the aforesaid possible additional adverse ramifications.

At its core, there can be a considerable disparity between-and thus incompatibility with-the estate planning goals held by a parent with those of a child. Should the parents' goals surface during the parent's lifetime through a disclosure of the parent's estate plan, disharmony may not only result between a child and parent, and among children, but also between a parent and son-in-law or daughter-in-law. Moreover, any resultant disharmony occasioned by such disclosure will arise during the parents' lifetime, causing undue anxiety to the parent and among children, possibly instilling in a parent a diminished view of a dissenting child, and create an already deleterious environment regarding family harmony that could well extend beyond a parent's death.

When the parent's disclosure of the estate plan results in a disagreement with children as to elements of the plan, the parent is faced with the choice of either changing the plan to satisfy a dissenting child and possibly disenfranchising other children in the process, or retaining the current plan which is congruent with the parent's goals and which the parent has determined is in the children's best interests. If the latter route is chosen, the disagreeing children may forever hold their parent in disfavor for "not respecting" their wishes. If more than one child has inconsistent desires with respect to making changes in the estate plan, e.g., two children each wishing to serve as sole trustee instead of a corporate trustee, the problem is compounded, for even if a parent was otherwise amenable to changing the plan, the wishes of both children are incapable of being satisfied.

A final significant drawback to informing children of the estate plan is that it can put parents in an almost untenable position should they later amend the estate plan in a manner significantly affecting a child's interest, e.g., changing the financial fiduciaries so as to alter the role of children in such capacities, changing the shares of the estate passing to children or grandchildren, changing the terms of trusts that are to hold assets for children, etc. What does the parent do then? Does the parent tell children of the change or simply remain silent? If the former route is taken, disapproval and resultant family disharmony may be the immediate reaction by a disaffected child, both against the parent and siblings. If the latter route is chosen, children only learning of such change following the parent's death may forever hold their parent in disfavor, viewing such change as a parental betrayal greatly intensified by the parent's silence. They may also suspect such change was wrought by an advantaged sibling's influence on a parent.

The bottom line is that in circumstances where the children are in agreement with the plan, no benefit to family harmony was achieved by advising them. If family harmony friendly strategies and provisions have been included in the estate plan, the risk of family disharmony in the administration of an estate likely will have been already reduced to the maximum extent possible, with little to no possible benefit in having discourse with children concerning its elements. Should a child inquire of parents as to their estate plan, parents need only state that they have a comprehensive plan designed to minimize taxes and administrative costs and provide for an equitable distribution among the beneficiaries of their estate. Should any additional unwanted invasive inquiries be made, parents should simply state that family harmony is their most important goal and that no beneficial purpose would be served by any further disclosure.

In short, the above frequently voiced well-worn "feel good" adage of consultants and a large segment of estate planners that such disclosure will further family harmony by "avoiding surprises" and "clearing the air" is normally without merit except under family business succession plans. The surprises that such disclosure is intended to avoid are more than elusive, with the parent being put a high risk of being unpleasantly surprised. Moreover, the "clear air" that existed prior to such disclosure can quickly become miasmic as a result of such disclosure. Such rationale simply will not sustain objective scrutiny in realistic, modern day family settings, if it ever did.

In family situations involving children from a prior marriage and a surviving parent who has remarried, children from the prior marriage are often concerned that assets accumulated during the marriage of their parents will be dissipated in favor of a stepparent or the stepparent's children. This concern is frequently so strong that children are unable to accept the parent's spouse as a member of the family, thereby creating a strain in the parent-child relationship. Such situation calls for a slight variance from the foregoing disclosure recommendations. If a parent has entered into a premarital agreement prior to the marriage, or the stepparent has consented to the parent's estate plan, a simple and brief statement to children stating the interests of the deceased parent have been preserved and protected in the parent's estate plan and that the parent desires for children to be accepting of the parent's spouse should suffice to minimize family disharmony resulting from this aspect as much as feasible under the circumstances. Any further explanation of the estate plan would normally be undesirable for the same reasons discussed above regarding its potentially negative impact upon family harmony, only to be emotionally exacerbated by the presence of a new spouse of a parent.

In the circumstance where a child is named as a health care agent, it is normally advisable that such child be informed and given a copy of the health care power of attorney, as well as a copy of the living will. Health care decisions can be time sensitive, and assuming the health care power of attorney is effective immediately, this procedure avoids any undue delay should the child be called upon to make a health care decision for a parent. If a child is named a financial fiduciary under the testamentary instrument or durable power of attorney, such disclosure would only atypically be time sensitive. Consequently, there is normally no compelling temporal need for prior disclosure to a child of any aspects of the plan governing asset management, only a means of timely access to the subject instruments when the time arises for their implementation.

In sum, the considerations listed above warrant a careful assessment by the parent of any benefits to be derived by the disclosure of their estate plan to their children when juxtaposed with its substantial risks to family harmony. If the above family harmony provisions are incorporated in testamentary instruments and appropriate strategies addressed in the estate plan, the vast majority of family harmony risks will already have been properly attenuated to the extent feasible so as to be of minimal risk. If they have not, no disclosure of the estate plan is likely to have any significant beneficial effect on their reduction, while at the same time carrying a significant risk of family disharmony in such effort while a parent is living, which may well endure following the passing of the parent. Further, as discussed above, such disclosure also risks non-objective unsophisticated children placing pressures on a parent to revise the parent's desired estate plan in their favor, which revisions are likely not only to be antithetical to their parents' desires, but also often to the desires of their siblings as well.

In the majority of situations in which an informed parent would be expected to conclude that the clear and present risks of such disclosure outweigh any potential benefit, the far better option is to reduce to writing for post-death disclosure the factors the parent considered when creating the estate plan, best by their inclusion in the above-noted "personal declaration" provision in the testamentary instrument in the manner discussed in the subsequent section. Such post-death disclosure should foster in children an understanding of the parent's goals under the estate plan without parents having to incur the significant risk to family harmony that would attend the disclosure of their estate plan during their lifetime.

Even when a parent determines it to be inadvisable to inform a child of the parent's estate plan during lifetime (other than perhaps a child being named as health care agent), in the absence of any other close advisor it may nonetheless be desirable to list a child as an additional signatory (and being so advised by the parent) on the parent's safe deposit box. This permits the child to gain access to important estate planning documents upon a parent's disability or death (or if such parent's spouse is the first named fiduciary, in such circumstance if the parent's spouse is likewise disabled or deceased).

In the situation where a parent has named a third-party financial fiduciary, that child would typically be the child named as health care agent. The child would be instructed to gain access to the safe deposit box when the parent, or both parents, as the case may be, are unable to manage the parent's finances due to a mental disability or has died and to follow the directions in the sealed envelope with the child's name on it. The written directions in the envelope would indicate the identity of third-party fiduciary administering the parent's estate to whom or which the original estate planning documents in the additional large sealed manila envelope in the safe deposit box are to be delivered. In the alternative situation where a child is named financial agent, the instructions for the child would be to open the envelope in the safe deposit box addressed to the child and secure immediate legal advice as to the child's duties as financial fiduciary in the management of the estate under the provisions of the original estate planning documents in the box.

In either case, the note would also inform the child of the law firm that drafted the documents and that such firm has electronic copies of the executed estate planning documents to preclude any possibility that the child might choose to destroy the existing estate planning documents should the envelope be opened and the child determine its provisions were not as the child desired. In keeping with the foregoing discussion, absent a business succession plan, for family harmony reasons in neither situation would the child need to be advised beforehand of any aspect of the estate plan, including the name of the financial fiduciary.

Prior to concluding discussion on whether children should be advised of the estate plan, another family harmony aspect related thereto is worth mentioning. In addition to the estate planning advantages of revocable trusts discussed above being more adept than wills in several respects in their ability to incorporate certain family harmony strategies, unlike wills, neither the provisions of the trust nor the assets it holds are a matter of record. Particularly with respect to married couples leaving their assets either outright or in trust for their spouse upon their death for asset management protection and tax purposes, doing so under a testamentary trust created under a will, due to its public record aspect, will unavoidably result in children having access as to the assets in the probate estate of the predeceased spouse and the terms of the planned disposition of the remaining trust assets upon the death of the surviving parent among children. This obviously can compromise family harmony during the lifetime of the surviving spouse as a result of such indirect disclosure.

Conversely, under provisions of the Kansas Uniform Trust Code, all otherwise statutorily required notices of the revocable trust provisions and accountings of its administration to current and remainder beneficiaries are automatically waived if there are no current and remainder beneficiaries of assets left in trust by the predeceased spouse for the benefit of the surviving spouse other than the surviving spouse and descendants of the surviving spouse. K.S.A. § 58a-813(d). Further, even if there are other remainder beneficiaries, such as a charity or stepchild, such notices can be specifically waived in the instrument. K.S.A. §58a-105(b). The same is true with respect to sub-trusts created for children. *Id.* Because revocable trusts and the assets in the trust estate are not a matter of public record, children cannot do an "end around" such waivers as they can with the public record aspect of wills and accompanying inventory of the estate, thus preserving the privacy of the estate plan and its underlying assets from undesired access by trust beneficiaries until the death of a surviving spouse.

Evolution of the Author's Practice in Addressing Family Harmony Issues

Having previously revised prior long-standing approaches in counseling clients regarding the choice of a financial fiduciary, approximately two decades ago the author's firm turned its attention to pursuing other root causes of most family disharmony in the estate planning process outlined above that experience had demonstrated, and then developed strategies that hopefully remedied them. Structural changes to estate planning instruments were then designed and implemented to emphasize family harmony as an overarching estate planning goal and minimize factors deleterious to its maintenance following a parent's disability or death, some of which, as discussed herein, also served to preserve the integrity of dispositive provisions as well. In that process, it was determined that revocable trusts, as opposed to wills, were clearly the preferred testamentary instrument, for in addition to its advantages in many other respects, as opposed to wills it was the more facile instrument in utilizing such strategies (e.g., the incorporation of fiduciary discharger provisions, efficacy in including mediation and arbitrations provisions, not being a matter of public record, etc.).

Toward that end, in the first article of the trust instrument following an initial "family declaration" paragraph listing family members and their birthdates, the second paragraph sets out the primacy of the family harmony goal, followed by preserving the integrity of the intended disposition of the estate, and the reduction of taxes and administrative costs, further noting that the subsequent paragraphs that follow in such initial article are supportive of furthering such three noted goals. Subsequent titled paragraphs then incorporate the above-discussed strategies and provisions that appropriately address them, including the treatment of gifts and loans; in terrorem clauses; the entitlement of children serving as a fiduciary to compensation; the reasons for appointing a non-family member as a subsequent fiduciary of the revocable trust; compensation issues relating to non-fiduciary services provided to a parent by a trust beneficiary; the treatment and effect of property passing to a beneficiary outside the provisions of the trust instrument on such beneficiary's share of the trust estate; the reason for any disparity in children's trust shares; and mediation and arbitration provisions. Other provisions in subsequent articles of the testamentary instrument address the other family harmony strategies addressed herein, including the distribution of tangible personal property, "trustee dischargers" and children serving as trustee having the authority to name a successor corporate trustee and resign.

The comprehensive implementation of the foregoing salutary strategies and inclusion of protective provisions in testamentary instruments, in conjunction with appropriate client counseling, has resulted in reducing family disharmony in the estate planning process and the administration of trusts and estates of the firm's clients in multi-child families by an estimated eighty percent from that which heretofore had occurred in their absence. At the same time, it has reduced the severity of such family disharmony in a significant percentage of the balance of such situations.

Conclusion

For every complex problem there is an answer that is clear, simple and wrong.
-H. L. Mencken

There is nothing like the death of a moneyed member of the family to show people as they really are, virtuous or conniving, generous or grasping.
-Jesse Dukinminier and Stanley M. Johanson (1972)

Most estate planners know full well that the myriad of complex estate planning issues presented in the estate planning process is not amenable to a simple solution. Nonetheless, notwithstanding the high priority most clients would place on maintaining family harmony in that process, estate planning attorneys traditionally have oversimplified, overlooked or otherwise minimized this aspect. Instead, the focus has been almost entirely on factors relating to the proper disposition of their property upon their death and the achievement of ancillary goals, such as minimizing taxes, asset protection, governmental resource planning and using trusts in the management of assets for beneficiaries, leaving most of the family harmony enhancing strategies discussed herein either totally lacking in consideration or addressed little more than perfunctorily.

Although such other estate planning facets are certainly important and are at the technical heart of the estate planning process, the all too frequent detritus from such failure has been a high incident of significant family disharmony following the death or disability of a parent, substantial attorney fees and other administration costs being incurred resolving or addressing otherwise mostly avoidable contentious matters in the administration of the estate, and damages to the integrity of the estate plan resulting from a skewed distribution of their clients' estates from that intended by parents. In short, when such adverse circumstances arise, there will have been a fundamental failure in the preservation of this most valued of intangible family assets, as well as collaterally damaging other important facets and goals of clients in what may have otherwise been in all other respects a well-devised estate plan. Given that the vast majority of such highly adverse consequences is avoidable in the estate planning process and the accompanying inclusion of appropriate provisions in the testamentary instrument, it should be safe to opine that estate planning processes and the estate plans that devolve therefrom which fail to adequately address and protect this important estate planning facet are unquestionably flawed.

Excepting individuals who do not engage an estate planning attorney in their estate planning, there appears to be little doubt but that a clear majority of the family disharmony in the estate planning process is occasioned by errors of omission, not of commission, by estate planning counsel. Estate planning attorneys have been long-standing unwitting protagonists in such disharmony due to our collective failure to implement a more comprehensive holistic approach to the estate planning process by practicing "preventive legal medicine" regarding the preservation of family harmony in the estate planning process in much the same way holistic approaches to health matters have evolved in the medical field.

It is thus long past time for a sea change in the collective focus of our profession on this issue. The author submits there is every reason to conclude that estate planning attorneys who incorporate the family harmony enhancing strategies discussed herein in their practices will achieve affirmatory results consonant with those of the author's firm. As a welcome incident thereto, they should also find their clients to be highly appreciative of their attorney's considered emphasis throughout the estate planning process on this preeminent family value.

Foulston's Estate Planning and Probate Group

Foulston Siefkin LLP, the largest Kansas law firm having offices exclusively in the state of Kansas, has nearly 90 attorneys and is headquartered in Wichita, Kansas. The firm has additional offices in Kansas City and Topeka. The firm's Estate Planning and Probate Practice Group currently consists of attorneys who collectively practice in all significant estate planning, probate and trust areas. Viewers are invited to click here for information on the Group's practice areas and attorneys, law summaries of estate planning areas of special interest, regional and national estate planning articles authored by Group attorneys, related links and other estate planning information which may be of interest.

This estate planning law summary above was authored by the firm's Estate Planning and Probate Practice Group. Provided as a service to viewers, the strategies discussed therein are not designed to be an exhaustive discussion of the subject matter. Moreover, the discussion is often Kansas law specific, and are subject to varying and changing federal and state laws. This document has been prepared by Foulston Siefkin LLP for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.

For Further Information

Foulston Siefkin regularly counsels clients on issues relating to Estate Planning and Probate. If you are interested in additional information regarding these matters, please visit our website at **www.foulston.com** or if you would like to discuss specific ways in which Foulston can help you, contact Tim O'Sullivan at 316.291.9564 or **tosullivan@foulston.com**, or Stewart Weaver at 316.291.9736 or **sweaver@foulston.com**, or Matt Bish at 316.291.9729 or **mbish@foulston.com**.

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