WHAT CAN GO WRONG AND HOW TO FIX IT

A Discussion with Carol Warnick, David Grant,
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Introduction (Carol and Kristin)

Potential problems.

Wealth creators' prerogative vs. impact is to the beneficiary

Case for Discussion #1 (Carol)

Dr. Dan was married to second wife for 12 years (first wife died) and had 3 kids from his first marriage. He was a very successful surgeon who also invested in and built several surgical centers through the region that were very profitable. He bought a "hobby ranch" south of Jackson, WY before the prices increased as that area became a playground for the very wealthy. The ranch ran cattle for the most part, but before his death he was beginning to experiment with raising bison. His two sons left their previous jobs and moved to the ranch some years prior to his death because they liked the ranching life style. His daughter married and moved to Arizona and was not involved at all with the ranch.

He wanted to give back to his medical school in the Midwest, because the school had given him various jobs and grants to enable him to pay his tuition and his living expenses back in the 40s when he attended medical school. He was fine with his sons keeping the ranch after his death and trying to make it profitable meeting the relative new demand for bison meat.

He always gave small amounts of money over the years to his medical school but wanted to do more at his death. The medical school was putting a new wing onto a building and Dr. Dan agreed to help finance the new wing with a gift in his revocable trust, in return for the school naming the new wing after him.

His estate plan was drafted by his step-son, who was a lawyer and became quite close to Dr. Dan. Dr. Dan, who was in his 90s by this time, wanted $1.5 MM to go to his second wife, $13 MM to go to his medical school, and the residuary to his children, who had already received part of the ranch in trust from their mother when she died. The total estate, after taxes, was somewhere between $25 and $30 million, depending on how the ranch was valued.

He intended that a portion of the ranch (the closest part to Jackson) would be sold off for development after his death to fund the gifts to his wife and the medical school, thus enabling his sons to keep most of the ranch intact. He originally planned to do this before his death, but his sons became very upset whenever he discussed it. So, instead of taking the heat while he was alive, he merely put the gift in his estate planning documents and didn't tell his sons.

After his death, the sons challenged both the gift to the second wife and the gift to the medical school. They hired an aggressive Jackson lawyer and brought suit alleging undue influence on the

part of the lawyer and lack of capacity since Dr. Dan was in his 90s when he signed his estate planning documents.

Case #1 Practice Points:

1. Avoid indicia or undue influence and conflict of interest
2. Selection of advisors
3. Selection of fiduciaries
4. Avoid surprises by:
    a. Clearly communication
    b. Beneficiary education
    c. Purposeful planning institute
    d. Help wealth creator understand consequences of plan

Case for Discussion #2 (David)

An acclaimed research scientist at a prestigious university agreed to a large planned gift to the university where he had worked over the course of his long career. Being the "very intelligent" man that he was, and without consulting with or advising his wife, children, lawyer, CPA or financial advisor, he committed to give millions of dollars to the university through his estate, to be effective upon his death. Based upon this commitment and his distinguished career, the university named a building in his honor. He and his wife, both in their eighties at the time of his charitable pledge, soon died within a few months of each other. After they had both passed away, their daughter, who was named as executor and successor trustee of their family trust, determined that her scientist father must have dramatically overestimated the value of his estate, such that the charitable pledges exceed the value of all other assets. The daughter became generally aware of her father's generous commitment when she attended the dedication of the new building named in her father's honor. Almost a year has passed since her father and mother both became deceased and she hasn't heard anything from the university. The terms of her parents' trust and pour-over wills are silent as to the charitable gift. Moreover, she's never seen a written donor agreement of any kind. What are her obligations to the university and to the named beneficiaries of the trust? What should she do?

Case #2 Practice Points:

1. Post-death reformations and declaratory actions
2. Settlement Agreements
    a. Mediation & arbitration to reduce fees
3. Honesty & Open Communication with All Potential Parties
    a. Privilege and confidentiality
4. Willingness to serve as trustee?
5. Bringing malpractice claims against drafter?
    a. Scope of engagement?
    b. Privity issues
        i. Beneficiaries (Colorado – new supreme court case)

ii. Charleston vs. Hardesty (Nevada – not a bar)
iii. State by state

6. To reduce legal fees: use mediation/arbitration

Case for Discussion #3 (Layne)

Samuel and Lisa had no children and a few relatives. They also cared about several close friends and a few favorite charities. In 1995, they engaged their attorney, Abigail, to establish a joint revocable trust that provided general cash bequests for friends and relatives, that included a college fund for a friend's son, and that left the bulk of their estate to three charities in different percentages. They also established an irrevocable charitable remainder unitrust (CRUT) for the ultimate benefit of those same charities, naming a bank as the trustee and reserving the right to change the charities and the trustee. The CRUT was formed as a NIMCRUT, with distributions not to exceed actual trust income, with a make-up clause for any years in which the income exceeded the fixed unitrust payment.

As the years went by, Samuel and Lisa became annoyed with their friends, who had become demanding and increasingly meddlesome in their lives. In addition, most of their relatives died. Because of a dispute over low trust income from the CRUT, they persuaded the original trustee to resign, and they named a different bank to serve in its place. Samuel and Lisa also became disenchanted with the original charities, and their attorney, Abigail, prepared documents to modify the beneficiaries of the CRUT in 2005 and 2009. They also had Abigail prepare amendments to their revocable trust in 2002, 2006, and 2011.

In 2015, Samuel and Lisa, both in their 80's, came went to their attorney's office with a new friend, Frank, with whom the attorney was not acquainted. Samuel and Lisa instructed their attorney to completely restate their revocable trust. Under the new document, Frank was named as the successor trustee, their successor guardian, and the primary beneficiary of the revocable trust, replacing all of their existing beneficiaries, except for Samuel's brother-in-law, whose cash bequest was significantly reduced. Frank was also to become the new trustee of the CRUT. Initially, they asked Abigail to help them terminate the CRUT and get the investments back because they had no charities they liked anymore. Abigail explained that they could not do that for a number of reasons. Weeks later, they contacted Abigail to arrange for the designation of two different charities to replace the existing charities. Upon investigation, Abigail found out that the charities had been formed earlier that year by Frank's wife, Kristen, but Abigail also confirmed that the charities were listed as public charities on the IRS' web site.

Abigail informed Samuel and Lisa that this change in their estate planning would result in potential litigation from the omitted beneficiaries, especially in light of the significant changes, the recent involvement of Frank, their advanced years, and their declining health. She met with them to candidly ascertain their mental ability to make these decisions and to ascertain if they were acting under Frank's "undue influence." After determining that they were of sound mind and not under pressure or duress from Frank, who turned out to be a long-term friend and had been assisting with their investments for many years, Abigail discussed with Samuel and Lisa the various options to reduce post-mortem litigation. Because of the cost and "hassle" involved, they told Abigail it was all unnecessary. Without Abigail's knowledge, they did prepare their own declaration of intent

as to why the old charities were omitted from both the revocable trust and the CRUT and why the new charities were designated for the CRUT.

In 2016, after Lisa died and Samuel became legally incompetent, litigation ensued relating to Samuel's guardian and as to the validity of the recent modifications to their two trusts.

Case #3 Practice Points:

I. Value of Proper Planning:
   A. Leaving a legacy of values and relationships, not just assets.
   B. Purposeful planning.

II. Potential for litigation:
   A. Undue influence.
   B. Lack of mental capacity.
   C. Self-dealing using friend-created charities.

III. Methods to reduce likelihood of post-mortem litigation:
   A. Competency evaluation by qualified psychologist or psychiatrist.
   B. Involvement of second attorney to provide an additional opinion, both as to the clients' mental capacity and any undue influence.
   C. Affidavit of clients declaring their intent and providing the rationale for the changes made.
   D. Video of clients declaring their intent and providing the rationale for the changes made.
   E. Affidavits of knowledgeable persons, perhaps including witnesses and notaries.
   F. Pre-mortem judicial action.

CONCLUSION