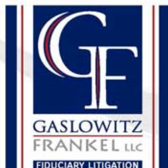

Knowledge Experience Results

TOP TEN TIPS ON HOW TO AVOID ESTATE DISPUTES

Craig Frankel and Adam Gaslowitz

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WHAT THIS EBOOK IS ALL ABOUT AND WHY YOU SHOULD READ IT

Did you know that over three percent of all wills are contested? In Georgia alone, that's over three thousand contests per year. Nationwide, it's more than one hundred thousand cases annually. Interestingly, the number and variety of estate disputes continue to grow. Baby boomers are beginning to age and die. Society is growing more affluent, and people are dying with more assets. People are living longer and requiring family and non-family assistance with their care in later years. Demographics are changing, and children are living in different cities from their parents and siblings. And more people are remarrying later in life and creating all manner of blended families.

You may be surprised, but the three percent number represents only contested wills. It doesn't include disputes over the management of trusts and estates after a will has been admitted to probate or a trust has been funded. "Post-probate" cases - those related to the administration of trusts and estates - are on the rise. In fact, they now make up more than two-thirds of the cases handled by the lawyers at Gaslowitz Frankel LLC. Elderly family members also are victims of predators and opportunists who try to take their money when they are vulnerable and least able to protect themselves.

Why are we sharing this with you? It's simple. For the past twenty-five years, the lawyers at Gaslowitz Frankel LLC have worked with thousands of families facing these types of disputes, not just in Georgia, but throughout the Southeast. So, we have accumulated an expansive "know-how database" of tips to avoid these types of disputes, and we thought, "Why not let the world know that there are ways to avoid the problems associated with estate disputes?" And that's what this eBook is all about. We are giving you and your family members ten practical tips to avoid the typical disputes we see every day.

You probably know that most people come to an estate planner with three goals in mind:

1. To provide for and protect their families;
2. To ensure that their children and dependents have appropriate guardians and trustees; and
3. To minimize taxes as much as possible.

Right? Well, almost. In the current federal estate tax environment, estate tax planning is not actually a real concern for the majority of clients. Why? Because the 2010 tax reconciliation act instituted a $5 million exclusion amount in 2011, indexed to inflation ($5.34 million for 2014), for each of the estate, gift, and generation-skipping taxes, all with a maximum rate of 35%.

So, what this means to you is that 99.8% of Americans will face no estate tax at their deaths. Yet, many estate planners still tend to focus the majority of their efforts on estate tax avoidance, while failing to consider adequately how to protect their clients' families during or after probate. Or failing to consider who really is the more appropriate trustee, executor, guardian, or fiduciary.

Here's our advice. ***For most families today, the focus should be on ensuring that the best possible decisions are made with regard to protecting the family, planning for income taxes, choosing the appropriate fiduciary, and planning for estate and trust administration.*** In other words, think about what will happen after the will is probated or the trust is funded. What we're saying is this: ***make choices in the estate plan that will both achieve the family's goals and limit the possibility of disputes relating to their wills and trusts,*** so that neither the families nor their estates are wiped out by litigation.

Every will, trust, or estate planning document, no matter how simple or well-drafted, may become the subject of a dispute. Even with a simple "I love you will" (everything to my spouse and then to my children), a disgruntled family member may challenge the estate planning document simply because he or she disapproves of the named fiduciary. Or a family member may become disappointed after he or she observes (and stews about) the administration of the estate.

The bottom-line is this – we cannot prevent all estate and trust litigation, but we can do two very important things long before the opportunity for litigation arises:

1. We can engage in the type of planning that will reduce the likelihood that a dispute will arise in the first place; and
2. We can reduce the likelihood that a lawsuit will be successful if one is filed.

The reality is that regardless of whether a claim is successful, the damage to all parties caused by the fact of (or threat of) litigation is often irreparable. To say it differently, ***as much damage can result from bringing a claim as from succeeding on a claim.***

What follows is our top ten tips for you and your family to consider that will help avoid future litigation over estates.

TOP TEN TIPS ON HOW TO AVOID ESTATE DISPUTES

Tip #1. Do Not Open Joint Bank Accounts

We know that our parents and family members may need assistance with their finances as they age. This is common and appropriate. So, what do most people do? They go to the bank (and stock broker, 401(k) and IRA account providers, etc.) and change the accounts to joint ones. Right? The aging family member sees the account rep and says she wants to add so-and-so (often a child who lives nearby or a trusted caregiver) to the account for "convenience purposes" – to pay bills and reconcile the account. Nine times out of ten (or more) the account rep will simply hand the aging family member a joint account form and instruct them to sign it. DON'T SIGN IT!

What you may not know is that a joint account often is really what lawyers call a "joint account with right of survivorship." Basically, this means that ***when the elderly account holder dies, the surviving "joint account" holder gets*** **everything in the account.** How does this sound to you? Well, not so bad when the checking or savings account only has $5,000 in it to pay the bills. But, what happens if the family member recently sold her home and put the entire proceeds in her bank account or keeps all her assets in one brokerage account? It's a no-brainer – the account balances grow substantially larger. And retirement accounts, whether they are 401(k) accounts or IRA accounts, frequently are some of the biggest assets a family member owns. ***If an account is held in joint names, the survivor automatically gets everything.*** It never goes through probate, never gets divided among the family members, and the will does not control who gets it.

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So, what should you or your aging family member do? Ask for a Power of Attorney (POA) account instead. You may have to talk to a manager rather than the "front desk" clerk, but ***you want a POA account, not a joint account.*** A POA account authorizes the other signatory to deposit and withdraw funds from the account for the convenience of the family member who owns it, but the funds go to the family member's estate upon his or her death. Simply put, don't open a joint account with anyone, unless it is your express intent and desire for that person to receive the funds in the account when you pass away.

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Tip #2. Protect Family Member with Powers of Attorney

Speaking from over 25 years of experience, we can tell you that powers of attorney can be absolutely essential in today's world. ***A power of attorney is a document in which you (the principal) authorize someone else (an agent) to stand in your place and act for you.*** Powers of attorney can be broad or limited. They are most useful inprotecting a family member as he or she ages. At some point, your loved one may not be able to make decisions for him or herself. If your loved one has not funded a trust or signed a power of attorney, the only choice for the family may be to ask a court to appoint a conservator or guardian (which means someone to act for the loved one).

Sounds complicated? It can be. The problem is that a conservator or guardian can only be appointed if the person is totally incapacitated, and this is a difficult thing to prove. It also can be expensive and time-consuming, and your loved one may resent your "going to court" to have them "declared" incompetent. In other words, your loved one may get mad at you, which does not help things at all. Okay, okay, let's focus on the positive. That's why you're reading this eBook after all.

As your loved ones age, they become more fragile and, though not completely incapacitated, at least diminished in capacity. And they need protection. So, powers of attorney make a lot of sense, especially for our parents, but even for younger adults. The issue is that ***powers of attorney can be abused, and the agent may take advantage of the elderly or diminished capacity adult, either unwittingly or intentionally. Often, it starts off innocently.*** Here's how it often goes. The "near-by" child (or caregiver) gets the aging parent to sign a broad power of attorney to help with the finances "just in case." We can already see you smile. Familiar scenario, right? The agent starts to use the power of attorney

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for small decisions – like paying electric bills or buying groceries. Then, the agent notices that no one is looking over his shoulder, and he makes a small purchase, and then a larger purchase, that benefits the agent more than the parent. Eventually, the agent starts to use the power of attorney more and more-and all the money is gone by the time anyone finds out. This is what we call an "opportunist."

There are predators as well, who may be family members or caregivers who develop the relationship with the aging person with the intent and goal of taking advantage. Think of the typical Publishers' Clearing House type of scam, but tailored specifically to your loved one.

What can you do? Should you stop using powers of attorney altogether? No. Our best advice is to be smart and protective. ***Talk to the estate planner about how the power of attorney will be used and whether you can include protections for you and your family.*** The estate planner may resist this type of approach. After all, he or she likely has a "standard" form that is broad and covers both the expected and the unexpected situations. The planner may tell you that a power of attorney must be as flexible as possible. This is true to some extent, but not always.

For example, most powers of attorney authorize the agent to write checks, sell the family home, and make gifts. Why? Because this may be needed by the elderly person at some point. Or gifting may be needed to reduce tax exposure. But, this opens the door to potential abuse by opportunists.

So, talk to your estate planner to include (or, at least consider) protections in the power of attorney.

First, consider prohibiting gifting altogether by the agent holding your power. But if you need or want to include gifting authorization, consider the following:

- Limiting gifts "up to" a certain amount;
- Authorizing gifts only if given in equal amounts to all children or grandchildren;
- Requiring disclosure to the children (or a third party "protector" or advisor) prior to making the gift, perhaps with authorization to file an objection with a local court if they do not believe the gift is appropriate;
- Requesting approval of the gift by a majority of the children or heirs (or a

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third party "protector" or advisor); or
- Seeking approval by a court.

Second, consider similar restrictions on the agent's power to engage in loans, sales of assets, sale of the family home, business "deals" with the agent, business "deals" with immediate relatives, change of beneficiary designations, adding the agent to bank or brokerage accounts, adding the agent as joint or co-owner of any property, or any other substantial financial decision.

Let us give you an example. The power of attorney may authorize the agent to sell the family home, but only if the price is approved by a majority of the children, or only if disclosed to the spouse or a trusted friend with the authority to file an objection in court if the sale does not make sense.

Third, consider including in the power of attorney a requirement that the agent prepare an annual or periodic accounting of any actions taken as agent, to be provided to the principal or the children or a trusted advisor.

Perhaps the accounting obligation may only apply to substantial transactions (such as over $5,000 or some other amount). The obligation to prepare an accounting can be limited to only those years in which any actions were taken, or to start in the first year the power of attorney is used, or some other "trigger" event. In order for the accounting requirement to be effective, the agent should be required to maintain a computer accounting (such as Quicken) and keep all receipts.

In addition, ***someone other than the principal - such as a child or trusted advisor - needs to be authorized to enforce the accounting requirement if the agent fails to comply.*** Yes, sometimes trusted agents don't do what they're supposed to do, and in the absence of such authorization, the only person who can enforce the requirement is the principal, who may be too elderly or scared or lack the capacity to do anything.

You're probably thinking, "Can a conservator step in and force the agent to behave?" Good question! The answer is yes, but the court would first have to declare the principal to be legally incapacitated and appoint a conservator. This is called a "contractual standing provision." A contractual standing provision needs to be included in all protections used in a power of attorney.

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Finally, consider requiring the agent to tell the principal and his or her children or a trusted advisor (in writing) the first time and every other time the power of attorney is used. Or, at least, to whom the power of attorney has been presented (such as a bank, or a hospital, or a real estate broker, etc.)

Here's the deal. You (or your estate planner) may balk at some of the protections. But they are not that onerous and can protect you and your loved ones from predators and opportunists. In any event, you should at least talk about using some of the protections, even if you "opt in" or "opt out" on the planner's form document.

Tip #3. Keep in Mind that Your Choice of Fiduciary is One of Your Most Important Decisions

Who's a fiduciary? That's the person who administers the will (typically called an "executor" or "personal representative") or the one who manages the trust (called a "trustee") or the agent on a power of attorney. A fiduciary has certain legal duties to the principal (the person who appointed the fiduciary) and to the named beneficiaries. The fiduciary can be sued for breaching or violating his or her fiduciary duties, but for practical purposes, you or your loved one may not find out about misconduct until it is too late. ***So, the secret is to choose a good fiduciary.*** We mean it!

The problem is that it's not as easy as you might think. Whom should you choose? Your spouse? Your spouse and your oldest child? An accountant? A close friend? A bank or other professional fiduciary? And, then, who should be the successor if your first choice cannot serve or continue to serve? This becomes even more important as trust laws change and allow trusts to continue for multiple generations, and sometimes, for hundred of years. Ugh! Decisions, decisions.

Okay, here's what we have found. Choosing co-fiduciaries often leads to problems. Many people don't want to hurt anyone's feelings, so they choose their spouse and the oldest child (or some similar variation), sometimes thinking that they will counter-balance each other. It sounds great in theory. The problem with this approach is that, often unintentionally, the spouse and child (particularly when the child is from a previous marriage) often have different interests, and ***the tension between money "now" for the spouse versus money "later" for the children gets in the way.*** It's true even in situations where the spouse is the child's natural parent rather than a step-parent, where, of course the potential

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problems are magnified. You see where we're going with this?

There are people who would rather choose to "match" up the spouse or child with a trusted CPA or financial advisor, again thinking that they will counterbalance each other, or perhaps that this will "spare" the spouse or child hurt feelings, but the CPA will do all of the work.

Let's get this straight upfront! With both of these approaches, there is an inherent problem. ***Unless the document specifically provides otherwise, fiduciaries must act together unanimously.*** This means that every co-fiduciary has a practical veto over the other. If the co-fiduciaries cannot agree on a recommended course of action, there is an impasse, and nothing gets done.

In addition, spouses or children may be reluctant to object to the other's requests. The same can be said for CPAs, who generally are very good record-keepers, but not-so-good referees. Sorry, folks, that's just being honest. Said humorously, most people who become CPAs did not become CPAs because they like confrontation; in fact, they generally are just the opposite. It's generally not realistic to expect a CPA to serve as the "protector" with another family member as a co-fiduciary.

Finally, spouses or children may not be good with money (really, who knew?), and the other family member or CPA actually cannot be the "buffer" or otherwise fix this problem. ***Let's face it, if a family member is not responsible with money, he or she should not be appointed as a fiduciary, even if there is a co-fiduciary to "protect" the assets.*** This is particularly true where the family member is in financial need. Why give the family member the temptation, or, said differently, expose the family member to suspicion of misconduct or greed from other family members? You're just asking for trouble.

On the other hand, some folks are reluctant to appoint corporate or professional fiduciaries because they believe it will cost too much money and is unnecessary, and they don't want to hurt the feelings of their spouse or other family members. Yes, these are sometimes valid concerns. But, the cost of all the legal fees you'll run up in a future dispute could far exceed any fiduciary's compensation.

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The simple truth is that ***family members are usually not very good fiduciaries if the estate or trust is at all complicated,*** either by the mix of assets or by the complex nature of the family's dynamics. They often drop the ball and forget to file tax returns, or keep incomplete (or no) records, or do not understand what they are supposed to do, or any other number of scenarios. Professional fiduciaries usually do not have these problems. Besides, the statutory rates for fiduciaries are not as high as people assume. Fees vary from state to state, but in Georgia, executors get 3-5% of net assets with court approval, and trustees get compensated on a sliding scale based on the size of the trust (1% on initial funding of trust and annual fee of .50% to 1.75% based on the value of the trust, with the percentage dropping dramatically for trusts valued at over $1 million). This may be money well-spent, particularly when you consider that professional fiduciaries generally are more consistent with investment and returns than the typical individual fiduciary.

So, as a general rule, you'll be better off with professional fiduciaries if the estate (or the family) is in any way complicated, especially with estates in excess of $500,000.
If the estate is smaller, or you want to have a co-fiduciary in some capacity, consider some of the following protections.

First, make sure that your will or trust document includes adequate impasse resolution provisions. ***In other words, tell the fiduciaries (and your beneficiaries) how a dispute between co-fiduciaries will be resolved.*** This could include using a majority vote where there are an uneven number of co-fiduciaries. Or, you could authorize one or the other co-fiduciary to make the final decision based on subject matter, like the corporate fiduciary makes final decisions on investments, but the individual fiduciary makes the final decision on discretionary pay-outs. Another option is to designate a third-party "tie-breaker" when there is an impasse.

Second, you could implement many of the same protections suggested here regarding powers of attorney, such as thresholds or triggers for disclosure or approval by heirs or majority of heirs or independent third party for substantial decisions. Of course, as discussed in more detail below, ***requiring fair and timely accountings also would be extremely helpful*** in these types of situations.

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Regardless of your ultimate decision, think carefully and open-mindedly about who should serve as fiduciaries. ***Remember that your goal is to provide for your beneficiaries without burdening them.*** Families and their baggage are complicated enough. Throw into the mix the death of a loved one and an estate to divvy up, and it can be a prescription for disaster if you put the wrong people in charge of making the difficult, sometimes unpopular, decisions.

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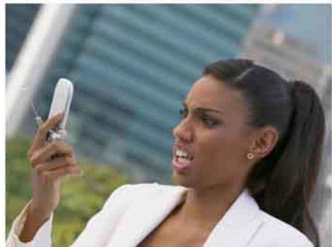
Tip #4. Don't Underestimate the Emotional Issues Tied to Personal Property



This may sound funny, but family members frequently fight more intensely about who gets the personal property than the money. We have handled many cases in which the money disputes were big, but resolved relatively quickly, only to find ourselves spending months or years fighting over cookbooks, or antique guns, or family pictures, or Dad's watch, or those Hummels. We can just hear you asking, "Is this for real?" Yes, it's real, and it happens all of the time.

When a parent or grandparent dies, many of us revert back to our childhood relationships with our brothers, sisters and other family members. The same sibling rivalries and hurts we experienced in our youth come back in full force. Feelings get hurt because one child gets too much, or all of the "good stuff," or what another child considers "special." Often, sentimental items are missing or already "taken" by another sibling or family friend (or caregiver). Whatever the reason, the simple truth is that we all want to get that "special" item from our loved ones, so that we can remember them and feel remembered by them. We know you can relate. We've all been there. Things that had little meaning or value before a parent dies often take on inflated significance after.

The practical problem, of course, is that it is difficult to plan in advance - oftentimes tens of years in advance - what we will have when we die. And then grandkids are born, and relationships change, you name it.

Many estate planners suggest not including a large number of specific bequests in a will or trust, which will have to be updated repeatedly with codicils as the situation changes. Instead, these planners suggest using what is called a "non-binding memorandum" in the will or trust. What this means is that ***you***

provide a default provision in the will or trust - something like "all of my personal property will be split among my spouse and children equally" - but then say you may leave a memorandum or list that you are asking your legal representative to follow after you die. Basically, the memo does not have to be signed with the same formality as a will or trust. And, you say in your will or trust that if the legal representative follows the list, a disgruntled family member or beneficiary cannot sue him or her.

Frankly, these work pretty well. Just remember to prepare and sign the memo, and also to update the memo periodically. And, of course, sometimes the memo gets "lost" before the will is probated, either because you did not keep it with the will or because an unhappy family member discarded the memo. Keep this in mind: unlike a will, where the estate planner may retain a copy, with a memo, there may be no one who knows about it but you. Still, all in all, this is a good approach that can help avoid future disputes. Here are a few suggestions that may help.

First, only keep the current memo with your will, and throw away the old ones. This way, no one will be "hurt" by the changes.

Second, consider sending a copy of the memo to your lawyer or the executor or trustee or a family member or friend who does not get anything, and tell them that this is what you want unless you write and tell them otherwise.

Here's a more basic approach we often suggest. Since we often downsize as we get older, give away some of your personal property while you are alive, assuming you are ready to part with it. ***Nobody says you have to wait until you die to give things away.*** Talk to your children, grandchildren, and loved ones and find out what is important to them. You'll be surprised. Think about the memories and family history or stories you want to pass on. We guarantee you'll enjoy the feeling of giving something special to someone you love and knowing that he or she actually received it. Watch them cherish the gift of things you found special while you are still living!

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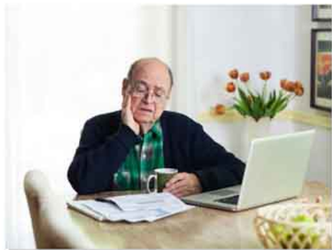
Tip #5. Be Particularly Careful Regarding Title to Property



Do you know how your property is titled? Most people don't. As a general rule, folks tend to think that their last will and testament (or a trust, if they have signed one) will govern how their property will be distributed upon their death. This is often correct, but only if they owned the property at their death. Just like we discussed earlier in connection with joint bank accounts, if real estate or other property is owned jointly (with right of survivorship), then the property will pass to the "joint" owner at your family member's death, and the will or trust will have absolutely no effect. Surprise!

This happens more often than you think. Many married couples title their home in the names of both spouses, jointly with right of survivorship. It's the same with investment property and vacation homes. Don't get us wrong - it's totally okay if this is what you really want. Just remember that homes often are one of the largest assets anybody owns. Then, the will may end up giving property disproportionately to what you intended.

One more thing. Often, when one gets separated or divorced, he or she forgets to change the title to property timely. This happens on insurance policies and 401(k) accounts with regular frequency. The result is that the divorced spouse gets the account at death.

Let's talk about some real problems here. Perhaps the biggest potential problems involve 401(k), brokerage, and IRA accounts. Spouses are often listed as the co-owner or beneficiary, which is required on a 401(k) account, unless the spouse signs a special form giving up his or her interest. This may be what both spouses want, unless there is a divorce or separation. But, these accounts often include a blank for successor or remainder beneficiaries. In other words, they ask the account

holder to identify who will get the account if a spouse does not survive the account holder.

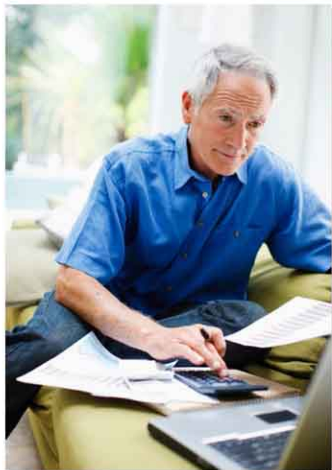
In that event, the account designation controls - this happens on life insurance policies as well - and the last will and testament or trust do not do anything. What's the end result? Well, ultimately, you or your family member may have spent days or weeks agonizing over the will or trust, and then spent hours with an attorney fine-tuning the will or trust, all to no avail - and all because the majority of property gets distributed outside of the will or trust. How does this sound? Not good, we know.

We see this happen all of the time. There are numerous estates where the majority of the decedent's property gets distributed pursuant to not-so-well-thought-out joint title documents, where the well-thought-out will or trust basically gets ignored. And it gets ignored NOT because the will isn't clear. It gets ignored because the property never passes through the estate in the first place.

So, what should you do? Talk to your estate planner about jointly titled property. Show the planner the ownership documents; do not trust your memory (yes, we have found it's often mistaken). And think about how you want your property distributed. Many family members leave monetary gifts in their wills and trusts for family members or charities that never end up getting funded because there is no money left in the estate. Also, most wills and trusts provide that the estate and income taxes of the decedent, if any, will be paid from the estate, not the joint property. This can further deplete estate property and leave beneficiaries unintentionally empty-handed.

Think about who owns your property. Review the legal title to your property before you go see the estate planner. And make sure that your will and trusts, as well as your joint accounts and beneficiaries on key accounts and insurance, are titled properly.

Tip #6. Ensure Fair and Transparent Accountings to Minimize Lawsuits



You may already be aware that there has long been a trend among estate planners to waive accounting requirements in their form wills and trusts. This is generally done to avoid expenses in administration. It also may be done to protect the fiduciary from frivolous lawsuits. Here's the general thinking. The client has chosen a fiduciary that he or she trusts; therefore, why impose any burden on the fiduciary? It also avoids public scrutiny. And, many people do not want their beneficiaries to know how much money they will be getting in the future, or in other words, they want their children to be responsible and self-reliant and avoid becoming "trust babies." You can probably guess the reasoning behind it.

Many people, including us lawyers, misconstrue waiver of accounting provisions. Typically, the waiver of accounting is limited to accounting to the court, but the fiduciary misreads the provision and thinks it applies to beneficiaries as well. But, even where the accounting waiver applies to beneficiaries, think twice before including the waiver. Why?

First, the single biggest red flag that causes lawsuits against fiduciaries is the fiduciary's refusal to tell the beneficiaries what is happening. When the fiduciary stonewalls (or hides behind the waiver provision), the beneficiaries assume the fiduciary has something to hide, even if he or she did nothing wrong.

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Second, without an accounting requirement, fiduciaries often fail to keep accurate or contemporaneous records. Thus, even when there is a legitimate question that should have been easily answered, the lack of good (or any) record-keeping causes a problem.

Third, when there is no one monitoring a fiduciary's conduct, it opens the door to misconduct. In other words, the "opportunist" may begin to take advantage of the opportunity or become arrogant in his or her decisions because "no one will know."

Our best advice for you is this: absent a good reason not to, include an annual accounting requirement in your wills and trusts. Concerned about premature disclosure to young family members? Provide that the accounting go to a trusted aunt or uncle or family friend. At least someone will be monitoring the fiduciary's conduct. At a minimum, even if you decide to waive an accounting requirement, consider requiring the fiduciary to maintain contemporaneous records (on Quicken or the equivalent) and keep all receipts.

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Tip #7. Include Protections for Important Decisions by Your Trustee

We already covered protective provisions for powers of attorney that discourage opportunists and predators from preying on your loved ones when they are most vulnerable. Let's discuss similar protective provisions in your trusts.

First, consider requiring advance approval or notice to beneficiaries or a trusted friend for:

- Sales of assets greater than a certain amount, or
- Sales of personal residences, or
- Sales of significant business interests, or
- Big business "deals," or
- Changes in title to real property, etc.

Second, consider requiring advance approval or disclosure of gifts or transfers to family members:

- Based on threshold or trigger amounts or percentages, or
- When the gifts or transfer to children or beneficiaries are not equal,
- When the gift or transfer reduces the value of the trust below a certain amount, or
- When there are more than one or a certain number of gifts or transfers in a single year or time period.

These may not be needed in every case. But, they are not onerous, and the problem is ***you don't know when you or your loved one will need the***

protections. We all want to trust our spouses, family members, and fiduciaries, but it is sometimes hard to predict the "bad apple." We have friends whose family members have disappointed them, and the bad apple was not always the person we predicted. ***You never want to put yourself or a loved one in the position of vulnerability.*** Why tempt an opportunist? Why ask yourself or a loved one to confront a fiduciary who is exerting more and more control, either in good or bad faith? It makes no sense, right?

So, why not use fair, protective provisions to make sure that your money goes to the person you love, and that also makes sure that you and your loved one is not pressured or scared to act? Do it!

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Tip #8. Be Wary of Giving "Absolute Discretion" and Liability Waivers

It's common today to include "absolute discretion" type language in many trusts and wills. The rationale is that it will protect the fiduciary from future liability claims by "greedy" beneficiaries, and since you would not have chosen the fiduciary if you did not trust him or her, why not allow them to use their judgment to make decisions taking into account whatever circumstances have changed in the years since the document was drafted?

The problem is that fiduciaries change over time, especially with trusts that may last for decades (or even centuries), which is more and more common. In addition, these provisions often embolden fiduciaries to make bad (or self-centered) decisions because they believe they are totally insulated - they feel that they have unfettered authority, even though Georgia (and most other states) prohibit a fiduciary from acting in bad faith or with gross negligence. In other words, no matter what a trust says, a fiduciary will still be liable for intentional or reckless misconduct, but fiduciaries with "absolute discretion" do not realize there aren't any limits on their decision-making.

This leaves the beneficiaries without any effective remedy for a fiduciary's misconduct, because the beneficiary also thinks "absolute discretion" means just that, absolute discretion. ***Now ask yourself, "What is the purpose of a trust or will?" The most basic purpose is to manage and transfer property according to the grantor's wishes. Everything else - like tax planning or creditor protection - is secondary.*** So, why would you want a will or trust that did not provide a practical remedy to ensure that the executor or trustee does what he or she is supposed to do and follows the wishes of the grantor? Many estate planning attorneys seem to worry more about protecting the fiduciary than protecting the beneficiaries who are the natural objects of their client's love.

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We are not big fans of absolute waiver of liability provisions. Instead, we recommend:

- Giving your fiduciary clear direction as to what you want him or her to do, and
- Requiring the fiduciary to provide timely and accurate information to the beneficiaries.

These two things will help avoid more lawsuits than any "absolute discretion" clause. But, ***in the event that the fiduciary does act badly, you have made sure that the beneficiary can complain and get the problem fixed without fear of being punished by the fiduciary that has discretion over how much money they might receive from a trust.*** As a practical matter, just leaving this option open will discourage the fiduciary from being "tempted" to take advantage of the situation.

Tip #9. Plan More for Income Tax Issues Rather than Estate Tax Issues

Most estate planners include a lot of "form" (or "boilerplate") language in their wills and trusts. No problem with that. They don't need to recreate the wheel on every technical provision that in all likelihood will be the same in many documents. But, these forms were created to cover the "what ifs" in all situations, including complex and large estates. Most will and trust forms include numerous provisions to try to avoid estate, gift, and transfer taxes, sometimes called "death taxes."

One way to avoid or reduce estate, gift, and transfer taxes is to try to reduce the value of assets as much as possible and to give gifts during one's lifetime that do not trigger an estate or gift tax. Remember, the tax rate for such transfers is substantially higher than normal capital gain or income taxes. There's a problem with this approach - 99.8% of all estates will never have to pay an estate or gift tax. ***As we already mentioned, the current exemption for estate, gift, and generation-skipping taxes is $5.34 million.*** What this means is that if you die with less than $5.34 million of assets, you will pay no estate, gift, or generation-skipping tax. In addition, there are new rules - called "portability" - that allow spouses to "share" the exemption amount, which means that couples may not have to pay any tax, unless they together have assets greater than $10.68 million.

If you are not likely to have an estate or gift tax problem, you want the value of your assets to be as high as possible, so that when you or your beneficiaries sell the property, the capital gain (the "profit" on the sale) is smaller, and thus, your tax is smaller.

What this means to you is that you need to talk to your estate planner about the value of your assets. If your assets are below the amounts listed above, then you want your planner to try to maximize tax values. And, you want your estate

planner to focus on tax planning techniques that consider income taxes more than estate taxes. In other words, your estate planner may need to change or update their forms to consider tax issues he or she has not considered before.

Also talk to your estate planner about giving up some of the flexibility in their forms - included primarily to avoid or minimize estate and gift taxes - in exchange for more control of your estate. For example, many forms allow for spouses to change who the beneficiaries are (called a power of appointment) or make gifts or other tax elections. You may want more say in what happens to your assets if you do not have to consider estate and gift tax issues. ***You also may not want to put your spouse or other loved ones in a position where they have to choose between your children or taxes.***

Our best advice is to ask your estate planner about your tax exposure and insist that he or she focuses on the right tax issues for you. Yes, your situation is unique, so insist that your planner consider your unique situation. After all, isn't this the very reason you went to an estate planner in the first place? ***If your estate is large, you need to focus on estate and gift taxes and, perhaps, future flexibility. But if your estate is not likely to pay an estate or gift tax, then you want your estate planner to think most about reducing income and capital gains taxes.*** And you want your estate planner to give you the most control over what will happen with your assets when you die.

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Tip #10. Disclose, Disclose, Disclose

Did we say "disclose" yet? Disclose! Folks ask us all the time, "What is the most common problem you encounter as trust and estate litigators?" The answer is simple. People get suspicious about what they do not know. And no one likes surprises. It's that common fear of the unknown.

Parents often are hesitant to tell their children - even their adult children - how much money they have or what they want to do with their money when they die. This concern can be addressed by providing general information or increasing the information flow as the years pass by, at least initially, giving the information to a trusted uncle or aunt or family friend. But, like it or not, many children believe that getting an inheritance is a right, not an option.

In our country today life expectancies are getting longer. In the 1930's, a newborn had a life expectancy of 60. Now, a newborn has a life expectancy of 85 or more. And, the longer you live, the longer your life expectancy. Why is that? Because you have already outlived the children and adults who died at younger ages - in other words, you already beat the odds. The result, of course, is that ***you will spend more of your money during retirement and old age than was true in the past. And, there will be less left over for your children and grandchildren.*** To make matters worse, your children may have expected an inheritance sooner than today's reality, but they may be in their 50's and 60's before you die and they see anything. Of course, you may decide to skip over your children altogether and leave your money to your grandchildren or charity.

All of this creates great fodder for discontent and resentment. Solution? Disclosure and communication. ***Lots of communication with your family about your assets, what your loved ones can expect, possible disproportionate allocation of gifts, any restrictions they might be surprised by later, charitable desires, etc. No***

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matter how difficult you may find it to be, keeping your children in the dark is worse. If you are uncomfortable discussing these types of issues, ask your estate planner to assist in a family meeting or the drafting of a family letter. There is nothing worse for a beneficiary than an unpleasant surprise. It's like a hand reaching out from the grave and slapping him or her across the face.

Advance disclosures empower the beneficiary to make plans for his or her family. It also frees you to decide for yourself how you want to spend your money, in retirement and after. Besides, advance disclosure reduces the likelihood of confusion and mistrust. And that reduces the likelihood of future litigation.

ON-THE-GO QUICK SUMMARY OF THIS EBOOK

So, what have you learned? Family disputes about wills and trust can and do happen. And, they are on the rise. But there are ways we can minimize the likelihood of future lawsuits, and there are ways we can minimize the likelihood of success if a lawsuit is filed.

We have set out in this eBook ten tips you and your family members can implement to protect yourselves when you age and are most vulnerable.

Tip #1. *Do not open joint bank accounts.* Instead, insist on "Power of Attorney" (POA) accounts, where the joint account holder can help the aging person manage his or her money, but the money goes to loved ones when the aging person dies.

Tip #2. *Include common-sense protections in your powers of attorney so that the agent does not waste or misuse your money.* Consider requiring approvals for key decisions. Think about requiring periodic accountings. And empower loved ones to enforce the terms of the power of attorney if the agent does not act properly. Remember, without these protections, the only person who can enforce the terms of a power of attorney is the grantor - who is aging and most vulnerable when a power of attorney is used.

Tip #3. *Keep in mind that your choice of fiduciary is one of your most important decisions.* It is very difficult for spouses and children (or a CPA) to act together as co-executors or co-trustees. They often have competing interests, especially when having to decide about "money spent now" versus "saving for the future." As a general rule, people name co-fiduciaries so there are some checks and balances. But, unless the document says otherwise, co-fiduciaries have to act unanimously. The result is that each co-fiduciary has an effective "veto." So, if you still want co-fiduciaries, consider including impasse solutions. Try not to require one family member to say "no" to another family member. Also, consider professional fiduciaries. They are less expensive than you think, and they cost less than a future lawsuit will cost.

Tip #4. ***Don't underestimate the emotional issues tied to personal property.*** Family members equate your "things" with love and self-worth. Consider using a non-binding memo that sets out in detail how you want your personal property to be distributed at death. These memos can be updated throughout your life as circumstances change. Or, better yet, give away your "special" items while you are alive. Let your loved ones know that you think they are special, and enjoy watching them receive the gifts.

Tip #5. ***Be particularly careful regarding title to property.*** People often do not realize how their property is titled, whether it be the family home or the bank account or brokerage account. And, they often forget that financial accounts and life insurance have beneficiary designations that will transfer the property at death outside of their wills and trusts. Show your estate planner the title to your property. Show your estate planner your beneficiary designations. And, consider these issues when you draft your wills and trusts, so that your estate is distributed at your death exactly the way you want.

Tip #6. ***Make sure that your wills and trusts include fair and frequent accountings.*** This avoids surprises. And, it discourages "opportunists" from taking advantage of you and your loved ones.

Tip #7. ***Include protections for important decisions by Your trustee.*** You don't want to be the victim of predators and opportunists when you are most vulnerable. So, include common-sense provisions in your trusts, such as requiring approvals of sales of property, gifting, and "bid" decisions. Require notice to beneficiaries of key distributions and key decisions. Don't waive accounting requirements.

Tip #8. ***Be wary of giving "absolute discretion" and liability waivers in your wills and trusts.*** It's okay to trust your executors and trustees, but remember, they may serve as fiduciaries for long periods of time, they may be replaced by successors whom you do not trust as much, and you do not want to encourage bad acts. A fiduciary may be tempted to make poor decisions if he or she believes there is no one watching what is happening.

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Tip #9. ***Unless your estate is greater than $5 million, plan more for income tax issues rather than estate tax issues.*** Often, the forms used by our estate planners include provisions in which estate values are minimized to avoid estate, gift, and generation-skipping taxes. And, the forms include maximum flexibility for the "what ifs" relating to these taxes. This may make sense if you have a large and complex estate, but 99.8% of us do not have these types of estates. So, you should be doing income tax planning, which means maximizing asset values to reduce capital gain and income taxes in the future. And, you should be less concerned with flexibility and more concerned with controlling how your property is distributed when you die.

Tip #10. ***Remember that your loved ones do not want to be surprised or disappointed.*** The best way to avoid the unwanted surprise is to tell your loved ones what is going to happen long before it happens. In other words, disclose early and often. If you are uncomfortable talking about these issues, consider talking with your estate planner about setting up a family meeting or drafting a letter for you. The information can be tailored or limited to the maturity level and age of your family members, giving more information as your family members mature, and, sometimes, using a surrogate (like a trusted uncle or financial advisor) for the financial information. But, if your loved ones expect a large inheritance, or do not understand that you are giving money to charity, or do not know that you have decided to treat them differently than they expect, surprises will never be good.

We hope you enjoyed this eBook. Was this information helpful? Please let us know by sharing your thoughts on:

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ABOUT GASLOWITZ FRANKEL LLC

For over twenty-five years, the lawyers at Gaslowitz Frankel LLC have successfully represented thousands of families and fiduciaries when faced with trust and will disputes. We understand only too well, however, that most of these disputes can be avoided, or at least minimized, with transparency and thoughtful protective provisions. It's important to remember that much of the damage that comes from an estate or trust dispute comes not from the potential for losing. Rather, it comes from the dispute itself - the legal costs, the destruction of family relationships, the waste of family assets, and the enormous emotional toll that being embroiled in litigation can have on a person.

Please do not hesitate to contact us if you have a dispute regarding a will, trust, estate, or power of attorney. Please also do not hesitate to have frank and open conversations with your estate planner. Perhaps then you will never need to call us in the first place.

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