HULL ESTATE MEDIATION INC.

Protecting your estate from legal challenges

How a pre-estate family conference can preserve family harmony and protect your estate plan

It only takes one dissatisfied beneficiary to start estate litigation. That's what the pre-estate family conference is designed to prevent.

When preparing your estate plan, you want to leave your family with a legacy they all accept, rather than a costly dispute that will erode the value of your estate and may permanently divide your family members.

Traditional estate planning focuses on developing a comprehensive estate plan, including a will disposing of your assets. While this is important, it does nothing to prevent unhappy family members from bringing a legal action to challenge that will — and it takes only one dissatisfied beneficiary to start litigation and drain the value of your estate.

Enter the professionally-mediated family conference.
A family conference gives you the opportunity to explain your wishes to family members and describe how you intend to dispose of your estate. It provides a forum for discussion that ensures both you and your intended beneficiaries are comfortable with your proposed dispositions.

It also allows you to address the emotional issues that may arise around your will, and if necessary, make changes to your estate plan so that everyone is satisfied.

This guide provides an overview of the steps you can take to protect your estate plan, and explains how the pre-estate family conference can play an integral role in the estate planning process.

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Protecting your estate from challenges

Your will is the cornerstone of your estate plan. One of the best ways of protecting your estate from challenges is ensuring your will is professionally drafted and distributes your assets to the people you intend. Here are a few steps you can take during your lifetime to reduce the likelihood of a successful challenge to your will.

- **Have proof of your mental capacity.** A will is invalid if you didn't have the mental capacity to sign it when the will was made. Ask your lawyer or your doctor to take detailed notes on your mental capacity and your ability to provide and understand instructions at the time.
- **Guard against claims of undue influence.** Your will can be challenged on the basis that someone has forced you to sign a document that does not reflect your real intentions. If you are elderly, unhealthy, frail or highly dependent on one person when you make your will, have your lawyer and doctor prepare detailed notes on your mental condition at the time.
- **Ensure your will is properly executed.** Your will can be challenged if it is not properly executed. Your lawyer will ensure that it is properly witnessed and that the witnesses sign the necessary affidavits. Any changes you later make to your will must also be properly signed and witnessed.
- **Document any gifts you make during your lifetime.** If you make large gifts during your lifetime, make sure that the appropriate legal documents are prepared and that your lawyer makes notes as to your mental capacity. This is particularly important if you are making unequal gifts – for example, if you give money to only one of your children.
- **Draft your will to protect against challenges.** Careful will drafting can help reduce challenges to your estate. For example, your will can contain a clause providing that if a beneficiary challenges your will, they will lose their right to receive anything from your estate. Or you can have your beneficiaries sign a contract not to challenge your will.

The high costs of estate litigation

Protecting your estate from challenges becomes even more important when you consider the financial and emotional costs involved in defending an estate during the litigation process. People generally focus on the fees and disbursements they pay to their lawyer, but the emotional costs of litigation can leave family members permanently estranged.

Traditionally, the estate was ordered to pay the costs of all of the parties involved in litigation, regardless of who was successful. However, in recent years, courts have moved away from this approach and are focusing on the success the parties achieve in the litigation. This can mean that parties may have to bear their own costs, or that someone who unsuccessfully challenges a will may be ordered to pay the estate's costs.

There are several stages in estate litigation, and your costs climb as you move through each stage. Those stages and their approximate costs are:

Obtaining an order organizing the litigation	$5,000 to $10,000
Collecting and disclosing evidence to establish your case	$2,000 to $20,000
Attending discoveries to give sworn evidence	$10,000 and up, plus the costs of preparing the transcripts ($2.00 to $3.50 a page, with an approximate length of 200 pages)
Preparing for and attending a pre-trial conference	$3,000 to $7,500
Preparing for and attending at trial	$15,000 to $30,000 a day for trial plus fees for preparation time
Appeal of court's decision	$40,000 and up

Mediation

Mediation is a non-binding process in which people attempt to reach an agreement on the issues between them with the help of a trained mediator. Mediation is far less costly than the court process (overall mediation costs generally range from $7,500 to $25,000) and allows people to reach an agreement themselves rather than have a decision imposed on them by a judge. The downside is that if mediation is unsuccessful, you'll have to pay both the mediation costs and the litigation costs, which will add to your financial burden.

Most frequent causes of estate litigation

Even if you have a comprehensive estate plan and you've taken all the necessary steps to bulletproof your will, you may still find yourself the subject of litigation. Here are some of the most frequent causes of estate challenges:

- **Lack of a comprehensive estate plan.**
  It's important that your estate plan covers all of your assets and that it's kept up-to-date, so that it reflects any changes in your personal circumstances or intentions.
- **Inadequate estate planning advice.**
  Make sure you have advice from estate planning professionals (lawyers, accountants, financial planners or insurance professionals) about your estate plan. Obtaining professional advice also reduces the likelihood of poorly drafted documents that may create confusion about your true intentions.
- **Acrimonious family members.**
  If your family members are acrimonious and are likely to challenge your wishes, make sure your estate plan is as enforceable as possible. Keep in mind that if an estate dispute starts, family members may adopt positions that are completely unreasonable and be resistant to all rational advice.
- **Actions of your personal representatives.**
  The executors and trustees that you appoint must behave in a scrupulously fair manner towards all family members. Make sure you are selecting individuals who will be able to set aside any pre-existing feelings they may have about your estate or the beneficiaries and will be able to establish good relationships with your family members.

The family conference solution

You can protect your family from the high costs of estate challenges by using a family conference to solve disputes before they become litigious. With the family conference mediator's help, you can use the conference to tell family members about your estate plan and obtain their approval of that plan.

Before the family conference

There are a number of steps you need to take before the family conference takes place to ensure that it runs smoothly, including determining who to invite. In general, you should invite all of the adult members of your family who may be affected by your estate plan. At a minimum, your spouse and children should attend.

You also need to decide where to hold the meeting. A neutral location such as the mediator's office is usually the best choice.

You should prepare an agenda before the meeting to ensure that all of the issues you want addressed are raised. The mediator will work with you and your lawyer to prepare the agenda and become familiar with your estate plan and any issues that are likely to be contentious.

At the conference

The meeting will generally start with the mediator explaining their role to the family members and outlining the rules governing the meeting. Typically, the mediator asks family members to sign two agreements at the beginning of the meeting:

- The Family Conference Agreement, which emphasizes the neutral role of the mediator and the confidential nature of the meeting. It also provides that the mediator cannot be subpoenaed or required to give evidence about the family conference.
- The rules for the family conference, which are designed to promote an atmosphere of mutual respect and courtesy.

The meeting should start with the mediator outlining the family conference process and providing a brief outline of your proposed estate plan. You, and possibly your spouse, will also provide brief opening statements, which reiterate your goals for the family conference. Your lawyer will then provide a detailed explanation of your estate plan and answer questions that your family members may have.

Once your family members have been fully informed of the details of your estate plan, they can be split into smaller groups or caucuses where they can openly discuss their concerns. The mediator will move between the caucuses and the parents to determine what issues are dividing the family. The mediator will promote negotiation on these issues and suggest possible ways of resolving them.

The goal of the family conference is to have all family members sign a Family Constitution approving the estate plan and agreeing not to contest the will. If the meeting goes well, this can happen in a single session. In some cases, subsequent meetings will need to be held.

Need for full disclosure

If the family conference is to succeed, it is essential that you fully disclose the details of your estate plan to your family members. If you fail to do so, you will create an atmosphere of mistrust that will poison the process. In addition, if after your death your family members discover that you did not fully disclose the details of your estate plan, they are more likely to challenge your will.

There are a number of sensitive topics that may be difficult to discuss with your family members, including unequal treatment of your children, spendthrift beneficiaries, and succession issues with respect to your family business. The mediator can help you plan the best way to address these topics with your family.

What if some family members won't attend?

Some family members may refuse to attend the family conference. If that occurs, the rest of the family should still meet so that you can obtain their agreement to your proposed estate plan. Once the Family Constitution is signed, the mediator can then send it to the non-participating family members and invite them to sign it.

In some cases, all of your family members may attend the family conference, but some family members may refuse to approve your proposed estate plan. If that happens, you may want to amend your estate plan to satisfy as many of their concerns as possible without sacrificing your personal goals. Make sure that all of your family members receive a copy of the Family Constitution, even if they won't sign it.

Even if some family members won't sign the Family Constitution, it is likely that a court will consider the process favourably if your will is challenged. It will also be difficult for those family members to argue that you lacked testamentary capacity or were unduly influenced, because your lawyer will have comprehensive notes about the family conference. In addition, circulating the Family Constitution to all of your family members shows your clear intentions as to how you want your assets divided.

In the end, whether or not all family members participate in the process or agree with the result, holding a family conference and developing a Family Constitution are key steps in protecting your estate from litigation.

After the conference

Once the Family Constitution is signed, your lawyer and other professional advisors will prepare the necessary documents, including wills, trusts, powers of attorney and deeds of gift, to implement your estate plan. Once that is done, you'll need to be diligent in reviewing your estate plan regularly to make sure it still reflects your wishes. You should review your estate plan immediately if you have any major changes in your personal circumstances, and you should review it every few years if no such changes occur. If you make substantial changes to your estate plan, you'll need to hold another family conference.

For more information

For more information on the family conference process, or to make a confidential appointment to discuss how a family conference can help you, please contact:

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