

# RISK ASSESSMENT IN ESTATE PLANNING

## ARE YOU AT HIGH RISK OF HAVING CONFLICT AMONGST YOUR LOVED ONES?

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Families today come in all shapes and sizes. There are blended families with step-parents and stepchildren. There are elderly parents who need constant care. Children may live close by or across the country. People may never marry, staying single or simply cohabitating. These types of families may work while you are alive, but due to various reasons, they can be breeding grounds for conflict after you pass away.

Estate planners have been adjusting accordingly. As the specter of estate taxes dims for most (the exemption is now \$11.2 million), estate planners can focus their attention on other areas, such as minimizing family conflict. At a recent national semi-

nar on estate planning, 44% of the attendees surveyed stated that family conflict was currently their biggest concern.

### **RISK CAN BE LOW, MEDIUM, OR HIGH AND IS HIGHLY DEPENDENT ON THE NUMBER OF CATEGORIES OF HEIRS, HOW DISPARATE THOSE CATEGORIES ARE, AND THE NUMBER OF HEIRS.**

Before you can minimize conflict, you must first assess the risk of potential conflict and whether it is low, medium, or high. Medium risk is hard to define; it is much easier to classify someone as low or high-risk. A low-risk individual generally has one or two natural heirs who do not have dis-

parate interests. A high-risk individual will have two or more natural heirs who do have disparate interests.

To do this, your first step is to determine the potential heirs and then categorize those who are similarly situated. A man with a wife and two children would have three potential heirs and two categories: spouse and children. The risk of conflict increases when there is more than one category of heirs. The disparity or conflicting interests of these categories is also important. For instance, joint children are likely okay with the spouse, i.e., their parent, receiving all of the assets. The same may not be true when your children are not also



your spouse's children.

The second assessment is the number of heirs. More heirs create a greater chance of unhappiness and discontent. This is true even if the estate plan treats all heirs equally. Siblings can hold grudges for years against one another and these grudges can create distrust. Personal property is also a battleground for dispute amongst heirs. Moreover, value may not be most important in these battles, but instead the idea of not getting "cheated" rules. For example, I was once involved in a case that arose because someone poured out a bottle of Jack Daniel's. That case was not about value, but rather for reasons that are more personal.

Building on that, the conflict arising from love of a parent can occur while the parent is alive. A new issue confronting estate planners is custody battles over the parent. Because a person may live for years in a reduced mental or physical state, someone has to care for them. This has led to an increase in children battling over the parent similarly to how divorcing parents battle over a child. Topping the list are disputes regarding whether to place the parent in a nursing home and whether one child is trying to take the money.

**OBJECTIVE OBSERVATIONS OF HEIRS CAN PREDICT CONFLICT, SUCH AS IF THEY ARE ESTRANGED, HAVE CONFLICT WITH THIRD PARTIES, ARE MINORS, OR ARE DISTANT RELATIONS.**

The third risk assessment is consideration of the individual heirs themselves. This can be subjective by considering how likely you think it is that the heirs will cause conflict. Oftentimes, this is a waste of time because an individual can have a hard time truly discerning the potential for conflict due to rose-colored glasses. Instead, objective standards can be more useful, especially for identifying high-risk estates. For instance, do you have an estranged child? Such a child would be more likely to create conflict.

Third parties also provide objective standards for evaluation of heirs. Medicaid and SSI are both needs-based government programs. Therefore, an heir receiving those benefits, such as a special needs child, will come into conflict with the government if the child receives an inheritance. One more example is an heir with creditor problems because a creditor could come after the heir's inheritance.

Age should also be considered. Leaving assets to a minor may create unforeseen problems, such as the sale or use of those assets. An additional problem is

having someone manage the money on behalf of the minors. If you are a single parent, then that person may be the children's other parent, which can be a frightening thought.

This article has focused on spouses and children thus far, but another source of conflict is if you do not have a spouse, children, or parents. Normally in that situation, your estate would pass to your siblings. Then, if your siblings predecease you, it passes to their children. This can increase the number of heirs quickly and create disparate categories of heirs. I have had estates with thirty-plus heirs, many of whom do not know one another. With that many heirs, the potential for conflict is always high.

In summary, to assess your risk for conflict, you need to consider the number of heirs, the categories of heirs, how distinct such categories are, how closely related those heirs are to you and one another, your relationship with the heirs, and whether the heirs have potential third-party conflicts. In my opinion, low risk is limited to those situations in which the assets are left to one or two similarly situated individuals. High risk includes any situation in which two or more disparate groups exist. High risk also includes the situations in which conflict is nearly guaranteed, such as with special needs individuals, heirs with creditor problems, or minor heirs.

**RISK CAN BE MANAGED THROUGH PROPER PLANNING BY UTILIZING A LAST WILL AND TESTAMENT, POWERS OF ATTORNEY, AND TRUSTS.**

Fortunately, if you assess your risk as high, you can manage that risk by creating three or four basic documents. First, your last will and testament will allow you to designate your heirs, thus eliminating additional or categories of heirs. Second, your durable power of attorney will designate an individual to manage your financial affairs if you are incapacitated. Third, in the same manner, your medical power of attorney will designate an individual to make medical decisions for you when you cannot. Finally, a living will sets forth your advanced directives regarding life-saving or prolonging measures.

These four documents in their basic form can prevent or lessen conflict. The basic form documents can be prepared by most attorneys or through various websites. However, prudent individuals who assess themselves as having a high risk of conflict should seek out legal assistance to help them create better documents. Case in point, because personal property is often a source of conflict, the last will and testa-

ment can include provisions for the division of that property. Such a provision may be as simple as directing the beneficiaries to draw straws and then pick an item one at a time. As silly as it sounds, I have had beneficiaries become angry about the disposal of food. Because of this, my standard will now has a provision in it allowing the estate representative to throw away or donate the deceased's food. Perhaps that would have prevented the Jack Daniel's dispute. The goal with provisions is to take away decisions from the beneficiaries: fewer decisions lead to fewer arguments.

Your powers of attorney can protect you from the conflict over your person while you are alive as well. For example, you can direct that home health aides should be hired or you should be placed in a nursing facility in certain situations, such as if you can no longer bathe yourself. In conjunction with such a directive, you can require your durable power of attorney to pay these bills as opposed to trying to save money. These types of provisions require careful thought but are important to reduce potential conflict.

Finally, your estate plan can include other documents or provisions to reduce the risk of conflict with third parties. For the heir receiving Medicaid or SSI, you can designate that the heir's inheritance passes to a special-needs trust. For a minor child or debt-riddled beneficiary, you can direct the minor's inheritance to pass to a more traditional trust. In all three cases, a third-party, the trustee, manages the money on behalf of the heir.

Right or wrong, families fight. They can fight even more when money or property is involved or when they have a venue in which they can wage their fight. By assessing the potential for conflict, you can take steps to prevent your heirs from engaging in these types of fights. We have all heard someone say, "Mom would be rolling over in her grave right now." Fortunately, by assessing certain objective standards, an individual can prevent him or herself from being the subject of such statement.



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