

The Challenges of Our Aging Population: Resolving Disputes Between Aging Parents and Their Families

By Myer J. Sankary

WITH A GROWING AGING population and increased individual longevity, aging adults and their families will face many new uncertain and complex challenges in the years to come. Lawyers will need to be better equipped to understand their aging clients in order to give sound advice about planning not only for their retirement but also for the challenges of longer life and the changing role of their families. It is inevitable that these conditions will produce more conflict but with careful planning, conflict can be minimized. This article addresses problems aging parents often encounter with their offspring, in-laws and other relatives and offers suggestions about dealing with these predictable disputes.¹

Conflict Hot Spots

As parents age, conflict can arise in the following areas:

- Finances (who controls it, who bears the caregiving costs, etc.)
- Health (medical decisions, hygiene and end-of-life choices)
- Property (inheritance, conservatorship, sale of the parent's properties)
- Independence and safety (e.g., taking away the car keys)
- Living arrangements or caregiving (one sibling shouldering the burden or being controlling).²

Other issues that can lead to conflicts include the presence of multiple decision-makers, conflicting personalities, economic and geographic disparities among siblings, old

“baggage” and personal commitments. As these issues play out, siblings watch a cherished parent decline or deal with their loss.³

Asset Appreciation and Sibling Rivalry

Over the years family wealth can increase significantly (particularly in the value of the family residence that was bought many years ago for less than \$100,000 and is now worth \$1 million or more). When aging parents have diminished capacity, this increased wealth provides an economic incentive for siblings to compete over how the financial resources should be invested and spent and who should be put in charge of these decisions.

Disputes also arise over which child should become the parent's caregiver since such continued close contact with the parent and the parent's dependency on the caregiver can result in a disproportionate distribution to the child caregiver upon death of the parent. A related issue is when or if an aging parent should be moved to an assisted living facility or nursing home. It is not surprising that the increase in wealth often leads to increased litigation, since the financial rewards can be great if the legal fees don't take a major bite out of the estate.

In mediating disputes over these issues, clients (usually the competing siblings and sometimes the aging parent if still alive and competent) should be asked what they project they will spend in legal fees and costs if they pursue the claims in court? In most of these disputes over family wealth



management and care giving, as well as contest to wills and trust, the object is the division of a pie among competing claims. Probate disputes are unique because the parties need to realize that they are dealing with an ice cream pie that is melting before their very eyes—for every hour they spend in litigation with counsel, the pie will diminish. The sooner the dispute can be resolved, the more pie there will be to divide among the family members.⁴

Transfers to Non-Family Members

Increased litigation can also occur when there have been transfers by aging parents during their life and on death to non-family members, including friends, neighbors, caregivers and even strangers.⁵ Often this is a result of children and relatives who have had to move to distant communities because of marriage or for better job opportunities that results in separation and loss of family ties with their aging parent, aunt or uncle. The close bonds that once existed fade over time and there is ample opportunity for others to gain the trust and confidence of the aging adult who reaches out to others to avoid isolation and loneliness.

With the increase in property values, there is more incentive to fight over large disparities and disappointed expectations while blaming the new best friend or caregiver for unduly influencing the aging relative to make transfers or estate dispositions that leave family members angry, hurt and frustrated.⁶

The causes of conflict are numerous, but the ones described above are some of the more common patterns that lawyers should consider when advising aging adults about their estate plans or when considering whether to initiate, defend or mediate a dispute involving an aging parent and their family members.

How to Prevent and Resolve Disputes between Aging Relatives and Their Families

The best way to avoid a dispute starts with careful planning and drafting of proper instruments. It is almost impossible to have a bullet-proof plan that no one will contest but an estate planning attorney should start with a thorough understanding of the family dynamics. One must examine the personal interrelationships between each family member. Add to that the relationship with in-laws and grandchildren. Some parents believe their offspring are not responsible with their own financial affairs and therefore cannot trust their children to help them with their finances. Some parents are also burdened by the “boomerang generation” when adult children return to live with their parents.

A Cautionary Tale about Unequal Division of Assets between Siblings

Sylvia, a widow, had two adult children: Rob, an extremely successful litigation partner with a substantial net worth, and Darlene, a school teacher with a modest salary. Both were married with two children each. Rob had no need for his mother’s property. Sylvia asked Darlene to move into her Palos Verdes home to take care of her as she became more infirm with age. Darlene and her husband agreed to move in with Sylvia to become mother’s caregiver with no objection from Rob. Ten years later Sylvia died

at 102, but three years before her death, she went to her estate planning attorney to make one small change in her estate plan—she wanted to give Darlene her home in Palos Verdes because she wanted to show her appreciation for the devotion Darlene showed to her during her declining years and because Darlene had a need as she did not own a home.

Darlene had not been compensated for her services except for the room and board living with her mother. Rob did not contribute to his mother’s care since he lived in northern California. At her death, the home was valued at \$1.8 million. When Rob received a copy of the trust amendment of which he was unaware, he was outraged. He called his sister to demand one-half of the value of the house. She refused, so he filed a petition to set aside the amendment and demanded that the property be divided equally as provided in an earlier version of the trust. Notwithstanding the testimony of her estate planning attorney that she was competent to make the amendment and she was not influenced by her daughter, Rob claimed that the mother was incompetent to make such a change in her trust and also that she was unduly influenced by Darlene. When the case came to mediation, each party had spent over \$50,000 in legal fees to prosecute and defend their position. Because Darlene could not afford to continue to defend against her brother’s claim, she finally settled by giving the brother half of the value of the property, requiring that she sell the house.⁷

Could this litigation have been avoided? Perhaps yes, perhaps not. When appropriate, many authorities strongly recommend that parents meet with their children while they are alive to discuss their intentions and desires regarding the disposition of their estate on their death. In this case, because of Rob’s strong personality and domineering demeanor, mother probably did not want to discuss her plans with Rob. She felt he would not let her do what she felt was the right thing to do.

Oftentimes elderly parents want to avoid conflict at all costs, even to the extent of telling each child what

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that child wants to hear, sending mixed messages that later will result in highly contentious conflicts and litigation. Although a parent may wish to keep harmony among their children while they are alive, they leave it for them to fight it out after he or she dies.

Could Sylvia's attorney have made any recommendations that might have avoided the conflict? Should an attorney recommend that the parent have a conversation with both children about her wishes about dividing her property? When a parent feels that he or she cannot confront a domineering and demanding child alone, the services of a neutral facilitator experienced in estate planning and dispute resolution can be helpful to facilitate the difficult conversation which can avoid future litigation and restore family harmony.⁸

Steps for Advising an Elderly Client about Their Intention to Make or Amend a Will or Trust

Determine whether the client appears to be competent to make or amend a trust, enter into contracts or give consent to health care. Probate Code §§810-813 provides a definition for both capacity and incapacity. Prior to this definition, the courts struggled to determine whether a person was incompetent based on a general vague diagnosis that the elder person had dementia or was generally incompetent. This statute now identifies a list of deficits that impair decision making and provides standards for the courts to determine whether a person was competent to enter into contracts, get married, make a conveyance, execute wills or trusts or give informed consent for medical care.

The estate planning lawyer should also carefully ascertain which standard of competency applies—the ability to make a contract (PC §810) or the ability to make a will (PC §6100.5), which is a much lower threshold. Consider whether *Anderson vs. Hunt* (see endnote 7 below) applies. When in doubt, refer your client to a competent geriatric psychologist or psychiatrist who can evaluate your client's competency and

can determine whether the client's decisions are their own or under the undue influence of another.

Determine whether the aging client is under the influence of someone who is using their relationship for personal gain to the detriment of the natural heirs of the testator. Does it appear that the testator is too eager to make the change or is uncertain about it? Question the tone and emotional level of the client's instructions to make the change and ask why? If the answer is "I have not seen my child in a long time" or "I'm angry with him or her," determine what the circumstances are and whether the reason for removing or reducing their inheritance seems justifiable.⁹

In some cases, lawyers have an ethical quandary. If you believe a client is not competent, you cannot initiate a conservatorship proceeding without your client's consent. Moreover, the lawyer cannot reveal confidential information. But you might discuss with your client the benefits of having a conservator appointed, and sometimes an aging client will agree, although it is rare. As a last resort, you might ask your client to sign a waiver of confidentiality to permit you to talk with a close family member or friend who will be able to assist the aging client. Of course, you should first consider whether the client is sufficiently competent to give a waiver of confidentiality and which test applies for making that determination.¹⁰

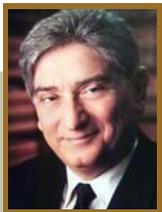
Use Probate Code §6100.5 as a guideline for asking questions regarding the making of a will. Does the client understand the nature of the testamentary act? Does the client understand and recollect the nature and situation of the individual's property? Does the client remember and understand the individual's relations to the living descendants, spouse and parents and those whose interests will be affected by the will? Does the client suffer from a mental disorder with symptoms such as delusions or hallucinations which may affect the

way the client disposes of his or her property in a way that the client would not have done but for the delusions or hallucinations?

Surprisingly, some practitioners contend that it is best practice not to keep records of the estate planning attorney's findings and impressions. However, many cases have been settled early because the client's attorney did keep records sufficient to support the attorney's impressions about the client's mental competency at the time the will, trust or amendment was executed and such records and testimony were the only evidence of the client's competency at the critical time of execution. The author's preference from a mediator's perspective (i.e., to help parties settle their disputes) is that the lawyer's observations and records describing what steps he took to determine the client's competency or lack thereof will assist the parties in coming to an agreement and to fulfill the final donative intent of the client.¹¹

Our society is faced with a growing aging population with life extending to 90 and beyond. For many, aging is a very difficult and painful process. Yet, with improved health services and growth of wealth for some, aging can be fulfilling and rewarding with time to pursue one's life's dreams and to share these experiences with a spouse, children, grandchildren and even great grandchildren. Aging is not always an easy road, and can be filled with conflict and bewildering complexity.

For lawyers who do estate planning or probate litigation, it is important to keep informed about how their aging clients cope with their challenges, how they make decisions and how they relate to their family, friends and caregivers. Lawyers should also be aware when choosing probate mediators, that the professional neutral should have broad knowledge and experience in these practice areas as well as advanced training, education and experience in resolving disputes between aging adults and their families. ♣



Myer Sankary is a member of the SFVBA Probate & Estate Planning Section, a former SFVBA Trustee and is currently the Chair of the SFVBA Mandatory Fee Arbitration Program. He is the past president of Southern California Mediation Association and has been a full-time mediator with ADR Services, Inc. since 2008. He can be reached at myersankary@gmail.com.

¹ One of the consequences of increased aging is that more cases are filed in probate courts than in the past. In a report by Dept. 11 Judge Steele to the probate Bar on July 31, 2013, he indicated that there were 8,680 probate filings in 2012 with a significant increase of conservatorship filings. The LASC Probate Court is now burdened by an increasing case load with limited resources. The SFVBA has coordinated with the Probate Court to implement a Volunteer Settlement Conference Program commencing August 1, 2013. Visit <http://www.lasuperiorcourt.org/Probate/UI/> for more information about this program.

² Abrahms, Sally. *Oh, Brother! With Parents Aging, Squabbling Siblings Turn to Elder Mediation*. AARP Bulletin, September 2010.

³ *Ibid.*

⁴ I like this metaphor because it has a visual and mental impact on both the parties and their lawyers and is a truth that most lawyers acknowledge, except when there is an argument that the claimant or respondent expects to recover their legal fees and costs in reliance on some statutory scheme.

⁵ In 1993, Probate Code Division 11, Part 3.5, starting at §21350, "Limitations on Transfers to Drafters and Others," and Part 3.7 starting at §21360, "Presumption of Fraud or Undue Influence," became effective to address the increasing problem of transfers made to non-related persons who prepared wills, trusts, and transfer documents or to persons who were defined as "care custodians." Per §21380, such transfers were deemed to be invalid and presumed to be the product of fraud or undue influence. The statute has been amended to allow transfers to long-time friends who have provided caregiving services, but the statute may be amended again.

⁶ See "China Goes Beyond Guilt Trips" by Julie Makinen, Los Angeles Times, July 29, 2013. China's new law requires family members attend to the

spiritual needs of the elderly and visit them often if they live apart. The law gives parents the right to sue their children if they do not visit their parents and provide support. It is unlikely such a law would gain support in the United States.

⁷ In the recent case of *Andersen v. Hunt* (2011) 196 Cal.App.4th 722, the Court of Appeal ruled that a correct reading of §§810-812 requires that the standard for testamentary capacity under §6100.5 be used in determining the decedent's capacity. According to the court, "When determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, we believe it is appropriate to look to section 6100.5 to determine when a person's mental deficits are sufficient to allow a court to conclude that the person lacks the ability 'to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.'" Based on this decision it would appear that the standard for determining Sylvia's capacity to amend the trust to change the disposition of the residence as a gift to Darlene was PC §6100.5, the standard for capacity to make a will. Unfortunately, at the time this case was litigated and settled, *Anderson v Hunt* had not been decided.

⁸ A classic book that provides guidance for parties in conversations that are potentially painful with a lot at stake is *Difficult Conversations; How to Discuss What Matters Most* (Penguin, 1999), written by Harvard Law School professors at the Harvard Negotiation Project, Douglas Stone, Bruce Patton and Sheila Heen. This book gives a positive approach to conducting a difficult conversation from a learning perspective, realizing that there are three different levels which are involved—the facts and context of the problem, the feelings and emotions that people have toward the subject and others in the conversation, and understanding that the words communicated also

touch upon the identity of the person. The reader may also find it useful to download one or more papers offering useful tools on how to apply the strategies found in *Difficult Conversations* from these websites: <http://www.gobooke.net/difficult-conversations/>, and http://www.osu.edu/eminence/assets/files/Handout_Difficult_Conversations.pdf. These articles offer helpful tips on how to prepare for a difficult conversation which lawyers can use to inform their clients about an effective strategy for resolving family disputes or preparing for mediation of a litigated dispute.

⁹ See *Capacity and Undue Influence: Assessing, Challenging and Defending* (2010), a Continuing Education of the Bar (CEB) Action Guide.

¹⁰ See Chapter 7 "The Client with Diminished Capacity" of the *Guide to California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel* (Revised 2008) by the Trusts and Estates Section of the State Bar of California. See also State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1989-112: The Duties of Confidentiality and Loyalty to the Client are Sacrosanct.

¹¹ In Sylvia's case described above, although the estate attorney gave his impressions that during the interview and execution of documents, Sylvia was competent to amend her trust and not unduly influenced by Darlene, it was not sufficient evidence for Rob, the lawyer, to accept. Because his mother amended the trust when she was 99, her son contended that she could not have been competent nor free from Darlene's influence. No doubt Sylvia was influenced by Darlene's kindness, but this would not be considered "undue" influence in most cases. Had *Anderson v Hunt* been decided, Rob's arguments about mother's incompetency might have had less traction.

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