Four Ways to Disinherit Family Members

by Dan Timins, 9/19/19

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I recently saw an estate where the decedent hated his brothers so much that he left his girlfriend a dossier of their lifetime legal quarrels, and had handwritten and typed recitations of his brothers and his fights and disputes. He even had his attorney chime in at the disgust he had in the brothers when they left a dead fish in his mailbox and hung a bottle of champagne from a noose on his porch. To say this person did not want his brothers to receive anything from his estate when he died would be an understatement.

Plenty of families don't get along. The problem is that – absent of a valid will leaving money to other individuals – family members are the "default" recipient of your estate. Few states recognize common law marriage, and no state recognizes friends or a charity as your estate's default beneficiary. In addition, if you choose to leave any property using your will, your next-of-kin must still be given legal notice of your estate being probated (even if they are being disinherited) and are usually the only people who can legitimately contest your will.

Fortunately, if you do have bad family relations and do not want certain family members to contest your post-mortem desires, there are several legal weapons available in your estate's arsenal:

1. **Leaving property outside of your will**

Probate has been a standard legal procedure for hundreds of years and was originally based on family lines. But people are surprised to learn they must place their next-of-kin on notice when they are passing property using their will. The good news is that you only need to probate property that is not already effectively left to someone outside of probate.

When you name a beneficiary or co-owner on your accounts or real estate, that property avoids probate. Jointly own a piece of real estate with your life partner? If he or she passes away, you just need to bring a copy of his or her death certificate to the county clerk and update the deed to just you as owner. Life insurance policies and retirement plans often require you to name a beneficiary: My will may state, "I leave my entire estate to my spouse," but if the

beneficiaries on my life insurance policy are my niece and nephew, then the property never makes it to the will. If you own real estate, you can always retain a "life estate" and name your choice of beneficiary for when you pass away. Likewise, investment and bank accounts usually allow you to name a "transfer on death" beneficiary; when you do die the beneficiary just gives your financial planner your death certificate. Lastly, property passing by living trusts also avoids probate.

Just like many people have learned the hard way, possession is often nine-tenths of the law. If you can have life insurance policies and financial accounts transferred to your chosen beneficiary quietly outside of probate, it becomes very difficult for dissenting family members to find out about their existence, and more difficult and expensive to dispute the transfer to your desired beneficiary.

2. **Using a "no contest" clause**

So you have chosen to disinherit your family or leave them less than they would be entitled to if you had no will. If they decide to glumly accept their diminished inheritance you have no issues. But if they choose to contest your will or trust they are in a position to (at worst) receive that lesser bequest or (at best) overturn your will or trust. One way to accomplish this is with a "no--contest" (a.k.a. "in terrorem") clause.

Here is where people mess up: They include the no contest clause, then leave no property to the disinherited family member. Since the disowned family member is receiving nothing anyway, he or she has nothing to lose by contesting the document, so the clause serves no purpose (and may actually give them the ability to also depose your choice of executor, which would otherwise not be permitted without the no contest clause).

Leave a more-than-nominal bequest when using a no contest clause. Let the potential contestant know that there is a somewhat attractive alternative to receiving nothing, so leave an amount that lets the family member realize they have an incentive to not contest the will. And remember that you need to make the amount meaningful enough to actually dissuade a dispute: Leaving a beneficiary $10 is more likely to goad them into contesting your estate than leaving them nothing.

3. **Documenting the reasons for disinheriting**

Be cautious attempting to follow this step: Legal documents have very-specific formats and execution requirements. Merely signing a letter that states, “I don’t like my brother or his wife, and I sense his kids are illegitimate, so I leave them nothing,” has just a little more probative value than questioning an overly-ripe pineapple about the merits of the estate dispute.

Use descriptive letters to supplement (and not supplant) your proper legal documents, and create formal, signed memorandums with notarized signatures to bolster – not replace – these documents. Demonstrate familial lineage by using written family trees and heirship affidavits to better-prove your mental capacity and knowledge of your heirs, and (when applicable) provide your future executor with medical records that help to prove your mental clarity at the time you made your distributive decisions.

4. **Creating ancillary legal documents to disinherit spouses**

When the spark has long-since extinguished in your marriage, but you have been married for 30 years, you may want to rethink how to handle your estate. Some clients want to stay together for the health insurance, but no longer want to live together. Other people may want to get remarried but maintain at least some of their estate for their children from the prior marriage.

Pre-nuptial and post-nuptial agreements can (and usually do) deal with what happens if you get divorced and when you die. You and your spouse may also “waive” estate rights in a separate document that does not even deal with a potential divorce. The only downside with these agreements is that they require both parties to consent, and usually require separate legal counsel to make them most effective.

You cannot completely disinherit your spouse without his or her consent. And make sure the language of a future document (such as a will) that attempts to overturn a prior document (such as a pre-nup) has the proper language to do so.

Properly disinheriting another person is a science, not an art, and you should follow formal legal guidelines instead of assuming what you think is logical will work once your estate is administered. Hold onto legal documents and hire an attorney when you sense a future dispute from a family member you would rather not help out.

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