The Ties That Bind…..and Gag: Family Dynamics and Succession Planning

Part I: Basics of Estate and Succession Planning (10 Minutes)

"Estate Planning" or "Succession Planning" is the process of planning for death and/or incapacity. It is a constantly changing and evolving process that needs to be monitored and updated as life changes occur. Many people, especially those who like to count on canned programs such as LegalZoom, think that estate planning is simply a matter of filling out form documents. It is true that the tangible product that lawyers produce to reflect the estate plan for a client are indeed a set of documents. However, estate planning is truly the process of creating a plan, reflected in the appropriate documents, for dealing with the client's potential incapacity and certain death. This is the intangible product or service that lawyers provide. Today I would like to spend a few minutes reviewing the basics of estate planning and identifying the typical documents that are used, and what their job is, and isn't. Once we all know the terminology, I would like to review 4 cases that illustrate what went wrong in the planning process, and identify red flags that should be addressed to avoid potential issues after the fact. The 4 cases that demonstrate what went wrong have all gone to the Court of Appeals, and one to the Supreme Court, in the Michigan Court system. I personally represented the client in two of the cases. In Michigan, the Probate Court is the first level, or trial court. Appeals from the Probate Court either go to the Circuit Court (another trial court) or the Court of Appeals, depending on the issue presented. Cases appealed from the Court of Appels are all appealed to the Supreme Court. All of the cases I am going to talk about were appealed from the Probate Court directly to the Court of Appeals. I think you will find the cases interesting, and I hope that they will generate considerable thought and fun discussions. First, let's define the documents we will be talking about.

At some point in our lives, each of us may become temporarily or permanently legally disabled. In other words, we may face an emotional or medical crisis that leaves us unable to make medical decisions for ourselves, and/or financial decisions for ourselves. This could result from illness, accidental injury, medical procedures, or any other trauma. Sometimes the disability is temporary, for example, after suffering from a stroke, until we regain the ability to make decisions on our own behalf. Sometimes the disability is permanent, for example, in the case of dementia or Alzheimer's disease. Either way, when this occurs, someone needs to have the legal ability to make decisions for us. If we plan ahead, we can execute documents that nominate the person or persons that we want to be making these decisions for us. If we do not plan ahead, someone will need to petition the Probate Court to have the Court appoint a Guardian (for medical decisions) and Conservator (for financial decisions) for us. Once the appointment has been made, the Guardian and Conservator must report regularly to the Court on your condition, your medical treatments, and your financial matters. Now stop. Think about this. Who do you think the Court would appoint? It's out of your control at that point so you really don't know who the Court will choose. And what about all the Court reporting? It's all public record. Do you really want your physical and financial status to be reported to the Court and available for public inspection? Not a pleasant thought, is it?

There is one way to help prevent Court intervention for medical decisions, and there are two ways to help prevent Court intervention for financial decisions. Notice I say "help prevent." There are never any guarantees, and it is possible that someone would petition the Court for a Guardian or Conservator based on the allegations that the person nominated in your documents is not suitable to serve. The Durable Power of Attorney for Health Care, or Patient Advocate Designation as it is often called, allows you to nominate the person that you want to make medical and placement decisions for you. In Michigan, the statute requires that you nominate one person at a time to serve as your Patient Advocate (decision maker), so you must nominate your choices sequentially. In other words, name your spouse first, then if they are unwilling or unable to serve, name your oldest child, etc. A good PAD will also include language that requests the Court to appoint the person nominated or serving as your Patient Advocate as your Guardian, should the need for a Guardian arise. The document can also specifically describe the medical treatment options that you are allowing, or not allowing your Patient Advocate to make. For example, you may designate whether you would like them to be able to execute a "Do Not Resuscitate" order or a "No Code" order, as well as whether you would like them to be able to withhold life support and other potentially lifesaving or life extending procedures. The document that I prepare is about 11 pages long. In Michigan, the Patient Advocate does not have decision making authority unless and until two doctors (can be physicians and/or psychologists) determine in writing that you lack the requisite ability to make your own medical decisions. Once you have regained your ability to make decisions, the Patient Advocate no longer has authority to act. The law and the statutes are designed to make sure that each person retains the ability to make their own medical decisions as much as possible.

There are two documents that can help prevent the appointment of a Conservator for financial decision making. The first is the Durable Power of Attorney. This document is the counterpart to the Patient Advocate Designation. In Michigan, you may nominate more than one person to serve as your agent at a time. You can also designate whether the agents must act together/unanimously, or whether they can each act independently. As you can imagine, there are benefits and potential pitfalls either way. Allowing each agent to act independently is certainly more convenient for them, however, you can see that there may be more confusion, doubling up on the work, or neglecting of work. If you choose more than one agent to act at a time, make sure these are two people who can work together well. If you prefer, you can designate that the agents must act together. This prevents one hand not knowing what the other hand is doing, and installs a checks & balances system to their work. However, the disadvantage is that it is more difficult for the agents to work if they need to both sign off on all decisions. Only you know which method is best for you and your agents. The Durable Power of Attorney can be effective immediately, or it can include “springing” powers, which only authorize your agents to act if and when you are incapacitated, similar to the Patient Advocate Designation. Also note that the Durable Power of Attorney is typically not effective over trust assets. More on that next.

The other document that may help avoid the appointment of a Conservator is a Trust. Trusts come in many sizes, shapes, and forms, but suffice it to say that if you create a trust, you may transfer assets into the trust and nominate a Trustee to manage them.

Typically, people act as their own Trustee while they are able, but nominate a successor Trustee to act if they are unable. The trust document itself should provide the mechanism for determining whether the current Trustee (you) is unable to serve, and the mechanism for installing the next Trustee. The limiting factor of a trust is the extent to which your assets have been transferred into the trust. The Trustee will have no authority over assets that are outside the trust. For example, if you have various bank accounts or retirement accounts held solely in your name, or jointly with another person, the Trustee has no authority over these assets. That's why I always have the client prepare the Durable Power of Attorney in addition to the trust to avoid the need for a Conservator over those assets. Like the Patient Advocate Designation, the Durable Power of Attorney should include language that nominates your agent to act as Conservator, should Court appointment become necessary.

Eventually we're all going to die and someone will need to dispose of and transfer our assets somewhere. By planning for this, we can control who will be the one to administer the process and who will ultimately receive our assets. This is where I see so many things go wrong. People don't understand that there is a process, and that there are statutory priorities to transferring the assets, and that they are accountable to others. The first mistake I see the client make is not understanding the significance of transfers outside of the Will or trust. We refer to them as "assets which pass by operation of law." These are assets that are jointly titled and those that have a designated beneficiary. Any asset that is held jointly (other than as Tenants in Common) will automatically become the property of the surviving owner. This is true even if the others on the account are put there as "signers only" or "for convenience." This is a pet peeve of mine because the banks do not understand this and they routinely go along with customers who wish to add one of their kids as a co-signer. This is no different than giving that account to the person you added if you die first. Life Insurance policies and retirement accounts always have a designated beneficiary (unless someone just plain forgets to fill in that blank). These assets will pass directly to the named beneficiary. In fact, it is a violation of federal law for the insurance company or the plan administrator to transfer the asset to anyone BUT the beneficiary.

The only exception to this is where there is no living beneficiary, in which case the asset is transferred to the decedent's probate estate.

After jointly held assets and beneficiary designated assets are transferred, the Will dictates who will receive any assets not otherwise disposed of by titling, beneficiary designations, or trust ownership. The trust will dictate who will receive any assets that are owned by the trust.

With this background, let's move into the fun and interesting part of the process, what can go wrong. "Even the best laid plans……"

Part II: Case Discussions—What Went Wrong? What Went Right? (50 Minutes)

The 4 cases that I want to discuss exceeded the page limits for the materials. They are included in the electronic materials, but if you have printed materials, you can download them from my memory stick. For our discussion purposes today, I will provide you a summary.

The first case I would like to discuss is the *Moon* series of cases. *In re Mark Moon*. In this case, I represented Merlin Moon, father of the decedent Mark Moon. Merlin was literally born and raised in the farmhouse in Eaton County, Michigan. The house sat on several acres of tillable land, used for growing crops, primarily to feed the dairy cows, and also contained pasture for the cows to graze, as well as a milking parlor for commercial production of milk. Merlin lived on that farm and operated the dairy farm his entire life. When Merlin's son Mark was old enough, they began farming together. When Mark married and had children, Merlin built a small ranch house on a parcel across the road from the farmhouse so that Mark and his family could live in the farmhouse. Both Mark and Merlin relied on the farm for their sole support. Mark's wife Kristina, however, worked for a shipping company (FedEx or UPS) in a neighboring town. She helped somewhat around the farm, but with a full time outside job, she wasn't really a part of the farm business. Kristina did not particularly like the farmhouse or living on the farm. Merlin and

Mark and Kristina made a deal. Merlin would transfer the property containing the house, some tillable land, and the dairy parlor, over to Mark and Kristina by Deed so that Kristina would feel that it was her home, and she could renovate the farmhouse to her satisfaction. Well, Merlin held up his end of the bargain and transferred all the property attached to the farmhouse to Mark and Kristina. However, Kristina did nothing to improve the farmhouse, and in fact, she eventually moved into town closer to her job, taking the kids with her. Now, some would call this a “separation.” And, at the time, Kristina probably would have agreed with that categorization. But on one fateful 4^{th} of July, Kristina brought the kids to the farm to see Mark. Mark finished up his chores and headed to the shower while Kristina and the kids stayed outside. When Mark didn’t come out for a long time, Kristina went into the house to find him, and much to her surprise, found him dead in the bathtub. He had suffered a fatal heart attack and slumped down into the tub. He was in his early 40’s. Merlin was devastated. Kristina was quick thinking, however, and quickly sold the cows and put all the machinery and equipment up for sale. She opened a probate estate and began transferring everything into her own name. When Merlin objected to this and made a claim that he was 50% owner of the farm operation because he and Mark were partners, Kristina and her family literally destroyed the farmhouse, gutting it, breaking the windows, tearing out walls, and vandalizing it. I visited the house with Merlin one day and it literally brought tears to my eyes.

Mark did not have an estate plan. And he and Merlin operated the farm on a handshake and their words. But Kristina had a Deed. What a disaster! I am still amazed by this case. We were able to show the Judge, and the Court of Appeals, that Merlin and Mark had a partnership, and as such, Merlin had a 50% interest in all the farming assets, including the land and the house. This meant that Merlin was the surviving partner, and he got all the land, the house, and the proceeds from the sale of the farm equipment. Remember, the only written document that existed was the Deed transferring the house and land to Mark and Kristina. Not to be deterred, Kristina then came back to the Probate Court with a new theory. She argued that since the property that was Deeded to her and Mark was actually partnership property, then the remaining property that was still owned by Merlin, but had been used in the farming operation, should be treated as partnership property as well. Therefore, she should get 50% of it as Mark's heir. But once again Kristina's argument failed. The Probate Court and the Court of Appeals both found that the property in question had always belonged to Merlin, had never been transferred to Mark or a partnership, had never been intended to be part of a partnership, and in fact had been used for other uses besides the dairy farm operation.

The second case I want to discuss is the series of cases involving the *Robert Stout Revocable Trust and the Dolores Stout Trust Agreement*, which just came to its final death in August of this year. I represented the Respondent/Trustee Kevin Stout in these matters. His sister, Tara Arwood (who also claimed to be representing her two adult children) was the Petitioner. Unlike the *Moon* cases, these people had all the documents they needed: Wills and trusts and even a testamentary trust to be created upon Robert's death. Robert died in 2009 and Dolores, who was incapacitated at the time of her death, died in 2010. Both Robert and Dolores appointed their only son, Kevin, as the successor Trustee of all their trusts and the Personal Representative (Executor) of their Wills. They had two other children, Tara and another daughter, Shawn. This case became so convoluted and confusing, both factually and procedurally that it was hard to remember how it all started. Initially, Tara brought an action against Kevin for breach of fiduciary based on her allegation that he withheld the final distribution of the trust until she signed a document releasing him from all liability for trust administration. Clearly Kevin could see the potential for Tara's complaints. After she raised that issue, she further added allegations that he breached his fiduciary duty by listing a property for sale that was supposed to go to Tara and her sister Shawn. And after that, things just got more and more cloudy. The Probate Court found no breach of fiduciary, which of course did not appease Tara, so she appealed to the Court of Appeals. They reversed and remanded the Probate Court's decision and found that Kevin had breached his duty in essentially "holding hostage" the final distributions, comingling assets between the trusts, which had differing instructions for distributions, failed to create a testamentary trust, failed to publish notice to creditors, failed to provide full and accurate reports of the trust assets, failed to treat the beneficiaries impartially, used trust assets for personal gain, failed to notify beneficiaries of his decision to charge Trustee compensation fees, and failed to distribute assets pursuant to the trust terms. However, they also determined that many of these breaches had no ultimate effect on the beneficiaries--- no harm no foul. So they remanded to the Probate Court to sort the mess out and determine how much, if any, Kevin still owed the beneficiaries. This time the Court of Appeals (and, by the way, one of the 3 judges on the panel this time was also on the panel for the first appeal), addressed the personal liability for trust distributions, the payment of attorney fees, and the payment of Trustee fees, and remanded again to the Probate Court to do the math. Eventually, the Probate Court appointed a Special Trustee to review all the transactions and determine who owned what to whom. After 7 months and 5 reports from the Special Fiduciary, the Court issued a final Order requiring Kevin to pay Tara and her two children certain amounts of money as well as pay the legal expenses incurred by the Special Fiduciary to figure it all out. And since the trust assets had all been previously dispersed, and this was a breach of fiduciary action, Kevin ended up paying all the distributions out of his own pocket. Ouch!

Next is *In re Melvin Berg*, an unpublished case from the Court of Appeals that came out just this May 17, 2016, involving a Conservatorship, a Grantor Trust, and a Farm Trust. There were numerous issues in this case, and several case files were consolidated into the one appeal. The facts, in summary, are: Melvin and his wife Elsie had 5 children: Dan, Catherine, Diane, Holly, and Rebecca. They owned approximately 300 acres of land, which Melvin farmed. Melvin and Elsie each created a revocable trust for the benefit of their children in 1992. Those trusts contained the sub-trust, the Berg Farm Trust, or Farm Trust. When Melvin became disabled (as determined by two physicians) or dead, the Farm Trust would become effective and Dan would have day to day responsibility for operating the farm for which he would be compensated and reimbursed.

Elsie died several years before Melvin. In 2012, Melvin, at age 91, petitioned the probate court to appoint a conservator to help preserve his assets. Just prior to Melvin filing this petition, the family had divided into two factions, with Dan, Diane and Holly on one side and Rebecca and Catherine on the other. Melvin was convinced that Dan was trying to usurp control of the farm. One the eve of the hearing in which the probate court appointed Melissa Dkyman as temporary conservator, Melvin executed an amended trust. While the amended trust did not disinherit any of Melvin's children, it drastically changed the distribution to the benefit of Rebecca and Catherine, primarily by eliminating the Farm Trust. Dan, Diane and Holly accused Rebecca and Catherine of undue influence. Melvin's capacity to create the new trust was also brought into question. Numerous legal actions were brought. The probate court appointed Dykman as Melvin's conservator, guardian, trustee and attorney. At one point, the probate court ordered that all real property could be sold and Dan purchased the farm.

In 2014, the parties entered into a settlement agreement, disposing of several issues. After the settlement agreement was finished, Dan requested reimbursement and compensation for helping Melvin on the farm from 2009 until 2012. The majority of the opinion deals with the procedural arguments as to whether he properly pled his claims and whether he should be allowed to amend his pleadings, but the real guts of the dispute was whether Dan should be reimbursed or compensated for helping Melvin during that time period. Dan of course argued that he had a claim and delivery right to be paid for those services, while his opposition argued that his services were gratuitous. What was probably the most frustrating for the parties was the neither the probate court nor the appellate court actually made a decision on the merits of Dan's case. In other words, both courts chose to make their rulings on whether the issue had been properly preserved and pled in light of the settlement agreement that was entered into. What's interesting for us, however, is whether he really was entitled to reimbursement and compensation. What do you think?

The fourth case to look at today is another Court of Appeals unpublished case from July 7, 2016, *In re Estate of Larry E Hutchinson Living Trust*. This case involves a blended family and oil, gas, and mineral rights, so it has all the makings of a good episode of "Dallas," and please don't make me explain what "Dallas" was about, you will make me feel old! In a nutshell, the facts are that Larry Hutchinson created a grantor revocable trust and funded it with real and personal property. He named his second wife, Joy, as the primary beneficiary and successor trustee. When Larry died, the assets of his trust were transferred to Joy's trust, which Larry had created for Joy's benefit during her lifetime. As Trustee, she was tasked with distributing the farm equipment to Larry's 5 daughters, and the remaining personal property was to go to Joy, along with all the "net income" of the trust. Presumably, this would include any profits from the sale of gas, oil and mineral rights. All real estate of Larry's and his trust were also allocated to Joy's trust. However, Joy was required to allow Larry's children a right of first refusal if she wanted to sell any real property. If Joy did in fact sell any real property, the proceeds were to be held in a separate account in the name of the trust and not comingled with other funds. Upon Joy's death, the proceeds would be distributed to Larry's children.

Rather than distribute the equipment to Larry's children, Joy sold the equipment and pocketed the money. When Larry's children found out about this, they petitioned the court to have Joy removed as trustee, further complaining that Joy had burdened the real property with loans and made agreements to sell some of it without informing them. Eventually the parties entered into a settlement agreement, part of which provided that the real estate would be divided into two portions, the Family Farm and the Woodland parcels. Joy was to sell the Family Farm parcel, pay the legal expenses for Larry's children, and keep the remaining proceeds. She was also supposed to transfer the Woodland parcel to the children. The purchase agreement she entered into for her parcel stated that the Family Farm was to be transferred "excluding all oil, gas, and mineral interests." Unfortunately, there was nothing in place to direct where those interests would go when the surface rights were transferred. In fact, nobody really thought about it until Joy died. That's when the executor of her estate petitioned the court to re-open the trust case so that they could transfer the rights to Joy's estate. Naturally, Larry's children opposed the request, claiming that the interests belonged to them. The probate court and the Court of Appeals both found in favor of Larry's children. The question came down to whether the trust terms prevailed or whether the settlement agreement had become the governing instrument since it was executed after the trust. The courts based their decision on the argument that the mineral rights existed before the sale of the property, and that the severance of those rights from the Family Farm's surface rights cannot reasonably be characterized as consideration for the purchase and therefore must be a proceed. What do you think?

Part III: Takeaways and Common Issues to Identify and Avoid (20 Minutes)

The *Moon* case really came down to two major issues, a lack of formal or written agreements, and family dynamics. And one bad document. Merlin and Mark should have created an official business entity, complete with leases and other agreements. They also should have each created necessary estate planning documents, such as Wills, Trusts, Buy-Back Agreements, etc. The one document that did exist, the Deed from Merlin to Mark and Kristina, was the worst document they could have prepared. It's still amazing to me that the Courts were willing to essentially set that aside and ignore it. I don't think I've ever seen that happen before or after, unless there was something faulty in the execution, such as lack of capacity or undue influence.

The family dynamics were unavoidable. If Merlin and Kristina had a bad relationship, or if Mark and Kristina had a bad relationship for that matter, there's nothing that could be done about that, BUT, it's even more important in those situations to have everything in writing. Even when there doesn't appear to be dissention between siblings or step-parents, I can't tell you the number of times that the family member's spouse is the one behind the scenes driving the case.

In contrast to the *Moon* case, the *Stout* case had all the necessary documents in place. Mom and Dad had created Wills and updated trusts, and had named the beneficiaries appropriately (although Kevin erroneously changed them at one point, which created an entirely different set of issues, such as income tax liabilities). The problems in *Stout* were titling and beneficiary designations, comingling of assets, record keeping and reporting, and family dynamics (even though this was an intact nuclear family). All of these issues really could have been prevented by a better selection of Trustee.

During the parents' lifetimes, but while Kevin was managing the trusts, some annuities became due, so instead of keeping the trusts as the beneficiaries, Kevin changed them to each of his sisters. He later treated them as if they were trust assets and counted them as part of their trust shares. This created unintended and undesirable tax liabilities for each of the sister, and significantly impaired the proper distribution of trust assets because anything with a designated beneficiary will pass directly to the beneficiary and should not be counted toward their share of trust assets---- UNLESS the trust is named as the beneficiary. Using "shortcuts" doesn't pay off.

There were actually 3 trusts in play here. Mom had a trust, Dad had a trust, and there should have been a sub-trust created from Dad's trust upon his death, but that never happened. Furthermore, the trusts did not all have the same distribution scheme. So, by comingling all the assets and treating them all as one big pot, proper distribution was impossible. The record keeping, which consisted of dozens of multi-column spreadsheets that were theoretically supposed to cross-reference each other, and combined cash transactions with theoretical distributions and advances, were impossible to interpret. Once a Special Fiduciary was appointed by the Court, it took months for him to try to unravel what should have happened vs what had really happened. And, finally, one of the sisters brought things to a head by filing a breach of fiduciary action when Kevin required the beneficiaries to sign a waiver and release of all liability towards him BEFORE he would give them their final distribution. Essentially he was holding hostage their share of the trust unless they would agree up front not to pursue any legal actions for any errors he may have made.

Family dynamics also came into play because Kevin was the oldest sibling and only son. He was smart and he was successful in his field. Therefore, Mom and Dad deferred to him to manage everything. This created some resentment between the siblings, and they came to not trust him. After a while, literally everything he did was presumed to be incorrect and intended to rip off the siblings. It was a no win situation for him. Unfortunately, he didn't hire legal counsel until he was way too far into the administration process to prevent litigation.

In *Berg*, we don't know why, but something caused a divide within the siblings. But this case brought out some common issues in planning for farmers and many other families who may operate a business together. The question of equal vs equitable was very prominent in this case, as was whether services provided by family members are compensable or gratuitous. Undue influence and lack of capacity were also alleged, and though they are very commonly alleged, they are very difficult to prevail on.

When some, but not all, of the children work on the farm, and others do not, is it fair to divide all the assets equally between the children? Most parents really wish to treat all their children fairly, and many assume that by dividing all assets equally, they are being fair. However, equal will not always be equitable. Make sure to address the fact and account for the fact, that the farming kids are forgoing other career options, income earning options, and retirement options to stay on the farm. If the assets are divided equally, the farming kids have essentially just spent their entire career working for free, without a retirement. Setting up business entities, enter into leases, and creating equitable asset distributions during the parent generation's lifetime can significantly reduce the risk of legal issues arising after their death.

Even if there are no family business operations, a common issue that comes up in litigation is whether a family member is entitled to compensation for helping the parents. This could be caregiving, bill paying, property management, taking them to doctor appointments, or any other helpful tasks that they need. In Michigan, the law presumes that a family member is providing these services gratuitously unless there is a written contract in place. Therefore, if a family member is forgoing other opportunities, strong consideration should be made to have a contract put into place, even if it doesn't pay out until after the death of the parent.

Hutchinson combined two of our common issues--- blended families and incorrect selection of fiduciary. Not only did Mr. Hutchinson select his children's step-mother as the successor Trustee, but it appears that she was also inept at administering the trust. She obviously failed to give a copy of the trust to the step-children, otherwise they would have been looking for the distribution of the equipment right away. Even if the relationship was good between Joy and Larry's kids while he was alive, that relationship can go south very quickly, especially is she is selling assets that were supposed to be transferred to the kids. Larry put Joy in a position of potential conflict of interest as well. Since his kids were the remainder men of trust assets, anything she spent on herself was less that the kids would get at her death. Nominating the stepparent as Trustee not only forces a continued relationship between Joy and the kids, it bases that relationship on money. The kids will feel compelled to constantly monitor and scrutinize every purchase, sale or transfer of trust assets that Joy makes.

Unfortunately, not only did Joy miss the issue regarding the oil and gas rights, so did Larry's kids and all the attorneys involved. This shows one potential risk of severing the oil and gas rights from the surface rights. It's imperative that these rights are accounted for in the estate plan. In this case, the probate court ruled in favor of Larry's kids basing its decision on the terms of the trust. The Court of Appeals confirmed that decision, but the dissenting opinion makes a very valid argument that the terms of the trust were effectively superseded by the settlement agreement between the parties. Under the settlement agreement, Joy's estate would have received the rights. This case could have easily have gone either way. You can't tell from the COA opinion why the courts ruled in favor of the kids, but I'm guessing there was some political or equitable reason behind it. I certainly wouldn't consider this case one of precedent.

So, to re-cap and summarize, what are the red flags that we should be looking for in our planning and advising?

1. Blended Families/ Re-Marriages: I don't care how close the stepchildren and stepparent are, things will *always* be different when the biological parent is gone. You can avoid a lot of potential issues by appointing a neutral/professional fiduciary; If possible, create a distribution scheme that won't force the parties to remain connected; their continuing relationship with each other should be voluntary, and not based on the fact that they share financial interests; Try to avoid leaving the biological children a remainder share of whatever the stepparent doesn't use; otherwise, the biological children will forever be monitoring and scrutinizing to make sure the stepparent doesn't "overspend their inheritance."
2. Some Kids Active on Farm/Family Business and Some Aren't: Most parents want to treat their kids fairly; to many people, that automatically means that they leave everything equally to all of them; however, equal is not always equitable; make sure to address these issues as discussed previously during the planning process so that sufficient thought can go into making things "fair." This might include setting up business entities and trusts, entering into leases, and creating equitable asset distributions during the parent generation's lifetime.
3. Get it in Writing: It's still very common to have family farm operations run on a handshake; and, chances are, the parties to the handshake will never have a problem; but, as we saw in the *Moon* case, it's the folks outside the agreement who will cause the problems; writings include business entities, leases, trusts, separate accounts, receipts, Wills and caregiver agreements; if a family member is providing caregiving services or financial or property management, there should be a written agreement as to whether compensation is to be paid, and to what extent;
4. Select the Correct Fiduciary. As we saw in *Stout* and *Hutchinson*, the documents were in place, but the selection of a fiduciary can make or break the administration of the estate or trust; many people think that if a person is "smart" or "successful" that they can "figure it out." Well---wrong! It's no different than anything else, if you

have never had instruction and experience in how to do something, then there's no reason that you would be competent at it; For example, I could buy a book at Home Depot that explains how wiring works, but that doesn't mean that I should re-wire my house.

5. Family Dynamics. This plays into literally every contested matter ever filed. After all, if the family dynamics are perfect, no matter what the fiduciary does, everyone will be ok with it. Of course, there are no families with perfect dynamics, trust me. As we saw in *Stout*, the parents always deferred to their oldest child and only son. He was smart. He was successful. However, the siblings were resentful of the parents always deferring to him, and had, at some point, become distrustful of him. From that point on, they would never believe that the wasn't somehow ripping them off. And, curiously, throughout the litigation, he always believed that the sibling was trying to pull a fast one and trick him. Even if the siblings get along, appointing one of them as a fiduciary puts them in a very difficult role and changes the dynamics of the relationship. Using a stepparent as a fiduciary is an even worse idea, as we saw in *Hutchinson*.
6. Hire an Experienced Lawyer. This is important during both the planning stage as well as the administration stage. "You don't know what you don't know." Much of my job is listening to the client and creating a plan that will not only achieve the client's goals, but will do so without creating discord among the family members, and ugly expensive lawsuits. I'm able to do that because I do so much litigation that I see where issues can arise and then plan accordingly. Once the proper plan is in place, don't unwind it all by having the wrong fiduciary selected to carry out the decedent's wishes.

Part IV: Questions and (Hopefully) Answers (10 Minutes)