INTRODUCTION

SURPRISE PLANNING

Are you writing or reviewing your will? Then you are a benefactor, and I welcome you.

Are you expecting an inheritance? Then you are a beneficiary, and I also welcome you.

As a benefactor writing your will or reviewing your estate planning, you need this book–especially if you are concerned that after your death your desires may be disrupted by arguments or deception.

As a beneficiary expecting an inheritance, you also need this book–particularly if you think your inheritance could be frustrated by mistakes, fraud, or disputes.

As an estate planning attorney and probate litigator (fighting inheritance battles in court), my intent is to show both you benefactors and beneficiaries how to prevent inheritance conflicts.[1] This area of estate planning is my specialty. I affectionately call it *surprise planning*. There is tax planning, special-needs planning, distribution planning, probate planning[2] . . . areas in which any estate planning attorney must be competent, but my niche and expertise is *surprise planning*: preventing inheritance conflicts.

As a *benefactor* who is honest and well-meaning,[3] you may wish not only to be well-remembered, but may also hope that your children wisely use the assets you wish to give them. As a well-meaning benefactor, you will be particularly concerned that important family relationships be strengthened, not undermined, by your estate planning.

As an honest *beneficiary*, you also occasionally think about your inheritance and may experience some anxieties about it. For instance, are the intentions of your parents (or another benefactor) being undermined? Should you approach your benefactor with these concerns? Finally, you may feel a bit ashamed about these anxieties. Good people, you think, do not envy what is not theirs. Nor do you want to appear greedy. Nevertheless, the idea of an inheritance and the ugly possibility of inheritance conflicts crosses your mind.

I emphasize here that while I address both you benefactors and beneficiaries in this book, it is you *beneficiaries* I am ultimately and particularly interested in helping, a desire I am confident your honest and well-meaning benefactors share. After all, it is obvious, as one court reminded us, that the primary purpose of estate planning is to benefit beneficiaries.[4]

If you are a benefactor or beneficiary concerned that estate planning intentions may be undermined by mistakes, anger, arguments, deception, disputes, or conflicts, then this book is for you.

PREPARE YOURSELF FOR THE UNEXPECTED

Shortly before this book went to press, I attended a traditional "farewell," a religious gathering marking a young man's departure on a two year church mission. This is similar to a Bar or Bat Mitzvah, traditional baptism, or other family milestone that carries joyous overtones for extended families, friends, and neighbors. At this large gathering I was pleasantly surprised to see a former client. Meaning no disrespect and solely to help you understand the following account more easily, I refer to this client by a first name, Susan, a name I have changed to protect her confidentiality

Eight years previously Susan had invited me and an associate to conduct a family discussion with her father and siblings regarding her father's estate planning. Now, these eight years later, Susan and I sat down and had a long talk about what happened that day and since.

I refer here to Susan's father as "Mr. Smith." At the time we met with Mr. Smith and his children, Mr. Smith had a will. The will instructed that all his assets be equally divided and distributed among his son and three daughters. Mr. Smith's *estate document* (his will) was clear. Unfortunately, however, Mr. Smith also signed *ownership documents* (deeds, titles, etc), naming his son as owner, co-owner, or beneficiary of all his assets.

This of course was a dangerous contradiction.

In brief, Mr. Smith signed a will on one hand that required all his assets be divided equally and distributed timely. On the other hand, Mr. Smith signed ownership documents that essentially nullified the will, giving everything to his son! To appreciate the problem here, you need to know that *ownership documents* (deeds, titles, etc)—not *estate documents* (wills or trusts)—indicate the legal owner or beneficiary of an asset.[5]

Susan and her sisters were rightfully concerned that their father's intentions to divide everything equally (found in the estate document–the will) would be undermined by their brother (who owned everything under the ownership documents).

Several facts were clear going into this meeting:

1. Mr. Smith loved all four of his children and wanted his assets divided equally among them. He had signed a will to that effect.

2. Mr. Smith had a special relationship with his son. They worked together over decades in joint business ventures and regularly fished and hunted together. Mr. Smith trusted his son absolutely to deal fairly with his daughters. Therefore, he had no concern naming his son as owner, co-owner with himself, or beneficiary of all his assets.

3. Mr. Smith's three daughters deeply distrusted their brother.

With the utmost respect for Mr. Smith and his intentions, we listened, we explained, and we practiced every skill we possessed to persuade him that he could accomplish everything he wanted–without subjecting his daughters to his son's absolute authority, control, and decisions.

Mr. Smith would not budge. He could not imagine his son undermining his signed will or doing anything to hurt his daughters. He expressed confidence and trust in his son. We explained to Mr. Smith that he could invest his son with authority to do everything Mr. Smith desired, without making his son owner and beneficiary of all the assets. But no matter how we honored Mr. Smith or expressed the issues, Mr. Smith interpreted every word from our mouths as expressing (1) our distrust in his trusted son and (2) our verdict on Mr. Smith's own intelligence and judgment. We were talking to a stone wall.

We stood and left the meeting. I was discouraged. The son had sat there the entire time, with a smug look on his face. The son perfectly understood the situation and refused to voluntarily persuade his father to follow our advice–something an honest man would have been quickly willing to do. It became obvious to me during the meeting that the son was a real piece of art, a dishonest man, and a serious problem. His sisters' distrust of him was not misplaced. It was clear what was going to happen after Mr. Smith died. It was as if it had already happened.

Eight years went by. Then, in the midst of writing the final drafts of this book, I saw my client at this gathering. We sat down and she brought me up to date. After our family meeting and in subsequent months before her father's death, Mr. Smith's son persuaded Mr. Smith to sign a new will giving the son *discretionary authority* as to when and how to distribute his sisters' equal shares. You can just hear the son as Mr. Smith signed the new will: "Dad, you know I will be fair." Of course, this amendment was just a move to hedge the son's bets. After all, the ownership documents gave him ownership control of all the assets anyway.

Then Mr. Smith died. The son took complete control of all the assets. The son made his father's primary residence his own residence. The son deeded his father's vacation home to his own oldest son (Mr. Smith's grandson and the nephew of the daughters). Mr. Smith's smug son took everything: real estate, investment accounts, life insurance, everything. These many years later, nothing had been given to the sisters, not a dime. The sisters briefly considered suing, but they were advised that the will was not helpful and the ownership documents would likely override the will anyway. Further, they were more interested in preserving long-term family relationships.

The response of Mr. Smith's daughters was stunning. When these kinds of situations occur, some wronged parties decide to do what they can to bear their pain and preserve relationships. For others, justice properly cries out to be satisfied. For most, the pain is much too powerful to allow any meaningful relationships to ever continue.

And in fact, as our conversation these many years later continued, my client's voice, face, and shaking hands betrayed her deeper emotions. After all these years she was still very hurt. She had been painfully betrayed and violated—not so much by her brother but by her own blind father.

WRITING ABOUT INHERITANCE CONFLICTS: HOW I DIFFER FROM OTHERS

In at least one of the following six ways, I differ from authors who have written about inheritance conflicts.

First, a Textbook in the First Person.

I think you will quickly recognize in the tone of the book that it is more than a collection of personal anecdotes or interesting stories about inheritance conflicts designed to enhance my standing. To prove this point, I think you will find two things of importance that make this book distinctly different from other books written on the subject of inheritance conflicts.

First, while I have written the book in the first person and while I present important stories from my own experiences, I have attempted in every way to support my experiences and assertions in the law. To this end, my experienced assistants and I have conducted extensive, time consuming research of hundreds of statutes and judicial decisions in all 50 states. Therefore, this book is more of an academic book, almost a textbook on inheritance conflicts, incidentally interspersed with personal experiences and observations.

Second, I have attempted to provide in the book numerous practical ideas and provisions based in the law that can be immediately implemented by the reader. At the same time, to confront a reader's potential disappointment, I will be blunt in saying upfront that to fully prevent mistakes, fraud, and misconduct, particular detailed agreements need to be implemented. I encourage attorneys or individuals to draft these agreements themselves. Or they can purchase the agreements I have drafted on my website. Please understand this blunt reality. I can never sell enough books at $15 or $25 per book that would recompense me for giving away agreements I have spent thousands of hours over many years developing.

Second, Emphasis on Education

I am unaware of any estate planning attorneys or authors who emphasize estate planning education the way I do. This means educating benefactors *and their families* about estate planning.

At one brief point in my practice, I spent four to five hours educating benefactors and their families about the basics of estate planning law. The experience was deeply gratifying both to me and clients. But because such education was too expensive at my hourly rates, I began writing this book as a guide to my clients in educating them about estate planning. That is the primary purpose of the book to this day. Now, I require that potential clients read the book before we begin their specific planning. This requirement has also been phenomenally gratifying and successful.

In brief, I respect you as my audience; therefore, this book is a tool to educate you, not a marketing ploy to attract you to retain me.

Third, Communication Strategies

Many authors who consider inheritance conflicts end up emphasizing one primary solution: family communication. The message is that family discussions are the critical key to preventing conflicts and preserving family relationships.[6]

Communication among family members is indeed important, but I approach these sensitive communications in a unique way. I divide estate planning into two parts: "distribution planning" (planning regarding division and distribution of assets among beneficiaries) and "procedural planning" (planning regarding the procedures to be followed in managing an estate or trust). I suggest there are numerous advantages to narrowly communicating with family about procedural planning, while communications about sensitive distribution planning should be conducted only if desired and appropriate.[7]

Fourth, Realistic Expectations

I take seriously the following practical questions: What if it is impossible to communicate as a family regarding a benefactor's estate planning? What if family communications never occur? What if memorialized family communications end up being forgotten or ignored by disruptive family members? In brief, how can inheritance conflicts be prevented in the absence of family communications?

Despite long calls for family communication, most observers will agree that successful family communications are not occurring on a widespread basis. Ever-continuing inheritance fights in courts are evidence of this fact.[8] As an insider, I know that most estate planning attorneys do not encourage clients to engage in serious communications with beneficiaries regarding the client's estate planning.[9] And benefactors themselves have many valid reasons for consciously choosing not to engage in these intimate conversations.

Fifth, Expertise as a Probate Litigator

Most authors writing about inheritance conflicts are experienced estate planning attorneys, financial advisors, or family coaches. But rarely do you find an author who distinguishes himself as a *probate litigator*–an attorney with expertise fighting inheritance conflicts in courts of law.

For over twenty years now I have fought inheritance conflicts in probate courts. I have experienced the smirks, the lies, the devious stories, the ugly accusations, the legal deceptions, the devastating manipulations. Some time ago, I had to deal for over 14 months with a smiling, arrogant, and chronic liar who was causing untold harm to beneficiaries. One day I almost went over a deposition table, wanting to strangle this liar. We finally proved the lies and won that case, but the experience at the deposition table that day was professionally and personally very disturbing. Thus, I began to study every conflict prevention and resolution strategy and technique I could (including mediation and arbitration). In the process I turned years of dark experiences to realistic methods that stop manipulators and prevent inheritance conflicts.

The best person to teach you how to avoid or win a battle is a person who has fought the battles. If my goal is to prevent a war or contain it as quickly as possible, I want a general with expertise in the field by my side, not a boilerplate attorney using cheap no-contest clauses, or an online customer support agent.

Having some expertise in fighting inheritance conflicts, I am in the unique position to teach you how mistakes are made, document fraud is perpetrated, and procedural misconduct is practiced. Most importantly, I am in the best position to teach you how to prevent these mistakes and shut down the fraud and misconduct.

Sixth, Practical, Reality-Based Solutions

I offer specific, practical, and proven strategies that can be implemented to prevent inheritance conflicts.

Let me make very clear right now, at the beginning: these strategies do not include typical, failed "no-contest clauses."[10] A no-contest clause is a provision in a will or trust that threatens to disinherit anyone who contests the will or trust. No-contest clauses systematically fail to prevent contests or punish contestants. I prove this fact in chapter 4, with extensive judicial decisions. No-contest clauses not only fail to work, they are dangerously conducive to fraud.

I do not advocate such ineffective solutions; rather, I give solutions that work. The solutions I discuss include:

- provisions that must be included in estate documents to minimize resentments, misunderstandings, and conflicts;
- procedures that must be implemented to prevent someone from fraudulently modifying or revoking estate documents;
- procedures that must be followed to crush attacks regarding the validity of estate documents;
- steps to remove a benefactor's bad fiduciaries (a fiduciary is a person who takes care of the benefactor's assets after the benefactor's death);
- strategies that build a brick wall against undue influence;
- strategies that efficiently control hostile or irrational beneficiaries outside of court; and
- strategies that must be implemented to prevent unauthorized alteration of ownership documents.

PRACTICAL SOLUTIONS
–THE TO-DO LIST–

At the end of most chapters, I explain specifically what you should *not* do and what you *need* to do to prevent inheritance conflicts. Let's start this practice now, here in the introduction. The first and most important item on our checklist is to educate yourself.

Educate Yourself

Before you do anything else, you need to educate yourself. You need to understand the laws of estate planning. Initially and specifically, you need to learn the basic laws of how assets are transferred from a benefactor to a beneficiary.

When a benefactor is ignorant regarding estate planning in general and the laws governing asset transfers in particular, the benefactor's estate planning is in trouble. It is even worse when these laws are a mystery to the family fiduciary. But when a benefactor, fiduciaries, and beneficiaries are all ignorant of estate planning law, then estate planning is almost guaranteed to fail.

Another way of saying this is that to ensure successful estate planning, a benefactor, fiduciaries, and beneficiaries must all be educated about essential estate planning concepts

For example, you all need to truly comprehend the legal presumption that ownership documents–not wills or trusts–determine who finally owns assets. You must appreciate the dangerous legal powers fiduciaries have in managing affairs. And you must understand why courts systematically reject no-contest clauses. These are just a few examples of concepts and laws you need to know.

Until all of you are *educated* about fundamental concepts of estate law, no other strategies (especially holiday communication strategies) will ever prevent inheritance conflicts.

Knowing what to do first helps us understand what *not* to do. Do not act, do not commit, do not promise, do not sign anything, do not become anxious, angry, critical, or stubborn, do nothing at all until

you are first educated about the law. Actions based in ignorance cause disasters. Education is the first lesson, and education (through this book) is the most important gift I can bequeath to you.

END NOTES

[1]. This sentence raises three points.

First, why would a probate litigator want to prevent inheritance conflicts? The answer is money and lifestyle. As an attorney, I make more money preventing inheritance conflicts than fighting inheritance conflicts. I can litigate one case in 200 hours for a $60,000 fee, and have my own victorious clients turn on me at the end about the fees the victory cost them. Or I can spend the same amount of time (200 hours) helping 10 clients (20 hours per client) engage in a to z comprehensive surprise planning at $7,000 for each client and make $70,000. Further, these clients and especially the families of these clients (who avoid the torture of protracted inheritance conflicts) recognize the value of what they are getting. That extended family gratification of course only results in extended opportunities and additional work for me. Prevention is always better than the cure–for everyone.

Second, what do I mean by the word "conflicts"? I use the word *conflicts* in the book to refer to any argument, dispute, or legal contest. Full-on probate litigation is not the only type of inheritance conflict out there. Most inheritance conflicts are arguments that arise from misunderstandings or disputes that arise from resentments or suspicions.

Third, how am I using the word "prevent"? I use the word in this sense: "to keep something from happening" or "to ensure someone is unable to do something."

In this sense, I think it is possible to prevent a fraudulent estate or ownership document from ever being accepted as genuine. It is possible to prevent a fraudulent will or trust or deed, for example, from ever being accepted as valid. If you implement the fraud protection strategies found in this book, I think it is possible to *prevent* a person who is aware of these strategies from wasting their time even *attempting* to alter estate or ownership documents fraudulently. These are daring statements–ones that I intend to prove in the book.

I think most inheritance conflicts are caused not just by document fraud but by procedural misconduct as well. Procedural misconduct occurs when individuals violate management and distribution procedures set forth in estate documents. *Procedural misconduct* is more difficult to prevent. Nevertheless, it is possible to prevent most procedural misconduct, and it is certainly possible to contain and resolve the conflicts caused by such misconduct in ways that are much more effective and efficient than litigation.

In sum, as an estate planning attorney and probate litigator, the intent of this book is to prevent inheritance conflicts caused by document fraud and procedural misconduct, and in those situations where procedural misconduct is impossible to prevent, the intent of the book is to show you how to dramatically contain and resolve the conflicts caused by such misconduct.

[2]. Tax planning is about reducing or eliminating taxes associated with the transfer of assets (estate, gift, generation skipping, capital gain, and various income taxes). Special needs planning is about preserving an individual's need for government benefits while also providing additional help to the individual. Distribution planning is about controlling the distribution of assets to beneficiaries through division and distribution plans, through choice of trustees, and through other decisions related to what we traditionally think of as estate planning. Probate planning is about preventing the hassles of informal probate. There is also asset protection planning, which is about protecting assets from dishonest lawsuits.

[3]. In reference to benefactors, I use the words *well-meaning* and *honest* with good reason. There are some benefactors who are not well-meaning. For example, it is believed Pablo Picasso wrote conflicting wills on purpose to incite conflicts among his beneficiaries. Other immature benefactors may play favorites, or play one

child off another child to gain various advantages, or may be so angry toward a child that they purposefully punish that child through their estate planning. This kind of benefactor is not honest, well-meaning, or mature.

[4]

. See *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961), cert. denied, 368 U.S. 987 (1962). "Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will."

[5]

. Two important points here.

First, the legal presumption is that ownership documents override a will or trust in indicating who is the owner of an asset. This legal presumption is so critical (and misunderstood by most people) that I introduce it here and examine it in detail in Chapter 3.

Second, I make a distinction here between "ownership documents" and "estate documents." See chapter 2 for more about this distinction.

[6]

. The following are excellent books and articles, providing insights into the importance of family communication in estate planning and how to go about doing it. Deborah L. Jacobs, *Nice Girls Talk About Estate Planning*, Forbes, August 9, 2011 (www.forbes.com); Dan Rottenberg, *The Inheritor's Handbook: A Definitive Guide for Beneficiaries* (New York: Fireside by Simon & Schuster, 2000); and Roy Williams and Vic Preisser, *Preparing Heirs, Five Steps to a Successful Transition of Family Wealth and Values* (San Francisco, Robert D. Reed Publishers, 2003).

On the other hand, at least one author recommends that benefactors keep their planning private without involving adult children. P. Mark Accettura, *Blood & Money: Why Families Fight Over Inheritance and What to Do About It* (Farmington Hills, Michigan: Collinwood Press, 2011), 201 and 210. Of books written for the general public regarding inheritance disputes, Mr. Accettura's book is one of the most substantial and well-researched. Mr. Accettura's book is an interesting read on the psychology behind inheritance battles.

[7]

. To the best of my knowledge, no other author or commentator has proposed a distinction between "procedural planning" and "distribution planning" and suggested the priority importance and advantages of a benefactor focusing on communications regarding procedural planning, with the option of keeping distribution planning details confidential until after the benefactor's death.

[8]

. In following chapters and on my website, www.the-dark-side-of-estate-planning.com, I provide extensive citations to these widespread inheritance court battles.

[9]

. This assertion is based on my experience as I communicate with estate planning attorneys through private communications and education courses; through my participation in various bar and bar legislative committees; as I communicate with scores of clients who have worked with other estate attorneys; and through my expertise as a probate litigator.

[10]

. I disagree with my colleague Mark Accettura in regard to the use of no-contest clauses. *Blood & Money: Why Families Fight Over Inheritance and What to Do About It* (Farmington Hills, Michigan: Collinwood Press, 2011), 203. Mr. Accettura professionally notes the weaknesses of no-contest clause, but only perfunctorily, in an otherwise strong endorsement of these clauses. The extensive research I have conducted simply does not support this endorsement (see chapter 2).