

# THE PROBLEMS WITH USING CO-TRUSTEES OR CO-PERSONAL REPRESENTATIVES (EXECUTORS) IN WILLS AND TRUSTS

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January 10, 2013\**

It happens almost every week. A client walks in who wants to create a trust or will and who has two (or more) children. When we get to the question of who will handle the business of a client's will or trust, the client almost invariably says "I want all of my children to serve together as Co-Personal Representatives (or Co-Trustees or Co-Executors) of my estate."

My initial thought is that the parent is lucky to have two (or more) children that they trust so much to handle the job. But oftentimes, when I ask how the client was fortunate enough to have two children that could handle this important task, the response is generally "well, Child1 is very capable, but I am putting Child2 in charge as well because Child2 would have hurt feelings if I didn't appoint them as well." Hurt feelings, I have learned, are not a good reason to appoint the children as "Co-anything" (mainly because this process is just the beginning of more hurt feelings). The following represents the major issues our firm encounters on this topic.

## **No Accountability:**

"I thought you were handling that." The number one way for a probate estate to take forever—waiting for the two children to complete a task they thought the other was going to do. Unless the children are Donnie and Marie, one child is invariably going to do more than the other. This leads to feelings of anger for both the other sibling and the parent (who didn't realize that "Johnny is lazy and I do everything"). At a time when a family is supposed to be grieving, why infuse anger and hatred into the mix? There is also the other end of the spectrum—two hyper-vigilant fiduciaries. While this is much rarer, a good way for big mistakes to be made is having two children running around doing things twice (paying bills twice, having property appraised twice, etc.).

## **Stalemate:**

Two children are appointed with true "50%-50%" power. What is the first thing they are going to do? Disagree! What happens when they disagree? That is what my firm (and another firm) get to figure out together. For just a few hundred dollars per hour (times two), a problem that would not have existed if one child was appointed can now employ the talent of multiple attorneys (turned relationship counselors) to solve it. I don't know of too many probate estates that can handle the financial weight of two firms billing at their full hourly rate for very long. While I think it is very kind of a person appointing "co-fiduciaries" to essentially leave their life savings to attorneys, I think I want my children getting at least a few dollars for my efforts.

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\* This article appeared on the website <http://www.estateplanningattorneydenver.com> on January 10, 2013

### **Banks don't like Co-Executors and Co-Trustees:**

I have had situations arise where two children inheriting a large sum of money tried to open a trust bank account at a bank. The children wanted to make sure they were joint on the trust account. The bank said "fine" (only after reading through the trust agreement to verify that the trust actually made the children "co-trustees"—which took about a half hour). The children next asked that there be two signatures lines on each check, so they would both have to sign before any checks could be valid. The bank said, "we don't do that anymore." The children were stuck. Neither would relinquish the power to sign on the checks, but the bank would not allow a dual signature check to be issued. This case got very emotional and heated between the children, but the main point here is that Banks are not really set up to handle co-trustee arrangements.

### **Courts don't like Co-Executors and Co-Trustees:**

While I have witnessed Colorado Courts appoint multiple personal representatives to act on an estate's behalf, the Colorado law doesn't really give guidance on how to administer a probate proceeding when two personal representatives are appointed. For example, two persons are appointed, they disagree, who wins? The law is silent. I can tell you who "wins"—the multiple attorneys who will go to Court and argue it to the Court! If you read through Title 15 of the Colorado Revised Statutes, the law really favors there being a single person in charge.

### **Distance does not make the Heart Grow Fonder:**

In today's mobile society, it is almost certain that the children will not live "down the street" from each other. If the children have true 50-50 responsibility, then they usually need to show up together at the bank or the court or the attorney's office to get matters handled. Just the coordination of two working person's schedules is hard enough these days, but it can be compounded when one fiduciary starts complaining that they drive farther than the other. In situations where one of the children has an emergency and cannot make an appointment, time and money can be wasted on attorney fees for appointments that are cancelled. This is again compounded when one child lives out of state. If the two children cannot physically be present together on a regular basis, it creates a situation where the trust or estate cannot get anything done. What conclusion do the children usually come to? The "other" kid should resign! Now we have a conflict between the "Co" kids!

### **Why have one attorney, when you can have two?:**

The issue of conflict dove-tails in from the last paragraph. Attorneys, by our ethical standards, cannot represent two parties that are in conflict. The conflict can be as simple as not agreeing on the value of property to the really important conflicts (who gets mom's engagement ring?). The first step the "Co-kids" usually take when they need initiate a probate is to hire one attorney to handle the probate estate. However, when the children are in conflict, the attorney cannot choose which of the children they will represent and must "fire" both of the children as clients. The next step is for each of the children to hire their own attorney. So...now you really have three attorneys who have billed an estate. Are more than two children co-personal representatives or executors? That can lead to situations with 4 or 5

attorneys billing the estate (or more!).

*So what should you look for when appointing a Personal Representative, Trustee, or other fiduciary?*

- 1 **Proximity:** If I had two children that were equally capable, I would name the child closest to where the parent lives. Travel takes less time, travel costs less, and the child can more easily safeguard the property of the parent. Proximity should be the number one consideration.
- 2 **Capability:** You know your children. Some people are good at paperwork, some are not. Some children are good with money, some are not. Don't send your duck to eagle school—make your banker daughter the fiduciary, not your artistic son.
- 3 **Virtue:** One of the children is probably fairer or more trustworthy than the other(s). Everything else being equal, I would want that person in charge.
- 4 **All other things being equal:** The kids are all live equidistant from you, are all capable, and all virtuous: you have a good (or bad) problem. Then just name the oldest (the oldest usually feels miffed if they are not appointed).

*Worst reasons for making children co-representatives of Wills and Trusts:*

1 **“My children are not close, and I want to bring them together after I pass.”**

The kids will (usually) not become close after you pass. Think more Able and Cain than the Brady Bunch. If you wanted to bring them together, leave all the money to charity and then they will have something in common—disliking their deceased parent.

2 **“I don't trust any of them, so they will act as checks and balances against each other since I can't be there to mediate.”**

Checks and balances barely works in Washington, D.C., and that is only because mankind hasn't come up with a better system of government. You do have a better alternative—name only one child to serve as a fiduciary at a time! Also, if you don't trust your kids, make mean Uncle Ned the fiduciary!

3 **“I just cannot make a decision because I love them all the same.”**

If you really love them, you will be able to decide. Otherwise, you really love your attorney more than them.