

12th Annual
LDS Philanthropies
Gift Planning Council
Conference

For a Wise Purpose

WHAT CAN GO WRONG & HOW TO FIX IT.

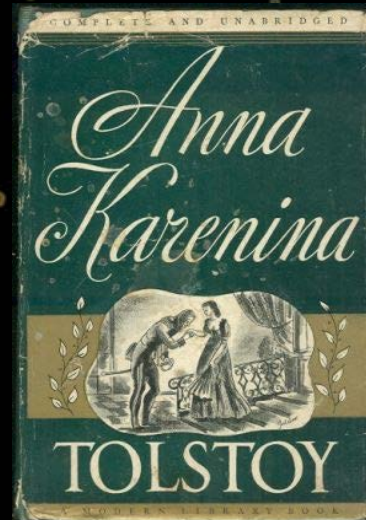
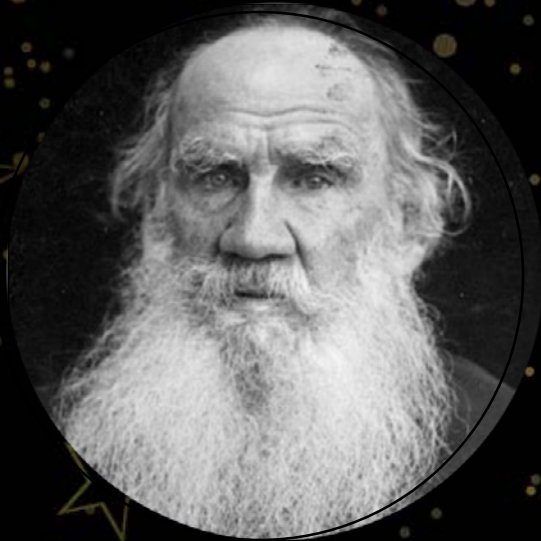
Carol Warnick, Kristin Keffeler

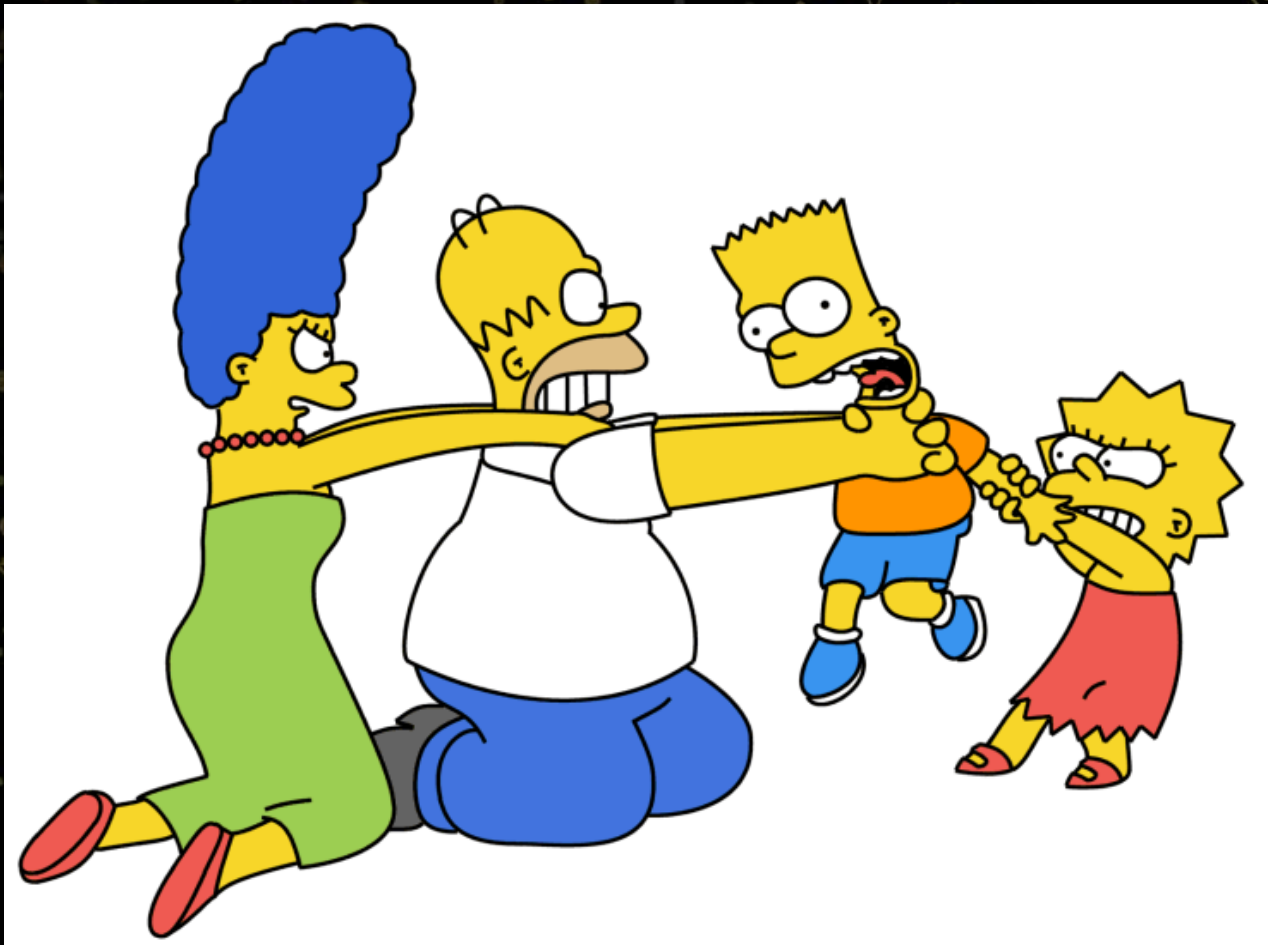
David Grant, and Layne Rushforth

November 2017

Who said this?

“All happy families are alike: each unhappy family is unhappy in its own way.”





Estate litigation battles are often outgrowths
of unhappy families

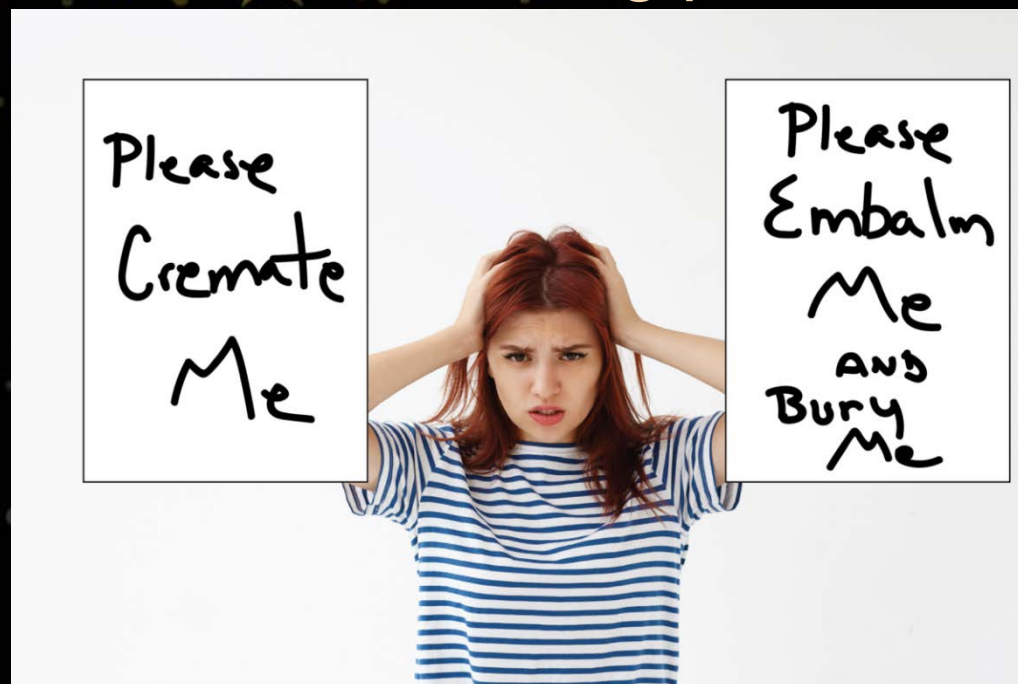
TYPICAL THINGS THAT CAN GO WRONG

- **Invalidity of Will of Trust**
 - Lack of capacity
 - Lack of legal formalities
 - Undue influence



PROBLEMS WITH DOCUMENT DRAFTING

- Ambiguities
- Settlor's intent is not clear
- Inappropriate tax apportionment provisions
- Unenforceable or conflicting provisions



UNFORESEEN CIRCUMSTANCES

- Changes in family relationships
- Changes in asset values
- Inaccurate forecast of income and/or appreciation
- When a family member does something you don't expect



UNINTENDED CONSEQUENCES

- Poor tax advice or planning
- Problems with disclaimers
- Unworkable tax apportionment clauses
- Poor cash-flow planning



FIDUCIARY ISSUES

➤ Improper administration

- Failure to account and inform
- Self-dealing/conflicts of interests
- Actions contrary to law or governing document



FIDUCIARY ISSUES CONT:

- Other breaches of fiduciary duties
 - Imprudent investing
 - Lack of impartiality
- Principal and income disputes
 - Lack of attention to the UPIA



**What is the
UPIA????**

AVOIDING PROBLEMS - 1

➤ Building the collaborative team

- Fiduciaries
- Advisors
 - Legal and accounting
 - Investments
 - Trust protector
 - Beneficiary Coach/Advisor
- Designation of successors
- Removal and replacement

AVOIDING PROBLEMS - 2

- Avoiding surprises through proactive communication
 - Set expectations about what will/won't happen when the plan is enacted
 - Don't avoid just because it is uncomfortable
 - Declaration of grantor's intent:
 - Desired consequences
 - Shared values
 - Encouraged conduct
 - Discouraged conduct

AVOIDING PROBLEMS - 3

- Avoiding surprises through proactive education
 - Grantor education
 - Beneficiary education
 - Build foundational trust/estate/financial skills and vernacular

AVOIDING PROBLEMS - 4

- Have the courage to build and strengthen relationships before it's too late
 - Invest in family meetings
 - Hire trained facilitators to help everyone build the skills to have tough conversations
 - Be sure to celebrate the gifts of the individuals within the family
 - Be sure to celebrate the strength of the family

CASE STUDY #1: DR. DAN

- Surgeon; profitable surgical centers
- Wyoming “hobby ranch”; cattle and bison
- 12-year second marriage to Wilma
- Sons involved in ranch, but not daughter
- Desires for \$25 million estate:
 - Medical school to build new wing in Dan’s honor;
 - \$1.5 million to Wilma;
 - Children receive balance.

DR. DAN'S PLAN

- Dr. Dan implements a plan so that:
 - Part of ranch is to be sold for bequests to medical school and Wilma;
 - Balance of ranch to be retained and run by his sons.
 - Provisions for daughter are vague.
- Dan implements plan without telling his children.

AFTER DR. DAN'S DEATH

- Sons challenge gift to wife and medical school, asserting
 - Lack of sufficient mental capacity
 - Undue influence on part of estate-planning attorney
- Potential problems with share for daughter.

CASE STUDY #2: SCIENTIST RONALD

- Ron is a successful research scientist.
- Ron pledges millions of dollars to a university, and the university builds a building that is named in his honor.
- Only some of the funds are paid prior to Ron's death.
- Ron engages an attorney to prepare a trust, and the trust does not mention the charitable pledge. Children are residuary beneficiaries.

AFTER RON'S DEATH

- Ron's daughter is the trustee.
- What are the trustee's responsibilities to the university?
- Possible options:
 - Post-death judicial actions for instructions, reformation, and/or declaratory relief.
 - Mediation and arbitration among all interested parties.
 - Malpractice against drafting attorney.

CASE STUDY #3: SAMUEL & LISA

- No children; few relatives; charitably inclined.
- Charitable remainder unitrust (NIMCRUT)
- Kerfuffle with bank trustee:
 - Bank resigns;
 - Substitute bank is designated;
- Things change:
 - Charities fall into disfavor;
 - Beneficiaries die and also fall out of favor;
 - Frank comes into the picture.

PLAN CHANGES

- Frank is designated trustee and residuary beneficiary of revocable trust.
- Frank is the trustee of the NIMCRUT, and charities created by his wife are the beneficiaries.
- Advice of attorney to take steps to reduce litigation are ignored.

LISA DIES; SAMUEL IS INCOMPETENT

- Frank is challenged as Samuel's guardian.
- NIMCRUT trustee challenges changes:
 - Undue influence by Frank;
 - Lack of mental capacity.
- Eliminated beneficiaries challenge the trust on the same grounds.

PREVENTION OR CURE?

➤ Preventative:

- Competency evaluation;
- Pre-mortem declaratory relief.

➤ Preparation for litigation:

- Declaration of intent;
- Second legal opinion;
- Video declaration;
- Affidavits of potential witnesses.

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CONCLUSION

Thank you for your time and attention