

DO YOU NEED A “LITIGATOR” OR A “TRIAL LAWYER” AND DO YOU KNOW THE DIFFERENCE?

Matters involving wills, trusts, probate estates and guardianships sometimes, unexpectedly, end up in court. When that happens, it is especially important that the right lawyer is representing you.

What appeared to be a “simple” probate or trust administration at the outset, unexpectedly turns into a litigation matter when a child, spouse or other beneficiary is either unhappy at the share of the estate (if any) which has been left to that person, or perhaps one of the estate beneficiaries objects to the manner in which the personal representative or the trustee is managing the trust or the estate. The office lawyer who was handling the probate or trust administration up to that point does not handle disputed matters and recommends to the client that another lawyer must be hired to deal with the litigation portion. The other side if that is when the unhappy beneficiary is seeking counsel.

There are many other scenarios where litigation unexpectedly becomes the order of the day. In this situation, a new lawyer must be brought into the matter and you, as a client, need to have some understanding of how these types of matters are handled in court, and how lawyers work.

There are basically two types of lawyers who handle these cases – those who will handle the entire litigation start to finish including personally conducting the trial of your case, if necessary, and those who may handle the preliminary matters but do not have the necessary trial skills and will bring in yet another lawyer at the last minute (at this point you’re paying either 2 or 3 lawyers) who will actually conduct the trial, if it comes to that. The reason for this is that although a lawyer may describe himself or herself as a fiduciary “litigator,” this does not mean that he or she is a probate or fiduciary “trial attorney”. That distinction is important! A trial attorney is the one who actually prepares the case for trial, goes to the trial, examines and cross examines witnesses and makes the argument to the judge – that is to say, the one who handles the final critical part of the case (and hopefully the rest of the case leading up to that point as well).

The litigator may go so far as to argue preliminary hearings and even attend mediation to attempt to settle the case – but if the matter cannot be settled, then another lawyer must be brought into the case to conduct the trial. Of course any case can be settled if you are willing to give away enough of what should be rightfully yours to the other side. We sometimes see an opposing counsel who is not a trial lawyer and is desperate to settle the case, perhaps to the point of being willing to “give away the farm,” because he or she can’t try the case and we both know it. That lawyer tells the client, “A trial would be uncertain and cost lots of money. Even though you’re not getting anything near what you deserve in their offer, you’re really better off accepting it than going to trial.” You want to be sure you’re not on the wrong end of that scenario.

You will already have spent tens of thousands of dollars (or perhaps hundreds of thousands of dollars) for the first lawyer's time to become familiar with every important detail of the case. When that lawyer says to you "this is as far as I go, I'm going to bring a trial specialist aboard" then you will spend tens of thousands (or hundreds of thousands of dollars) bringing that new lawyer up to speed. Unfortunately, that new trial counsel can never know as much of the facts, of the personalities, strengths and weaknesses of the witnesses and the parties, or ever be as knowledgeable as the previous lawyer. Even more problematic is if the trial lawyer is a generalist who tries many different types of cases, and really is not familiar with the law as it relates to wills and trusts because he or she does not practice exclusively in this area of the law. His or her only expertise is the ability to try cases. In fact, because the new lawyer can't know as much about the case as the predecessor or really knows little or nothing about the underlying substantive law of wills and trusts, it may be suggested to you that you pay BOTH lawyers to proceed – one with the knowledge of the facts and the underlying substantive law to whisper in the ear of the other with the ability to conduct the trial. The right question to ask the trial lawyer when being considered for employment is "What other types of litigation do you try?" or "How many wills or trusts have you prepared, and how many estates or trusts have you administered in the past 5 years." If the answer to those questions are "several other kinds" or "none," you will know that the trial lawyer's knowledge of the underlying law of wills, trusts and estates is probably very limited.

We are fiduciary litigators *and* trial lawyers with extensive knowledge of the law of wills and trusts and also with the trial skills necessary to conduct the trial of your case, if required. In fact, we only try cases involving wills, trusts and guardianships, because we do know this part of the law. We will not have to associate a second or third lawyer or law firm to carry the case to conclusion or fill in gaps in our knowledge or skills. On the other hand, if we know the counsel on the other side can't or won't try the case (he or she is just a "litigator"), we are in a much stronger position when it comes time to attempt settlement.

The final word is that when you consider hiring a law firm to handle your case, you should know at the outset whether *that lawyer* can and will personally handle the case start to finish and will actually conduct the trial of your case if that is required.

The Kelley Law Firm P.L.