

CONTENTIOUS TRUSTS AND THE PURPOSEFUL ADVISOR



Authored by Tsitsi Mutendi, Lead Advisor Nhaka Legacy Planning and Co-Founder at African Family Firms

Like the rise and fall of the tides of the oceans, all relationships have highs and lows. The individuals within these relationships navigate these waters like ships on the sea. Navigating to an unknown destination but holding the course when they can. Sometimes the waters are smooth sailing, and other times they can be perilous for the ships navigating them. At times the captains of the vessel can see with experience that the weather may take a turn and the storms as they reveal themselves. At times for the less experienced, the weather turns before they prepare, and they suddenly become perilous. Their ships can be taken into dangerous waters, and at times they can be sunk by an iceberg like the ill-fated Titanic. The biggest lesson that came from the Titanic was that being prepared. No matter how experienced the captain is or sturdy and seemingly “unsinkable” the ship may seem. If everyone is ready for disaster, they act accordingly, and more lives are saved. As advisors of families, we sometimes become captains of these ships that are navigating perilous waters. Our passengers may or may not have experience in the waters we sail. If they know the waters well, they can give us the right advice and tools to navigate our ship. However, in most cases, the passengers themselves get caught up in the moment and can obstruct or cause a lack of preparedness or

ability to navigate the waters. So what should we know walking into these perilous waters? For the intents and purposes of this article, let’s tackle the seas that are contentious estates and trusts. Contentious trusts & probate is the term used to refer to disputes over the administration of a deceased person’s estate, including the validity or interpretation of a Will, inheritance, and the way the estate is being administered. In most cases, these are caused when families have conflict over an estate amongst themselves or with appointed trustees. Walking into this storm needs great care as it may come in different formats.



As we all know, no matter how close a family is, there will surely be moments when they disagree or have differing points of view. Family conflicts can affect anyone regardless of their family structure, size, or any other number of factors, and the cause of conflict can come from a difference of opinion, experience, preference, perspective, personality, or beliefs. Relationships are the foundation of most people’s lives, and in the thrust of emotions, they cannot see the possibility of ever reaching land (peace and stability) safely. Using a mediator after a parent dies may be helpful when emotions are running high, especially among siblings. In many cases, sibling disputes often erupt after a parent dies, and it’s time to divide up the assets of an estate, and these fights can result in lengthy and expensive legal actions. When dialogue is open, engaging a skilled conflict resolution specialist may be a tool one can use, especially if the family is open to looking past legal action. Ultimately it builds the trust relationship between the advisor and the family, especially when the family navigates these seas without too much loss.

A common reason contentious trust happen is a sham trust. This usually happens when a trust is created and intended to appear legitimate but does not affect the rights and obligations of those named as the beneficiaries. For

a sham to be established, a common intention is required between the trustees and the settlor. Sometimes, a trust is not a sham, but members of the deceased family may feel it is if they are excluded from the will or the benefits of the trust. In such cases proving the trust is a sham, or not can be a challenging task. Most commonly, after a loved one passes, there is a sea of emotions that all members of the family face. Establishing the key members of the family and those of the trust is essential. Creating a space of dialogue separately with each party and creating a rapport is a great starting point. Remaining objective whilst establishing the critical issues will really help more so if arbitration is still an option. The first port of call is where relationships can be salvaged and dialogue encouraged. However, this may not always be an option.

As the saying goes, “prevention is better than cure.” How can an advisor help in the mitigation and or prevention of contentious trust and probates:



Estate-Planning Steps for Parents

Nothing is as certain as death and taxes. At some point, we will face both. Planning saves us the burden that comes with both. As obvious as that may seem, we all face clients who resist this conversation.

However, a continuous reminder, even if very subtle, is always advantageous to us as advisors and, more so, to the family who will face many of the challenges that come with mourning

and losing a loved one. In families planning before death can address many of the issues that arise after a principal dies. More so if they are parents. As we mentioned before, sibling conflict and rivalry is the leading cause of family conflict. The most important action a parent can take is to have a will that specifies which sibling receives what in terms of property. Questions as complex as “Who inherits the house? A business? A valuable painting?” Or simple conversations like “Who inherits a family pet or even an heirloom?” can be quickly answered and spelt out in a will.



Respect Differing Opinions

Empathy and respect are integral to maintaining healthy relationships with family, friends, and coworkers, even when you don't share the same ideas. Everyone is entitled to have their own opinions and beliefs, even if they do not always align with ours. However, what leads to contention could be the inability to accept or understand the other person's viewpoint. For advisors, engaging tools like an empathy map when we face arbitration is invaluable. It allows us to navigate the clients in ways that will enable them to perceive the viewpoint of the other person at the negotiating table. This means ensuring the family stays focused on the issue at hand instead of launching ad hominem attacks on the intelligence, integrity, or character of the person they are experiencing a conflict with. It's vital for you, the advisor, and all the parties to remember that not all conflicts or disagreements can be resolved, but they can always decide to treat their family member (or anyone else) with respect. At the very least, if empathy is not possible and the relationship cannot be salvaged, respect is a necessity.



Create Safe Boundaries

In any friction and conflict, there are opposing sides. While, as advisors, we cannot control what someone says or does in a conflict, we can make our clients aware that they can control how they respond to the situation. It is in our interests and that of the client that we make them aware that setting boundaries



Consider the Bigger Picture

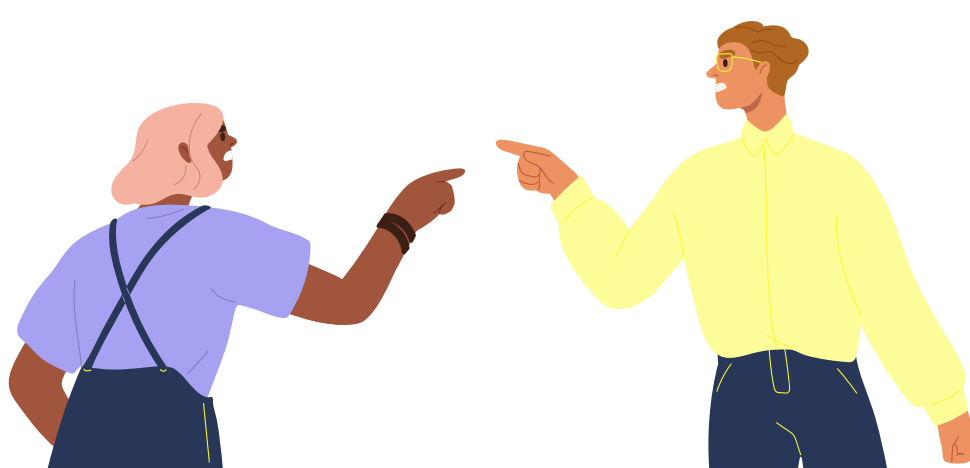
In most cases, conflicts usually seem to hinge on one person or side coming out as the “winner.” The focus becomes on the “winning or losing” narrative, which sometimes calls to our carnal urge to want to win and feel inconsolable if we lose. However, conversations with family shouldn't be viewed as battlegrounds if there is an outlook to preserve the relationship and reach a solution that both sides can be happy with. Family conflicts can be used as an opportunity to build the family's communication skills, which in turn can create a situation where the family can realise that they are “a team”, and they can find a collaborative solution. As an advisor, we can be the outsider who can be a team coach who helps them work with each other to ensure that through dialogue, they are practising respect, active listening, and empathy, even in situations where there's no clear-cut resolution.

is an effective way to practice self-care and self-respect when they start to feel overwhelmed by a conversation. Often times conflicts can lead to meaningful conversations and open up the opportunity to heal stressful relationships. However, if family members become aggressive or become too distressed during dialogue, setting up a boundary and putting the conversation on hold is essential. Psychological safety is an important conversation which is defined by all members in a conversation feeling that they are in an environment where their contribution is heard and acknowledged. If any parties feel unsafe in a situation, it's time as an advisor that you may introduce the need to seek additional outside help, such as law enforcement, a lawyer, an arbitrator, or a therapist. Communication is critical to finding common ground and working toward a solution that is ideal for everyone involved.

Accept what you can and cannot control.

As an advisor, this also applies to family members, no matter how much one may want to find a resolution. One cannot control the behaviour of others. You have to make it clear to your client that they can only control how they respond. As an advisor, you can use your experience on the conflicts you've handled in the past, how your clients reacted, and what the outcomes were. It's also imperative that in cases where you advise your client, you also communicate that if the dialogue does not go the way they expect that there may be a need to change their response and make it less predictable, making it harder for them to be triggered or manipulated into further conflict. Suppose all parties have communicated as effectively as possible, and it is still not well received. In that case, this may indicate a need to redefine the boundaries and expectations in their relationship.

As an advisor, if the results don't match your expectations, you can reflect on your approach and if it accurately reflects your clients' intended needs or requests. This will help you assist your client in a way that maintains their self-respect and the respect for the relationship they have with their family. Your opinion and support may not always be accepted or welcomed. This happens, and you should not allow it to affect how you handle clients and their needs. In some cases, you, as an advisor, may decide to pass on the case to someone else who may be able to handle it in a way that is in line with the client's needs if it conflicts with your values.



Let any anger subside

In cases of extreme anger and aggression, it's always better to let things calm down before trying to resolve a conflict so that all parties can have a rational and constructive conversation. When emotions are high, the human brain's functional partly goes offline, making it hard to have a reasonable discussion with practical solutions. Discussions in times of extreme emotions, like during or immediately after a funeral or during times of a principal's illness, are usually highly stressful and emotional. Logic does not always apply during this time. Putting emotions aside may not be possible. Trying to resolve a conflict while people are angry and lashing out may result in failure or even worsen the situation further. The emphasis to yourself and your client is to remember that the goal is not to win an argument but to find a healthy and mutually beneficial resolution. Allowing a "reflective/calming down period" may find all parties "fresh" and ready to tackle the conflict or its source from a different mindset.



Minimise or end contact completely if nothing helps

While it often pays off to reach out rather than withdraw and create a battleground, some conflicts are simply unresolvable. Both client and advisor are better off minimising or ending contact entirely.

As an advisor, it is essential to highlight that this applies particularly to situations where abuse has occurred and there is an indication that it could continue in the future. Ending contact is usually the last option for all parties, but it's worth considering for your clients, especially if their health and well-being are at risk.

As captains of these ships, we should try to be attuned to the family, its members, and their needs and temperaments. It makes it a little easier to use arbitration as a resolution. As with the points above, contentious estates may also be beyond just sibling conflict and become a toxic sibling rivalry that even outdates the ship's captain. They may not be even between siblings but between parents and children, aunts, uncles or cousins. As we know, modern families come in various myriads and diversities. Knowing when the situation and the individuals you are working with are beyond verbal or assisted resolution is also essential for you, the captain, to recognise and navigate as necessary. Creating a diverse network for you to tap into various disciplines and talent pools may also be very helpful for you as an advisor to tap into when faced with the opportunity for other resolutions outside contentious estates and probate.

