

CHAPTER THREE – Structuring the Last Will

Purpose of this Ch. 3 analysis: to understand the components of the “last will and testament.”

This is more than an exercise in mechanics – consider the relevance of each will provision for: (1) local property transfer purposes, (2) federal tax (income & transfer), and (3) other reasons?

Trusts and wills course: a study of mistakes (!).

Estate planning course objective: to avoid these mistakes (i.e., litigation and malpractice risk).

What Happens When Intestacy?

P.3

State of Texas (or other states) provide for property distribution rules (e.g., Texas Estates Code):

- 1) Community property – all to surviving spouse, unless deceased has children other than with the survivor spouse. Est. Code §201.003
- 2) Separate property – with children surviving (a) personal property to spouse (1/3) and surviving children (2/3rds); (b) real property – to children subject to life estate in 1/3rd to surviving spouse; (c) homestead rights to spouse. Est. Code §201.002.

Possible Planning Options

p.3

Structuring a plan for the transfer of the client's wealth:

- 1) Use a comprehensive memorandum for client (& spouse) to describe objectives, etc.?
- 2) Use family settlement agreement in substitution for last will?

Components of the Last Will – Structuring

What are the components of a last will?

- Exordium clause.
- Payment of debts and taxes.
- Disposition of designated property items.
- Powers of appointment (create? exercise?)
- Disposition of the residuary estate.
- Powers clauses (for executor/trustee).
- Appointment of appropriate fiduciaries.

What is a “writing”? Electronic format? Is non-English language permissible?

Exordium Clause

p.4

- 1) To identify the testator (multiple names?);
- 2) To declare the domicile of the testator (& venue for probate administration);
- 3) To declare “Last Will & Testament”; possible exceptions when multiple jurisdictions (& multiple wills)?
- 4) To invalidate prior testamentary documents (assuming a current document exists to be superseded);

cf., the effect of a “codicil” to a last will.

Identifying Beneficiaries

p.5

Identify one's spouse (e.g., recognize a common law marriage/reject common law status?).

Identify children, including after-born children.

To identify other beneficiaries.

To specifically disinherit a beneficiary; what about the birth of a beneficiary after the testator's death? E.g., IVF?

(cf., treatment if intestacy were to occur).

Debts & Taxes p.6

Debts: Are they really debts? Enforceable?

How allocate the responsibility for debts?

What is “abatement” process if excess debt?

Taxes: Identifying the death transfer taxes.

How allocate these taxes? Include an allocation provision in the Last Will (or trust?) re taxes?

What is the governing law for the allocation of federal/state tax liabilities? See (1) Texas Estates Code §124.005 (cf., Uniform Estate Tax Apportionment Act); or, (2) Federal tax allocation rules (*next slide*). Is this (1) a “property law” or (2) a “tax law” question?

Federal Tax Allocations - Reimbursement Rules

§2002 – taxes to be paid by executor

§2205 – reimbursement from the estate

§2206 – insurance beneficiaries

§2207 – power of appointment

§2207A – marital deduction property

§2207B – retained interest property

Cf., proportionate vs. “stacking” allocation process.

Planner: Make estate tax cost projections?

Purposes of the allocation provision: See p.9-10.

Disposition of Tangible Personal Property p.11

How divide these assets among heirs?

What is the income tax basis for these items?

Is income tax incurred on the distribution of each asset from estate? See §663(a)(1) & §102.

Provide a separate “Letter of Wishes”?

If so, is this a “testamentary instrument” (subject to the local wills/validity statutes)?

Recognize the community property interest of the surviving spouse? Or of separate property?

Disposition of Residential Real Estate

p.12

How deal with the transfer of a client's residential real estate? Use the last will?

Including, when there exists a community property interest of the surviving spouse?

What treatment of any outstanding mortgage debt against this property? Retain or satisfy the home mortgage debt?

See Tx. Estates Code §101.001(a) re (all) property ownership vesting immediately upon death. What is significance of this provision for tax and estate administration purposes?

Power of Appointment Clause

p.13

How determine the existence (and type) of a power of appointment held by the client?

Is the power a special or general power?

Where created? In what other documents?

Determine who are the “takers in default”?

Implement either an exercise or a non-exercise?

How mechanically exercise the P/A, if desired?

What effect of the residuary clause in the client’s will in exercising the P/A? Include a specific provision in the will that any P/A which is held is not exercised? See TX Estates Code §255.351.

Disposition of the Residuary Estate p.14-15

Alternatives for disposition of the residuary estate (after all specific bequests paid):

- 1) Outright transfers to the beneficiaries.
- 2) Testamentary trust(s) for the beneficiaries.
- 3) To an existing revocable trust; is a “pourover” permitted from the estate to a pre-existing (previously revocable) trust?
- 4) Special receptacles for the residuary estate assets are: (a) marital deduction trust, and (b) credit shelter trust.

Appointment of Executor & Trustee

p.17

**Designation of the executor (& successors).
What legal qualifications are necessary for the
executor? Tx. Estates Code §304.003.**

What family/psychological considerations?

Waive security bond for the executor? Why?

Payment of any compensation to the executor?

How determine the amount?

Appoint a special executor, i.e., for some assets?

What is an “independent administration”?

See Tx. Estates Code §401.001(a).

Administrative Powers for Executor/Trustee p.19

Property management, including investments (Prudent Investor). Unproductive property?

How allocate receipts and disbursements to principal or income (P&I)? E.g., property rents.

Distribute property “in kind” to beneficiaries?

What if varying income tax bases for the assets?

File a joint federal income tax return with a surviving spouse? What are the risks to either party on the joint return? Is “innocent spouse” relief available to one party (e.g., executor)?

Common Disaster Provision

p.22

Objective of the “common disaster” provision”
in the Texas Estates Code?

Under what circumstances reverse the
survivorship presumption in the common
disaster provision?

Testimonium Clause

p.22

How sign, i.e, “execute,” the Last Will?

What signing ceremony procedure should be used (and any special precautions)?

How prove and document the mental capacity of the testator at the time of the will signing?

Use any extra precautions? E.g., videotape?

Attestation clause (i.e., “self-proving clause”).

What is its function? See Tx. Estates Code §251.1045 (simultaneous execution, attestation and self-proving).

Include a “No Contest Clause” TX §254.005 p.23

Include a “no contest” clause, i.e., that a beneficiary shall take nothing if contesting the validity of the will? What if a statement that beneficiary “will take unless contesting”?

What is the effect if contesting party seeking a larger amount loses? Still entitled to the bequest if the challenge was “reasonable”?

If disinheriting someone who is “natural object of one’s bounty” provide (1) \$1 or (2) an explicit statement that the person is being disinherited?

Will Safekeeping

p.24

How keep the executed will (and other documents) safe? Keep in one's personal safe deposit box? Does another person have access to safe deposit box? Is a bank safe deposit box frozen after death? Scanned copy on computer?

Leave the executed will with the estate planning attorney for retention and safe-keeping? What if the attorney retires/dies?

Execute multiple copies and place copies in different locations? Deposit with court? See

Other Will Formats

p.25

1) Joint & mutual will

See Texas Estates Code §254.004 for explicitly stating that a contract to make a will exists; otherwise, no contract. What if husband and wife are executing wills at the same time?

2) Holographic will, Texas Estates Code, §152.052, recognizes validity of a will “written wholly in the testator’s handwriting.” This will can be self-proved with an affidavit.

Ancillary documents

p.26

- 1) Durable Power of Attorney – (*next slide*)
- 2) Revocable (or “living”) Trust Agreement
- 3) Appointment of one’s own guardian – cf., court proceeding – see Probate Code §1104.202.
- 4) Living will (Physician’s Directive)
- 5) Medical Power of Attorney (a representative for one’s medical affairs is appointed).
- 6) Anatomical gifts – how document to enable a consent for prompt “organ harvesting”?
- 7) Appointment of guardian for client’s children (not negating rights of the surviving parent).
- 8) Trust/safekeeping for pets?

Durable Power of Attorney

p.27

What is the governing law for a P/A?

Why a “durable” power? Attorney-in-fact (and not an attorney-at-law).

See statutory form for P/A in Appendix, P.52, & Tx. Estates Code, Chapter 752. New form.

Requires affirmative initials, rather than delete.

When make a P/A effective? (1) Immediately or (2) a springing power? P.54.

Record the P/A in any official records?

Necessary for real estate transactions?

Are gifts permitted to be made by the attorney-in-fact? P.53. What type/size of gifts?

Other Documents

- 1) Revocable “pour-over,” inter vivos trust.
- 2) Appointment of guardian for oneself. P.29.
- 3) Appointing Guardian for Minor Children – p. 30. Include this in the Last Will?
Form at Tx Estates Code §1104.153.
- 4) Living Will – Directive to Physicians, p.42
See Tx. Health & Safety Code provisions
- 5) Medical Power of Attorney – also Tx. Health & Safety Code, p.46

Unique (?) Considerations re Asset Transfers

Post death care for client's pets – create a special trust? Who is the guardian?

Computer passwords and electronic access – deposit this information with a special independent provider?

Frequent flyer miles.

Anatomical gifts. How document?

Federal Income Status of A Probate Estate? P.32

A decedent's estate exists as a separate taxpayer for federal income tax.

Effect of Texas Estates Code §101.001(a) when property vests – does income from the vested property bypass the probate estate?

How long continue the estate as a taxpayer?

Objective to have multiple taxpayers for federal income tax?

How much real benefit from §1(e) income tax bracket ladder (for trusts and estates)?

