

CHAPTER THREE – Structuring the “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., limit 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 (& client's spouse) to describe objectives re property dispositions, etc.? And to provide information about location of documents, including computer passwords, etc.**
- 2) Use a family settlement agreement in substitution for last will?**

Components of the Last Will – Basic Structure

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.5

- 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- 4) To invalidate prior testamentary documents (assuming a current document exists to be superseded);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.6

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

p.6

Are they really “debts” (e.g., claim by child against parent’s estate)?

Are they enforceable under local law?

How allocate the responsibility for debts?

What is the “abatement” process under Texas Estates Code if excess debt? See P. 37.

Taxes

p.6

Even if no transfer taxes – note re IRS
“Transfer Certificate” – fn. 8, p. 4.

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 (FN. 10 & p.
38); cf., Uniform Estate Tax Apportionment
Act; or, (2) Federal tax allocation rules (*next
slide*).

Note: Is this (1) a “property law” or (2) a “tax
law” question?

Federal Tax Allocations - Reimbursement Rules

§2002 – taxes to be paid by the executor

§2205 – reimbursement occurs 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 does client divide these assets among his/her heirs?

What is the income tax basis for these items?

Is tax gain realized 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)?

Or is this “precatory” language only?

Disposition of Tangible Personal Property, cont.

Options for tangible personal property dispositions: P. 12

Recognize the community property interest of the surviving spouse in specific property?

Or, recognize spouse's ownership of separate property?

Note special requests: e.g., p. 13, re literary manuscripts. Similar to situation in Ch. 1, p. 12, fn. 23? – inclusion of value in gross estate, but here then a loss deduction?

Disposition of Residential Real Estate

p.14

How deal with transfer of client's residential real estate? Use the Last Will? TOD deed?

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.15

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 (p. 15).

Disposition of the Residuary Estate p.15-17

Alternatives for disposition of the residuary estate (after all specific bequests are 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 estate to a pre-existing (previously revocable) trust?**
- 4) Special receptacles for the residuary estate assets are: (a) marital deduction trust (p. 18) and (b) credit shelter trust (p. 18).**

Appointment of Executor & Trustee p.18

Designation of the executor (& successors).

What legal qualifications are necessary for the executor? Tx. Estates Code §304.003 (p.19).

What family/psychological considerations?

Waive security bond for the executor? Why?

Payment of any compensation to the executor?

How determine the amount? (P.19, fn. 44).

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

What is an “independent administration”?

See Tx. Estates Code §401.001(a) (p.20).

Administrative Powers for Executor/Trustee p.21

Property management, including investments (Prudent Investor standard).

Hold unproductive property?

What authority of the Executor or Trustee to retain an investment advisor (permitted delegation of authority)?

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

continued

Administrative Powers for Executor/Trustee p.21

Authority to exercise stock options?

Authority to distribute property “in kind” to beneficiaries? But, what if varying income tax bases for the distributed assets?

Distribution of appreciated property to satisfy a pecuniary bequest will trigger gain realization.

Distribution of loss property? Loss not limited by §267 (see exception in §267(b)(13) for estate’s distribution to satisfy a “pecuniary bequest”).

continued

Administrative Powers for Executor/Trustee p.22

File a joint federal income tax return with a surviving spouse?

What are the risks to either party on the joint income tax return?

Is “innocent spouse” relief available to one party (e.g., the executor)? §6015.

File federal gift tax returns and consent to gift splitting?

Common Disaster Provision

p.23

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

**Under what circumstances should the
survivorship presumption in the common
disaster provision be reversed? To equalize the
estates for federal estate tax purposes?**

**Cf., transfer all net assets to one spouse but the
executor for transferee spouse is to have a
“disclaimer power” so as to equalize estates in
the post-mortem context?**

Testimonium Clause

p.24

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

What “signing ceremony” procedures 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). P.25.

Include a “No Contest Clause” TX §254.005 p.25

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.26

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 Probate Court? See Tx. Estates Code Chapter 252.

Other Will Formats

p.26-27

1) Joint & mutual will – one will for a couple.

See Texas Estates Code §254.004 - must explicitly state that a contract to make a will exists; otherwise, no contract. What if husband and wife execute wills at same time?

2) Holographic will, Texas Estates Code, §152.052, recognizes validity of a will “written wholly in the testator’s handwriting.”

Will can be “self-proved” with an affidavit.

Durable Power of Attorney p.29 (& P. 54 – Est. Code)

What is the governing law for a P/A? Tx.
Estates Code – Chapter 751. Ch. 3, p. 54.

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

See statutory form for P/A in Appendix, P.54, &
Tx. Estates Code, Chapter 751 (p. 109).

When make a P/A effective? (1) Immediately or
(2) a springing power? P.110-111.

Record the P/A in any official records?
Necessary for real estate transactions? See in
form at p. 109.

Durable Power of Attorney p.29 (& P. 54 – Est. Code)

**What is the possible grant of authority?
§751.031 and P. 98. See form at p. 110 and
Estates Code Chapter 752.**

**Are gifts permitted to be made by the attorney-
in-fact? §751.032 and P. 98-99. If so, what
type/size of gifts?**

**“Duty to Preserve Principal’s Estate Plan,”
§751.122, p. 102.**

Power of Attorney Certification Process

Tx. Estates Code § 751.203, p. 105 – provides form for Agent's Certification provided by the agent presenting a power of attorney.

Before accepting - may also request an opinion of counsel – Estates Code §751.204, p. 106.

May request an English language transaction – Estates Code §751.205.

Written statement of refusal of acceptance is required. Estates Code §751.207; & judicial relief, §751.212. & §751.251, p. 108-109.

Power of Attorney Statutory Form

**Tx. Estates Code § 752.051 – provides form for
“Statutory Durable Power of Attorney.”**

- Specified powers.**
- Additional power may be provided**
- Election re time power becomes effective.**

Other Documents

- 1) **Revocable “pour-over,” intervivos trust.**
- 2) **Appointment of guardian for oneself. P.32.**
- 3) **Appointing Guardian for Minor Children –
p. 32. Include this in the Last Will? Form
at Tx. Estates Code §1104.153.**
- 4) **Living Will – Directive to Physicians, p. 32
& 44. See Tx. Health & Safety Code
provisions**
- 5) **Medical Power of Attorney – also Tx.Health
& Safety Code, p.48**

Unique (?) Considerations re Asset Transfers

Post death care for client's pets – create a special trust? Who is the guardian? P. 28

Computer passwords and electronic access – deposit this information with a special independent provider? P. 28

Frequent flyer miles.

Anatomical gifts. How document?

Federal Income Status of A Probate Estate? P.35

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

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

How long does the estate continue 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)?