Estate Planning Insights

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THE WHO, WHAT, WHEN, WHERE AND **WHY** OF PROBATE

*When a person dies, the "person in charge" of the deceased person's estate (e.g., Executor, Trustee) must address and handle three phases of the post-death process: (i) probate, (ii) estate (or trust) administration [including tax matters], and (iii) termination and distribution of the estate (or trust) [including the setting up and funding of new trusts created upon the deceased person's death]. This newsletter will deal solely with the first part of that process: probate. Persons may utilize estate planning techniques to avoid probate – which, by the way, is not commonly done in Texas, since Texas has the simplest probate process of all 50 states; please note, **however**, that all decedents' estates must go through the second and third phases of the post-death process (to be discussed in subsequent newsletters).*

By definition, probate comes at a very bad time–shortly after the death of a loved one. The people who are responsible for "going through probate" are already sad and upset, so every little thing about probate is likely to be viewed negatively. Let's look at probate in an objective manner and see what it is–and what it isn't.

The term "probate" is derived from the Latin word, *probare*, which means "to prove". One of the purposes of probate is to make sure that the final wishes of the "decedent" (deceased person) are carried out. Those final wishes are often embodied in the decedent's "Last Will"--but how does anyone know what those final wishes are if no written Will is brought forward (produced in court)? A Will that is left sitting in a safe deposit box, home safe or desk drawer might as well not even exist. "Third parties" (meaning banks, credit unions, brokerage firms, investment companies, real estate title companies, stock transfer agents, etc.) will be reluctant to follow the terms of a Will that hasn't been legally proven to be the decedent's Last Will–the potential liability is just too great.

Merely filing the Will with the court is not enough either. Again, how would any third party–or relative, for that matter--know whether the Will which has been "offered for probate" is truly the one that the decedent wanted everyone to go by unless that Will is proven to be the decedent's "Last Will"? We say "Last Will" so quickly that we forget that we truly mean the very last valid Will executed by the decedent–and not the second to last (or earlier) Will and also not a "Will" obtained by an unscrupulous person at a time when the decedent was lacking in mental capacity. Thus, in order for a Will to be a "valid Will", it must be "admitted to probate" (declared to be a valid Will) by a court having appropriate jurisdiction (in larger counties, special courts, called "Probate Courts", handle these matters).

But validating the decedent's Last Will is not the only purpose of probate. Those same third parties who are worried about liability for distributing assets to the wrong people are also worried about dealing with the wrong person. They want to be sure that they are transacting business with the true legal representative for the decedent's estate. Just because someone is married at the time of death and just because Texas is a community property state does not necessarily mean that the decedent's spouse is the person with legal authority to act on behalf of the decedent's estate. The same court that declares the decedent's Will to be valid will also officially appoint someone to be the legal representative of the decedent's estate. Most of the time the court is going to appoint the person whom the decedent has named in the Will to serve in that capacity. Of course, in Texas, a good Will names someone (an individual or a professional corporation having the proper powers) to serve as the "Independent Executor" of the estate. The word "Independent" in front of the word "Executor" is important and valuable, and it's also unique to Texas (you won't find that "magic" wording in a Will from Florida or California or New York, for example). If the decedent's Last Will names an Independent Executor, to serve without bond, and if the court has no reason to question the decedent's selection of that person to represent the

estate, the court will make an official appointment of the named person as Independent Executor at the conclusion of the probate hearing. Having an Independent Executor represent the estate makes the ***estate administration process*** (as noted above, the second legal phase after death) much simpler and less expensive than in those cases where an estate is not handled by an Independent Executor.

The term "independent" means that, once appointed, the Independent Executor may handle all tax and administration matters free from court control, supervision and review. It does not mean that the executor is "independent" of the decedent (in fact, in many cases the Independent Executor is a spouse, child or other relative of the decedent and often a beneficiary of the decedent's estate as well). Thus, the second purpose of probate is to secure the official appointment of the Independent Executor (or other legal representative if the Will failed to name an Independent Executor) for the decedent's estate. Once appointed, the Independent Executor will swear an Oath in front of the probate clerk, agreeing to carry out the terms of the decedent's Last Will and also agreeing to handle all matters required by both state and federal law. After executing his/her Oath, the Independent Executor will then receive special papers, called "Letters Testamentary", that are evidence of the person's official capacity as the legal representative for the estate. Now all of those third parties in custody of assets owned by the decedent will have the assurance that they are dealing with the proper person.

The matters described so far can often be accomplished within two weeks of "filing the Will for probate". The actual steps and documents are as follows: (1) The attorney will file the decedent's original Will with the court (it complicates the process if the *original* Will is not filed – in other words, a *copy* of the Will is not treated the same as the original Will), together with an Application for Probate of Will and For Appointment of Independent Executor (or Issuance of Letters Testamentary)–an "application" is basically a "request" that is made to the court; (2) after the statutorily mandated ten day waiting period has expired, the attorney and (usually) the person named as Independent Executor will go to court for the probate hearing, where the named executor (or any other knowledgeable person) will provide oral testimony in response to the attorney's questions (relating to the death and domicile of the decedent and certain other particulars regarding the decedent and the Will), followed by the witness signing a written summary of his/her Testimony, in order to provide proof to the court of (a) the court's jurisdiction, (b) the validity of the decedent's Will and (c) lack of any reason why the person the decedent has named as the Independent Executor in his or her Will should not be so appointed; (3) at the conclusion of the hearing, the court will sign the Order Admitting Will to Probate and Appointing Independent Executor; (4) then the person appointed as the Independent Executor will swear to the required Oath and obtain Letters Testamentary; (5) then the attorney for the Executor will publish with the customary legal newspaper and file with the court the required Notice to Creditors (a formal, general notice stating that the decedent has died and providing the Executor's contact information in the event any person or entity has a claim against the decedent or his estate). At this point, barring other issues, there is only one remaining step (and document) in the probate process (to be distinguished from the ***estate administration process*** – which will be discussed in the next newsletter): preparation and filing of the Inventory.

When a living person wants to transfer an asset he or she owns to someone else, whether as a gift or as a sale or for some other reason, the living transferor/donor can sign whatever papers are required to transfer the title of the particular asset to the recipient/beneficiary. For example, the title to a piece of real property is transferred by a deed–a written document in which the transferor, called the "Grantor", signs over the piece of real estate to the new owner, the "Grantee". The deed contains the names and addresses of the Grantor and the Grantee, the legal description (and sometimes also the street address) of the particular piece of property being transferred, and some additional provisions, such as who is responsible for paying the property taxes and other assessments on the property for the year of transfer. That deed is then "executed" by the Donor (signed in the presence of a notary public, to which an affidavit is attached) and filed and recorded in the real property records in the county where the particular piece of real estate is located (if a mortgage is involved, additional documents are prepared and filed). As a result of that process, the Donee acquires "good title" to the piece of property. The Donee can now live on the property, rent the property, sell the property, subdivide the property – do anything that a legal owner of the property can do (because he/she *is* the [new] legal owner).

When someone has died, how do they transfer the title to all of their assets to the new owners (i.e., to the beneficiaries to whom they have given their assets by Will upon their death)? Obviously, they cannot come back from the grave and write checks or sign deeds, new signature cards/account agreements, assignments and other title transfer papers. And it is not legally correct to leave a deceased person's name on any assets much longer than is necessary to complete the ***estate administration matters***. Further, due to community property laws, the decedent may own a community one-half interest in certain assets that do not show his or her name in the title (such as an IRA in the other spouse's name), and yet, his or her interest still must be transferred to someone upon his/her death (it must go somewhere

and the law requires that a certain process be followed to insure that it is transferred correctly).

In essence, a decedent's Will is similar to a deed – it is a document that transfers assets from the decedent to the decedent's chosen beneficiaries. However, unlike a deed which contains a legal description of the particular property being transferred, most Wills contain very general terms and not an itemized list of all of the decedent's assets (part of the reason for this is that what people own is constantly changing and it would be very uneconomical to have to sign a new Will each time a new asset were acquired or an old asset disposed of). Thus, the decedent may clearly state that he or she is leaving "all of my assets" or "my residuary estate" (meaning all of his/her property remaining after certain specific bequests) or "the tax free amount" or specified percentages of his/her total estate to certain beneficiaries (whether individuals or trusts or charities or other entities), but the Will is obviously incomplete as a deed or document of transfer. To remedy this problem, a final document is filed with the probate court for a decedent's estate, called the Inventory, Appraisement and List of Claims ("Inventory"). The filing of the Inventory enables the beneficiaries to obtain "good title" to the assets passing to them by Will from the decedent. The Inventory "completes the deed" by providing the legal description of all of the assets being transferred by the decedent's Will (please note that the Inventory should *not* list any "non probate" assets–assets that are passing upon the decedent's death outside the Will by other legally valid transfer mechanisms, such as by beneficiary designation or by certain forms of titling [e.g., JTWROS]).

Typical categories in a Probate Inventory are: (1) Real Estate (including mineral interests); (2) Stocks and Bonds (and similar securities, including mutual funds and REITs); (3) Cash, Bank Accounts and Promissory Notes Receivable; and (4) Miscellaneous Property (such as vehicles, household furnishings and personal effects, partnership interests). No debts or liabilities are listed in the Inventory.

With respect to the transfer of real estate, the Will and Inventory together have the same effect as a deed. If the real property being transferred is located in the county where the Will was probated and if it is clear from the terms of the Will who is inheriting that particular piece of property, then no further action is necessary (although an Executor of a decedent's estate may sometimes execute a "distribution deed" to clarify who the property is passing to or simply to speed things up with the county clerk and the appraisal district–which are notoriously slow in picking up probated Wills in the "chain of title" to real estate). If the real estate is located in another county in Texas, a certified copy of the Will and the Order Admitting the Will to Probate (indicating that the Will was declared to be a valid Will) can be filed in the deed records of the county where the real property is located to transfer title. Again, however, without the Inventory, the Will serves as a pretty incomplete deed (unless it contained a specific gift of the real property and the legal description of the real property in it).

After the Probate Inventory has been filed and reviewed by the court, if there are no problems with it, the Judge will sign an Order Approving Inventory. This Order signifies *conclusion of the probate process*. As previously noted, however, it is not the end of the post-death legal process, which consists of three phases, probate being just the first phase. As you can see, barring unusual problems and circumstances, the probate process is relatively simple and straightforward in Texas (and nothing to be feared).

People often ask, "How much does the probate process cost in Texas?" Most reputable attorneys in Texas handle probate matters on an hourly fee basis, although some may charge a flat fee. It would usually not be appropriate to pay an attorney a percentage of the value of the estate as a fee for handling the probate matters. Although many lawyers are capable of handling probate matters, if the decedent's estate is large enough to require the filing of a federal estate tax return (i.e., for decedents who die in 2004, an estate >$1.5 million), then it will usually be better to hire an attorney to handle the probate matters who is also thoroughly knowledgeable regarding the estate tax matters (which are handled during the second phase).

Some people want a more definitive estimate of attorneys' fees. This is difficult because every estate is different and individuals serving as Independent Executor vary dramatically in their ability to handle their responsibilities without assistance. Further, estates that are under the federal estate tax filing requirement reach the third phase and complete the post-death process much more rapidly than estates that must file a federal estate tax return. When we are working with the Executor of an estate, we are happy to review the situation and provide our best guess regarding what the attorneys' fees might total as a percentage of the estate by the conclusion of the three part post-death process (although we charge fees on an hourly basis, never based on a percentage of the estate).

As noted, the **estate administration process** (the second post-death phase), and the **estate termination and distribution process** (the third phase), will be discussed in the next two newsletters.

Besides the second and third phases of the post-death process, future newsletters will also address the issue of document retention (what should be retained and for how long and where?), practical rules to follow for those who have created family limited partnerships ("FLPs") and limited liability companies ("LLCs"), the legal right seriously ill people have to adequate pain medication, and other topics that are, hopefully, of interest to our readers.

Savings Bond Election Expiring

August 2004 will be the last month Series HH savings bonds are issued. Thus, after August 31, 2004, current holders of Series EE/E savings bonds will lose the opportunity to defer reporting accrued interest on their Series EE/E bonds by exchanging them for HH bonds, which can permit tax deferral on accrued interest to continue for another 20 years after the exchange. Whether or not an individual holding EE/E bonds should exchange them before September 1, 2004, depends on a number of factors, such as: (1) the amount of interest deferral involved; (2) the interest rate on the bonds; (3) the final maturity date of the bonds; (4) the expected tax bracket when the bonds would be cashed if not exchanged; (5) the need for the funds; and (6) the availability of suitable alternative investments. If you have Series EE/E bonds and are not sure what to do, your CPA should be able to make the necessary calculations to enable you to make an informed decision.

Contact Us:

If you have any questions about the material in this publication, or if we can be of assistance to you or someone you know regarding estate planning or probate matters, feel free to contact us by phone, fax or traditional mail at the address and phone number shown below. Feel free also to submit proposed topics for future newsletters.

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