TEN DOS AND DON'TS FOR EFFECTIVE WILL DRAFTING

By:

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EDUCATION:

University of Texas at Austin, B.A. in Classics 1979, with Highest Honors
University of Texas School of Law, J.D. 1982, with Honors; Legal Research Board Director

PROFESSIONAL:

Founded Andreason Law Firm, PLLC in Sugar Land, TX -2007
Law firm of Mehaffy & Weber, P.C., Beaumont and Houston, TX, 1983 – 2007; Shareholder 1988 – 2007
Member of American Bar Association; Sections: Real Property; Probate and Trust Law; Tax Law; Business Law; Past Member of Estate and Gift Tax Committee
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Member of Jefferson County and Fort Bend County Bar Associations
Board Certified: Estate Planning and Probate Law, 1993; Commercial Real Estate Law, 1990
Listed in Best Lawyers in America, Estates and Trusts Section
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Southeast Texas Estate Planning Council, Past Director.
Texas Academy of Probate and Trust Lawyers
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AUTHOR/SPEAKER:

Frequent author and speaker on areas of expertise; selected papers and speeches:
"Estate Planning: the Basics and Recent Trends," Bank of Texas (Sugar Land Branch) Seminar (2009)
"Effect of 2007 Texas Legislative Changes on Estate and Probate Practice," Fort Bend County Bar Association Seminar (2008)
"Necessary Legal Documents for Law Office Management" Jefferson County Bar Association Law Office Management Seminar (2006)
"Estate Planning for Resident and Non-Resident Aliens," Colorado Bar Association National CLE Conference on Trusts and Estates (2005)
"Amending the Irrevocable Trust," Southeast Texas Estate Planning Council (2004)
"When a Good Plan Goes Bad: Revoking the Irrevocable Trust and other Desperate Measures," Law Education Institute National CLE Conference on Trusts and Estates, Aspen, Colorado (2004)
"Effect of Estate Tax Repeal on Document Drafting," Law Education Institute National CLE Conference on Trusts and Estates, Aspen, Colorado (2003); reprinted in State Bar of Texas Advanced Estate Planning Strategies Course (2003)
"Estate Planning After the Economic Growth and Tax Relief Reconciliation Act of 2001," Southeast Texas Estate Planning Council (2002)
"Why You Still Need an Estate Plan After Tax Repeal," Hibernia National Bank, Beaumont, Texas (2001)
"Qualified Plans and Other Nonprobate Assets," Jefferson County Bar Association Probate Law Seminar (2000; 1998)
"Choice of Entity," Southeast Texas Estate Planning Council (1999)
Chapter: "Income Tax Returns for Decedents and Estates," published in Texas Estate, Probate and Trust Administration (Matthew Bender & Co. 1992)
Review, "Protecting the Trustee and Executor in the '80s," 50 Tex. Bar J. 1264 (1987)
"Handling Post-Mortem Elections for Decedents' Estates," 49 Tex. Bar J. 786 (1986)

CHARITABLE:

First United Methodist Church, Houston, Texas: has served on various committees.
First United Methodist Church, Beaumont, Texas: Board of Trustees (1996-1998, 2002-2004, chairman 1997-1999); Staff Parish Relations Committee (chairman 1999-2001)
Fort Bend Lawyers Care, Advisory Director 2008-present
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PERSONAL:

Born December 17, 1958, Beaumont, Texas
Married to Lisa Andreason; three children

TEN DOS AND DON'TS OF EFFECTIVE WILL DRAFTING

FIVE DO'S

1. DO make sure that all property of the client is properly disposed of under the will.

A. Disposition of Entire Estate. Occasionally, I am asked to review a will that makes a number of specific bequests of particular accounts (even with numbers!) for accounts that no longer exist or were held at banks (also specifically identified) which merged or went into receivership years ago. Or the will disposes of specifically identified real estate or other property that was long ago sold. These wills also often have no residuary clause.

There are few things more embarrassing to an estate planning lawyer than being held responsible for a partial intestacy.[1] Clients don't like it much either. Regardless of the detail with which the client instructs you on the disposition of his/her property, and even if the client insists that there is nothing left to dispose of under a residuary clause, always include a residuary clause. Something as simple as, "**I leave all of my remaining property, including any lapsed or void gift, as follows:. . .**" would be sufficient.

Also, any will should contain the following, usually in the introductory paragraph:

This will revokes all wills and codicils that I have previously executed and disposes of all property that I own at the time of my death, wherever situated.

B. Wills of Non-U.S. Citizens. But what about clients with significant properties overseas? This is becoming an increasingly common issue with our growing international population in Fort Bend County! If the client has property in India or Brazil, and has executed a will disposing of that property, does the new will revoke that will and, if so, does it effectively dispose of the foreign property as the client wishes or does it just create a lawsuit in a foreign jurisdiction? While dealing with foreign wills is beyond the scope of this presentation, you should be sensitive to the issue. To play it safe, you may want to modify your opening paragraph as follows:

This will revokes all wills and codicils that I have previously executed with respect to my U.S-based property and disposes of all property in the United States that I own at the time of my death. This will does not revoke any will executed by me previously and making disposition of my property in [name of country].

Better still, if you are drafting a will for a non-U.S. citizen with wealth overseas,

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[1] If any portion of a decedent's estate is not disposed of by specific bequest and is not covered by a residuary clause, that portion of the estate will pass by intestacy. *Farah v. First National Bank of Fort Worth*, 624 S.W.2d 341, 347 (Tex. App. – Fort Worth 1981, writ ref'd n.r.e.) The general presumption against intestacy under Texas law will not be sufficient to create a residuary clause in a will if none exists. *Alexander v. Botsford*, 439 S.W. 2d 414, 416-17 (Tex. Civ. App. – Dallas 1969, writ ref'd n.r.e.)

consult with an expert in the foreign jurisdiction, to make sure that you don't accidentally dispose of something in a way that you will regret.[2]

C. Special bequests. In drafting special bequests, the following considerations should be taken into account:

(1) Real Estate. Specially bequeathed real estate need not be as particularly described as required in a deed, but it should be described well enough to be identified by a reasonable person. A street address would be sufficient for urban property. Rural property should be described by metes and bounds, if possible, especially if multiple tracts in the same county are being devised to different recipients. Make sure that you include not only a description of the land, but also all improvements, as well as "related insurance policies or proceeds."

If the client wants to make a special bequest of his/her residence to a particular person, it would be better to say "my personal residence at the time of my death" instead of giving a specific address. Otherwise, if the client makes a special bequest of his residence at a particular address, and subsequently sells the property and buys a new residence which he owns at his death, the new residence would not be substituted for the one described in the will, and the bequest will fail by reason of ademption.[3]

If the real estate is subject to mortgaged indebtedness, make sure that you express whether the debt securing the encumbrance is to be exonerated by the residuary estate, or if the client intends for the property to pass to the recipient subject to the outstanding debt and mortgage.[4]

(2) Stock. Special bequests of stock can create difficulty. It is usually best to identify the company but not a specific number of shares. Otherwise, the clause may create an ambiguity as to whether the client intended to follow the general presumption that a special bequest of stock includes stock splits, stock dividends, and other mutations.[5]

(3) Cash legacy. A general legacy of a specific dollar amount may be satisfied from cash or in-kind. Adding the words "in cash" is unnecessary and may actually cause the legacy to fail by reason of abatement, if there is insufficient cash in the estate to fund the legacy

[2] Wills of non-U.S. citizens carry many, many traps for the unwary, especially with respect to application of the federal estate tax rules. For starters, outright gifts to non-U.S. citizen spouses do not qualify for the federal estate tax marital deduction, and clients classified as nonresident aliens for tax purposes only have a federal estate tax exemption of $60,000, as opposed to resident aliens whose exemption is the same as U.S. citizens (currently $5 million). These issues are well beyond the scope of this paper. You should consult with an attorney knowledgeable about these rules before attempting any estate planning for non-U.S. citizens.

[3] *Wolf v. Hartmansgruber*, 162 S.W.2d 112, 116 (Tex. Civ. App. – Fort Worth 1942, no writ).

[4] In wills drafted since September 1, 2005, there is now a presumption that specially devised real estate will pass subject to any existing liens and the devisee will have no right of exoneration against the residuary estate. Texas Probate Code §71A. This reverses the common law presumption which applies to wills drafted before that date. See: *Currie v. Scott*, 187 S.W.2d 551, 554 (Tex. 1945).

[5] See Texas Probate Code §70A (effective for bequests made after September 1, 1993).

at the time of death. Keep in mind, though, that the satisfaction of a pecuniary bequest by property in-kind may have capital gain consequences for the estate.[6]

(4) Cemetery lots. If the client desires to bequeath cemetery lots under his/her will, make sure that you describe the lot explicitly. Otherwise, the lots will be reserved for the surviving spouse and the client's descendants.[7]

D. Personal and Household Effects. These types of assets cause so many problems in estate administration that they require their own discussion.

(1) Although this may seem counter-intuitive, always include in the will a special bequest of the personal and household effects, even if the same person takes the residuary estate under the will. But there is a valid income tax reason for making a special bequest of these assets. Under IRC §§661 and 662, a distribution of assets in kind to a beneficiary under a will carries out distributable net income (DNI) of the estate to the beneficiary to the extent of the fair market value of assets distributed.

(2) A related issue is: what constitutes "personal or household effects"? Texas Probate Code §58(d)(1) defines "contents" of a home, and there is caselaw on the issue, but why risk your will becoming the next reported case? Always include a definition in the will so there is no controversy later on what was intended to pass under a special bequest of such items. A sample clause follows:

"Personal and household effects" means all personal automobiles, trucks, boats, household goods, furniture, furnishings, garden and sports equipment, firearms, china, jewelry, silver, works of art, clothing, personal effects, and any other similar items, and includes any insurance on any of these items. The determination of which items fall within these categories shall be in the sole judgment of the executor, whose decision shall be binding on all parties."

(3) What about the client who keeps changing his/her mind about who receives the family china, or Grandpa's squirrel gun, or Aunt Dottie's wedding ring? Do you really want a probate a will with 15 codicils? Instead, consider adding the following clause:

I have made, or may make from time to time, written instructions to my executor requesting that certain items of my personal and household effects be distributed to certain named persons. It is my expectation that these desires will be carried out, and my executor shall be fully protected in relying on those instructions.

But what if the client is worried that the executor and/or family members may not honor the handwritten memorandum? An extrinsic document may not be incorporated into the will by

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[6] Texas Probate Code §378A(b): property distributed in-kind in satisfaction of a pecuniary legacy is to be valued at its date of distribution value.

[7] Texas Health & Safety Code §711.039(e).

reference unless that document is in existence at the time that the will is signed.[8] In that case, a better option would be to give the client advice on making a handwritten directive which would qualify as a valid holographic codicil.[9] This involves some risk and it goes against our need as lawyers to control everything that our clients do, so they don't mess it up and make us responsible for their mistakes. If you decide to do this, proceed cautiously.

(4) A different problem arises if these items pass to more than one beneficiary, such as "to my children then living, share and share alike." Since there is always a risk that the beneficiaries will be unable to agree in a rational or civilized way on the division of these items, an arbitrator should be designated, and that person should be the executor:

If any of my personal and household effects pass to more than one beneficiary, the executor shall have sole discretion to divide them among the beneficiaries, taking into account my desires and the desires of the beneficiaries, and in making up the respective shares, the executor may equalize any inequality in monetary value (as determined by the executor) by a distribution of cash. All expenses of packing, shipping, insuring and delivering any of these items to a beneficiary shall be paid by the executor as an administration expense of my estate.

Notice that this clause also requires the cost of packing and shipment to be an estate administration expense, which in large estates with far-flung beneficiaries may produce a significant estate tax deduction.

This may appear too much analysis over what is generally a very small part of the client's net worth, but "miscellaneous personal property" tends to cause problems disproportionate to its monetary value during the probate process. Anyone who has been involved in will contests knows how emotional family members get over personal and household effects. Thousands of dollars get spent in legal fees fighting over who receives a roomful of junk that no one outside the immediate family would pay ten dollars for. So anything that you can do to add clarity to your document on this issue may be money well spent for your client's family later.

2. DO make sure that the will creates an independent administration, waives bond, and creates a power of sale.

A. Independent Administration. This should be second nature for anyone with a Texas bar license. But if you are reviewing a will executed by the client while residing in another state, chances are that the will won't contain the magic language. If the client doesn't want to change his/her out-of-state will, the client may execute a codicil adding the required language for

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[8] See: *Brooker v. Brooker*, 106 S.W. d 247, 253 (Tex. 1937); *Welch v. Trustees of Robert A. Welch Foundation*, 465 S.W. 2d 195, 199 (Tex. Civ. App. – Houston [Ist Dist.] 1971, writ ref'd n.r.e.).

[9] Texas Probate Code §60 permits a written instrument "wholly in the handwriting of the testator" to be admitted to probate as a holographic will or codicil. However, extreme caution should be used here, since holographic instruments frequently find their way into litigation either on grounds of insufficient testamentary intent (is a will written on the back of a grocery list or a greeting card really a will?) or problems with meeting the "wholly in the handwriting requirement" (block printing or typewritten passages not valid).

creation of an independent administration and waiving bond under Texas Probate Code §145(p).[10]

A related issue, for any will, is: make sure that you have named one or more successor independent executors. An independent administration will continue only so long as the independent executor or a successor specifically named in the will continues to serve.[11] If you are drafting wills for a married couple, and each names only the other as independent executor with no alternates named, one of them is going to die without an estate under independent administration, unless the beneficiaries save the situation by agreeing on a successor independent administrator under Texas Probate Code §145(d). But why take the chance?

B. Power of Sale. It is very important to include an express power of sale in the will. Texas Probate Code §332 authorizes an executor to sell real or personal property without court authorization only if the will confers a power of sale. If no power of sale is included in the will, an independent executor may only sell property without court approval for the limited purposes of paying debts and expenses.[12] While the Texas Legislature amended the Probate Code in 2011 to allow an independent executor to have a power of sale in circumstances other than those in which the will expressly confers a power of sale, these provisions are of limited value if the beneficiaries are not all in agreement about a sale or in a solvent estate in which the independent executor seeks to sell property for a reason other than to pay debts and expenses.[13]

A sample power of sale clause follows:

My executor may sell, exchange, assign, transfer, and convey any security or property, real or personal, held in my estate at public or private sale, at a time and price and upon those terms and conditions (including credit) that he may determine.

3. DO always give careful thought to the apportionment of taxes, debts and expenses in a will.

A. Apportionment of taxes. One of the leading sources of malpractice claims against estate planning lawyers is an ill-conceived tax apportionment clause, which can have disastrous consequences. Particularly in large estates, and in estates where property is being divided between a second spouse and children of the first marriage, the tax apportionment clause has been rightfully called "the hidden disposition clause."

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[10] Execution of a codicil creating independent administration is a republication of the original will, with the independent administration terms added. *Hinson v. Hinson*, 154 Tex. 561, 280 S.W. 2d 731, 735 (1955): "It is well settled, however, that a properly executed and valid codicil which contains a sufficient reference to a prior will, operates as a republication of the will in so far as it is not altered or revoked by the codicil; the will and codicil are then to be regarded as one instrument speaking from the date of the codicil."

[11] *Rowland v. Moore*, 174 S.W.2d 248 (Tex. 1943).

[12] *Buckner Orphans Home v. Maben*, 252 S.W.2d 726, 728 (Tex. Civ. App. – Eastland 1952, no writ).

[13] Texas Probate Code §145A permits a court to confer a power of sale when all of the beneficiaries named under the will agree. Texas Probate Code §145C(1)(C) permits a real estate transaction to occur based on an affidavit signed by the independent executor, that the sale is necessary to pay debts or expenses of estate administration.

Most will forms provide for apportionment of taxes against the residuary estate. This works only if the will gives everything to the same person or persons (e.g., the surviving spouse, children, etc.), AND if the same person or persons are named as beneficiaries for nonprobate assets. But consider the following scenarios:

(1) Will makes a large special bequest to children from first marriage, and the residuary estate to surviving spouse. Here estate taxes would be borne by the surviving spouse, even though that gift is covered by the unlimited marital deduction. Indeed, the surviving spouse would be responsible for payment of estate taxes on the gift made to the children, since the estate would only be taxable if the gift to them were large enough to exceed the client's available federal estate tax exemption amount.

(2) Client has two children, gives his entire estate passing under the will to Child A, and provides for Child B with an insurance policy outside of the will. If the will allocates all taxes against the residuary estate, Child A will bear all estate taxes, even those attributable to Child B's insurance policy.

(3) Husband's will, probated many years ago, creates a marital deduction trust for the benefit of his wife. The beneficiaries of the trust after the death of the wife are the husband's children from a prior marriage. Wife makes a new will later, leaving her entire probate estate (which does not include the trust) to her own children and apportioning all estate taxes due at her death to the residuary estate. At wife's death, the balance of the marital deduction trust is includable in her gross estate under IRC §2044, but all estate taxes are borne by the residuary beneficiaries of her probate estate (her children), even those taxes attributable to the inclusion of the marital deduction trust in her gross estate for federal estate tax purposes. Note: Either Texas Probate Code §322A (the Texas tax apportionment statute) or IRC §2207A may save you from complete disaster, but it depends entirely on the wording of the clause in the will.[14]

In each of these scenarios, there will be very unhappy beneficiaries looking for someone to sue.

Solution: First, never take a tax apportionment clause for granted. If the estate is large enough to be concerned about estate taxes under any scenario (more than $1 million after this year?), and if there is more than one beneficiary, and especially if the beneficiaries do not have a common interest (i.e., a surviving spouse and the children of both spouses), pay close attention to the

[14] Consider the following reported cases:
Peterson v Mayse, 993 S.W. 2d 217 (Tex. App. – Tyler 1999, writ denied): A directive in a will that the executor "shall pay any death taxes out of" the residuary estate overrode the Texas tax apportionment statute. The Court rejected the argument that a will must expressly state that nonprobate assets are to be free of the tax burden. The case involved a probate estate of about $600,000 and $1.3 million in an IRA and other nonprobate assets.
Estate of Miller v. Commissioner, T. C. Memo 1998-416, aff'd 2000-1 U.S.T.C. 60,370 (5th Cir. 2000)(unpub. op.): The decedent left her residuary estate 50% to her husband and 50% to a trust for her children. The Court held that a provision in the will to pay all taxes "without apportionment" was sufficient to opt out of the Texas apportionment statute, including the provision designed to exempt marital deduction gifts from apportionment. As a result, the surviving spouse was burdened by one-half of the tax liability, which in turn reduced the marital deduction and produced a $400,000 estate tax deficiency.

drafting of this clause. Relying too much on "stock" language in our will forms may have unintended and unpleasant consequences.

Second, in these situations, use an apportionment clause based on Texas Probate Code §322A, which apportions taxes ratably based on the total assets of the gross estate for federal estate tax purposes and takes into account nonprobate assets such as life insurance, retirement accounts, and accounts passing by POD or JTWROS designation.

Third, if a large share of the estate passes to a surviving spouse or to charity, keep in the mind that those gifts will be covered by the unlimited marital deduction of IRC §2056 or the charitable deduction of IRC §2055, and, therefore, those gifts will pass tax-free to the named beneficiaries <u>unless you screw it up and accidentally provide for apportionment of taxes against those gifts in the will</u>.

b. <u>Apportionment of Debts and Expenses</u>. Debts and expenses should also be apportioned in the will. This may be combined with the tax apportionment clause (see above). The same issues that arise with respect to a negligent apportionment of taxes against the residuary estate may also apply to debts and expenses, if those items are significant enough to cause a shifting of resources from one class of beneficiaries to another. In addition, you should make sure that the direction to the executor to pay debts does not inadvertently accelerate an installment obligation.

Here is an example of a clause that allocates all debts, expenses and taxes among the beneficiaries of the <u>probate and nonprobate estates</u> on a proportionate basis. This clause also attempts to address some of the problems outlined above:

My executor shall pay all of my funeral expenses, expenses of administering my estate, and debts, other than debts that I have incurred by borrowing against the cash surrender value of life insurance policies on my life and debts to the extent secured by the assignment of life insurance policies on my life. Nothing herein shall require the payment of any installment prior to its due date or the payment of any indebtedness secured by a mortgage or other lien on any property. My executor may extend or renew any debt upon any terms and for any period of time as he may deem appropriate. My estate, however, shall not bear my spouse's share of any community debts or expenses allocable against his share of our community property.

My executor shall also pay all taxes (including any interest or penalties thereon) payable by reason of my death, including taxes on property passing outside of my probate estate.

The ultimate burden of all taxes, debts, funeral expenses, and estate administration expenses shall be apportioned among and collected from the beneficiaries of all of the assets included within my gross taxable estate, whether passing under my will, by trust instrument, contract or beneficiary designation, or otherwise, but excluding my personal and household effects passing under Section ___ of this Will. I direct my executor to take any action necessary to collect these taxes, debts, and expenses from the responsible beneficiaries, including withholding of an appropriate amount from any property

distributable to a beneficiary. Any charges to be made against my residuary estate shall be paid in such order and out of such of the assets in my residuary estate (including its income) as my executor deems appropriate.

4. DO consider the use of testamentary trusts even if no estate tax planning is necessary.

Although in my 30 years of practice clients have become more accepting of trusts (or perhaps I have become better at explaining them!), many clients – and some lawyers – have the false idea that, if the client does not have a taxable estate, all he or she needs is a simple will. There are a number of other reasons, completely unrelated to estate taxes, why a client may want or need to create a testamentary trust in his or her will. Some of the more important ones are:

A. Protection from Creditors. A client who is concerned about present or future claims of third party creditors against his child should not leave outright gifts to that child under the will, under the theory that "he can set up something to protect himself later." An inheritance received by a child outright would be subject to any claims of creditors against the child. Moreover the child may not create a trust for the benefit of himself to the detriment of existing creditors.[15]

To deal with this problem, the client should create a long-term trust with spendthrift protection for such a beneficiary.[16] A typical spendthrift clause follows:

No beneficiary shall have the power to anticipate, encumber or transfer his interest in any trust estate in any manner. No part of any trust estate shall be liable for or charged with any debts, contracts, liabilities or torts of a beneficiary or subject to seizure or other process by any creditor of a beneficiary.

The trust may include any types of property, including a share of the estate passing to that beneficiary under the will, as well as nonprobate assets such as life insurance and retirement accounts, which can be directed into the trust by beneficiary designation. A child may even be appointed the trustee of his or her spendthrift trust, so long as certain safeguards are observed.[17]

B. Protection from Failed Marriages. While an inheritance is the separate property of the beneficiary, we all know how separate property may be converted to community property inadvertently over time. Consider the following example. The client's daughter receives an inherited stock account which she puts in her name only, but under Texas law the accruing dividends and interest are community property, in the absence of a prenuptial agreement. Over time income accruals become commingled with capital gains from stock sales to the extent that

[15] A self-settled trust cannot include spendthrift protection for the grantor. "Such a maneuver allows the debtor . . to have his cake and eat it too." *Matter of Shurley*, 115 F. 3d 337 (5th Cir. 1997).

[16] Spendthrift protection for a beneficiary other than the grantor in a trust is sanctioned by Texas Property Code §112.035.

[17] For instance, the child's power of distribute trust principal or income to himself or herself should always be limited by an ascertainable standard – health, education, maintenance and support (the so-called "HEMS standard").

the community and separate components can no longer be distinguished through tracing. We all know what happens when divorce occurs: ex-son-in-law-to-be receives a gift of up to one-half of the inheritance, a result never intended by the client. Keeping daughter's inheritance in a separate trust for her and her descendants keeps the inheritance out of the Texas community property regime, and insures that client's estate and all future earnings and growth remain in the the family.

C. Minor, Incapacitated or Generally Unfit Beneficiary. A common use of trusts is to hold property for management for the benefit of a minor or incapacitated beneficiary, as a guardianship avoidance technique. Unlike a guardianship for a minor, which must terminate at age 18, a trust may provide for any age of distribution. Moreover, the trustee, unlike the guardian, serves free of court supervision.

But suppose the beneficiary is neither a minor or incapacitated, but is simply immature, inexperienced in money matters, or irresponsible. A management trust for the benefit of such a person, with one or more capable trustees appointed to make decisions and having wide discretion over distributions, would be in order.

5. DO include expanded powers for flexibility in drafting long term trusts.

While most clients would prefer not to have a 50-page trust instrument in single-space print, there are a number of trust powers that you should consider every time that you draft a trust. This is especially important if the trust is designed to last for multiple generations. Drafting a document in 2012, how could you possibly know the family situation, what will happen to the beneficiaries, what will happen to taxes, etc., 30 years from now? These special powers add flexibility to the document and should be used to give the trustee options to handle the unexpected when it occurs:

A. The power to reform the trust instrument. This can be a very useful clause in dealing with changes in the law or in circumstances, when provisions of the trust no longer work in the manner they were expected to when the document was drafted:

Reformation of Trust. At any time or from time to time during the continuance of any trust created under this Will, with or without the consent of a court of competent jurisdiction, any trustee other than my wife may reform (by signing a written instrument to such effect, filing it with the records of such trust and delivering a copy of it to each beneficiary) this instrument relating to such trust, so that, consistently with the purposes of such trust and this instrument, burdensome tax consequences may be eliminated or minimized.

B. The power to merge trusts.

My trustee is authorized to merge, without court action, any trust created under my Will into or with any other trust or trusts created by me or by my wife, wherein the beneficiaries, distribution of income and principal, ultimate method of distribution and all

other administrative terms and provisions are substantially similar. My trustee may select the trust instrument under which the resulting trust shall be administered; providing, however, that the Trust instrument having the earliest effective Rule Against Perpetuities savings clause shall be the one so elected. The decision of my trustee in this regard shall be conclusive of all parties in interest.

C. The power to partition a trust. This type of clause is drafted specifically with the purpose of protecting a generation-skipping transfer (GST) tax exemption for the trust estate when the Will creates a trust that may last multiple generations. But it may be used for general administration purposes as well:

My executor or trustee may elect to partition any trust or trusts created by this Will into parallel separate trusts for any reason he deems beneficial, and fund, apportion, administer and charge taxes and expenses to the parallel trusts as he deems advisable in the advantageous administration of my estate and the trusts created under my Will, so long as the method of asset allocation does not jeopardize an otherwise allowable deduction or exemption available to such trust. If such multiple identical trusts are created and if the trustee has the discretion to make distributions to the beneficiary or beneficiaries of such trusts pursuant to the provisions of this Will, the trustee thereafter may exercise discretionary powers held with respect to each such trust (including discretionary distributional powers) on an independent basis.

D. The power to remove and replace the trustee. This is especially important in giving the beneficiary some leverage in dealing with a corporate trustee that is mismanaging investments or has generally lost touch with the needs of the beneficiaries and the original purpose of the trust:

The current income beneficiary or beneficiaries of any trust created hereunder may remove any [individual or] corporate trustee by giving thirty (30) days' written notice of removal. The successor trustee next appointed shall thereafter serve in place of the removed trustee. If no successor trustee is appointed hereunder, or if no successor trustee named herein is willing or able to serve, such beneficiary or beneficiaries may appoint as successor trustee anyone qualified to serve under this Article ____, provided, however, that any trustee appointed under this Section may not be related or subordinate to the appointing beneficiary or beneficiaries within the meaning of Internal Revenue Code Section 672(c). No action by any court shall be required for such removal. Any power of removal shall be exercised by written instrument delivered to the trustee thereby removed which has been executed and acknowledged by the person exercising the removal power and by the newly appointed successor trustee and which specifies the effective date and time of removal. The succeeded trustee shall render such accounting as may be requested in writing by the newly appointed successor trustee. The succeeded trustee shall be entitled to receive all accrued but unpaid fees, if any, and, absent removal for cause established by a court of competent jurisdiction, to reimbursement of the costs and expenses reasonably incurred by it in connection with the succession process.

E. The power to terminate the trust early. The Texas Trust Code was amended in 2007 to permit a trustee to terminate a trust having a value of less than $50,000, without court order.[18] But that is only a fallback position, for situations when the trust instrument is silent. I would recommend including one of the following provisions in any will creating a trust, to deal with future changes in tax and economic circumstances and other unexpected developments:

Short Clause:

If in the trustee's opinion the assets of any trust are insufficient or if for any other reason it is uneconomical or inadvisable to justify continuation of the trust at any time and termination of the trust is in the best interest of the beneficiary, the trustee may terminate the trust and distribute the assets to or for the benefit of the beneficiary.

Long Clause (estate tax or creditor protection issues):

If at any time the size of any trust created under my Will is so small or is of insufficient liquidity that the trust is uneconomical to administer, or if for any other reason in the opinion of the trustee the trust is no longer necessary, impractical or inappropriate to continue for any reason under the current circumstances, including changes in economic and factual circumstances or changes in rules of law (tax or otherwise), including permanent repeal of the federal estate tax and/or the federal generation-skipping transfer tax, or it would not be in the best interests of some or all of the beneficiaries for the trust to continue, the trustee may, in its sole discretion and without prior or subsequent court approval, terminate part or all of the trust and distribute part or all of the trust estate, as the case may be (a) to the income beneficiary of the trust, or (b) if there are more than one income beneficiary of the trust, to the beneficiaries of the trust in the following order of priority: ____. Notwithstanding the foregoing, no individual trustee shall have, nor may he or she exercise, a power of termination hereunder if the trustee is a beneficiary of the trust and such power would result in a distribution to the trustee, the spouse of the trustee, or any individual for whom the trustee has a legal obligation of support; and in any such case, such power may be exercised only by the co-trustee of the trust, if any, and if there is no co-trustee then serving or if such power cannot be exercised without inclusion of any portion of the trust in the gross estate of the trustee for federal estate tax purposes, then such power shall not be exercisable at all. The trustee may assume that a beneficiary who would be entitled to receive all or any portion of a trust by surviving to a specified age will live to attain that age. Distribution of the trust estate in the manner provided in this paragraph shall relieve the trustee of any further responsibility with respect to the trust estate or any beneficiary of the trust. The trustee shall not be liable either for terminating or for refusing to terminate a trust as permitted under this paragraph. Before terminating a trust hereunder, the trustee may request and shall be entitled to be held harmless and receive appropriate indemnification from each beneficiary who receives a terminating distribution. Subject to the foregoing, but without limiting the trustee's discretion, the trustee is reminded that in exercising its discretion

[18] Texas Property Code §112.059.

hereunder, the trustee should consider the effect of a trust termination on any claims of creditors of the beneficiary or any claim or potential claim for reimbursement or contribution by a governmental agency against the beneficiary.

FIVE DON'TS

1. DON'T forget about the federal estate tax just yet OR
   DON'T throw out those bypass trust forms.

Congress has taken us on a long, wild ride with the federal estate tax. For over 15 years, from 1981 until 1997, we drafted wills under an estate tax system that contemplated a federal estate tax exemption of $600,000 and a top tax rate for the excess between 41% and 55% on all but the largest of estates. In 1997, Congress increased the exemption to $1 million with a phase-in over several years. Then in 2001, as part of the so-called "Bush tax cuts," Congress accelerated the $1 million exemption, provided for further increases in exemption and reductions in the top rate over a seven-year period (2002-2009), followed by outright repeal of the federal estate tax for decedent's dying in one year (2010), followed by a sunset provision taking effect in 2011 and future years that would have restored the exemption to the amount that it would have been but for the 2001 law ($1 million), and raised the top rate to 55% again.

Then in December, 2010, as part of a last-minute compromise between Congress and the President to extend unemployment benefits in return for extension of the Bush tax credits, Congress agreed to the following changes to estate and gift tax laws for two years only:

- An increase in the federal estate tax exemption amount to $5 million per person and a decrease in the rate to 35%.
- Special rules for decedents dying in 2010 which essentially give the executor a choice between no estate tax and a modified carry-over basis rule for income tax purposes, and an estate tax at the 2011-12 rate plus an unlimited step-up in basis.
- An increase in the federal gift tax exemption amount from $1 million to $5 million.
- A new concept was introduced called "portability," which, for the first time in tax history, would permit a surviving spouse to use the unused federal estate tax exemption of the first spouse to die.[19] In plain English, what this means is that if husband dies in 2011 with a $5 million estate, which he leaves entirely to his wife under his will, and wife dies the following year with a $10 million estate – half of which she had received from her husband, her estate tax exemption would be $10 million, not $5 million. Since husband's entire estate was covered by the unlimited marital deduction, none of his $5 million exemption was used, and all of it was portable to wife and available to be added to her exemption at her death.

But the ride is not over. The current law sunsets on December 31, 2012. Thus, if Congress does not take action before the end of this election year, the federal estate tax

[19] See I.R.C. §2010(c) (as amended by the 2010 Tax Relief Act.

exemption amount will revert to $1 million per person and the top rate will return to 55%. The lifetime gift tax exemption will also return to its former level of $1 million per person. Moreover, the new provisions on portability will expire.

Any prognosis at the present time would be based on mere speculation. Will Congress and the President remain deadlocked and allow the current law to expire at the end of the year? Will a compromise be reached, extending the $5 million exemption for another two years or reducing it to $3.5 million, as the President's 2012 budget proposal advocates? While the various scenarios can be played out and discussed, we are in the unfortunate position of having to continue to write wills for clients without knowing exactly what the law will be next year, much less five or ten years from now.

A full treatment of the various interrelating issues here is beyond the scope of this paper. Nevertheless, when giving clients advice on what to do with their wills until we ourselves know for certain, I have found the following rules of thumb to be helpful:

A. If the client(s) have less than $1 million in net worth, don't worry about it. This rule applies both to the wealth of a single client and the combined wealth of married clients. Don't forget to count life insurance at face value and retirement accounts when making the calculation.

B. If the client(s) have more than $5 million, recommend that they use a form of bypass trust to protect both exemptions. It is highly unlikely that Congress will raise the exemption higher than $5 million per person in the current political climate. Use of a bypass trust[20] will preserve the exemption of the first spouse to die – whether it turns out to be $1 million, $5 million or a number in-between – in a form that for certain will escape estate taxation at the surviving spouse's death.

But what about portability? Doesn't the new portability law mean that a married couple with up to $10 million in net worth will not require bypass trust planning so long as the exemption stays at $5 million per person? Maybe, but I am not prepared to recommend any long range planning for clients based on portability, for at least two reasons:

(1) Portability was a relatively new concept before it became part of the tax law in late 2010. It is scheduled to be swept out of the law with the rest of the extensions at the end of 2012 unless Congress acts. It hardly has the status of a permanent feature of the law that we can rely on.

(2) Although it has much superficial appeal, the specific rules on how and when portability of an exemption is allowed are really quite complex and there are a number of traps for the unwary.

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[20] By "bypass trust," I mean the type of trust that captures the estate of the first spouse to die up to the exemption amount of that spouse and bypasses the estate tax system entirely at the deaths of both spouses. This trust is also commonly called a "credit shelter trust," "exempt trust," or simply a "family trust."

(A) For example, the estate of a surviving spouse cannot take advantage of the first spouse's unused exemption amount unless a federal estate tax return is filed for the first spouse's estate. This increases the cost of estate administration appreciably and for modest estates may not seem a worthwhile cost to the surviving spouse, especially considering the uncertain state of the law.

(B) A little-known detail of the new law is that it is limited to the exemption of the last deceased spouse of the surviving spouse. Thus, for example, if wife dies first and leaves her entire estate worth $5 million to her husband, husband remarries in a few years to wife #2 who has no estate, wife #2 then dies in a few years, followed by husband a year later, wife #1's $5 million exemption cannot be used by husband's estate, even if wife #1's estate filed a federal estate tax return, because wife #1 was not the last deceased spouse of husband.

C. If the estate is between $1 million and $5 million, explain the options and let the client decide.

Some clients will elect to roll the dice and rely on Congress to retain the $5 million exemption. In that case, the client will ask you to draft a basic will with all to the spouse and then to children. Who's to say whether this philosophy is the right one? This client may get lucky and never have an estate tax problem again. On the other hand, this client may be calling you on January 2 wanting a bypass trust because the exemption has now dropped to $1 million and his estate is worth $4 million. Just make sure that you document your advice (in case the client guesses wrong) so the family won't blame you for the extra estate taxes later!

In these moderate-sized estates, a modified version of the bypass trust known as the disclaimer trust is a good compromise. A disclaimer trust is structured exactly like a bypass trust with one important exception. The traditional bypass trust contains a formula clause which enables the trust to become funded automatically with that portion of the estate equal in value to the estate tax exemption applicable at that time. Thus, there is no discretion as to the funding of the bypass or the amount of the funding. By contrast, a disclaimer trust is exactly what its name implies: a trust funded by a disclaimer exercised by the surviving spouse within nine months from death. Compared to the lengthy, complicated language of the traditional bypass trust, the funding clause of the disclaimer is very straightforward:

I give all of the remainder of my estate, including any lapsed or void gift (hereinafter referred to as "my residuary estate"), as follows:

(a) To my wife, if she survives me, or

(b) If my wife survives me but disclaims all or any portion of my residuary estate, then such disclaimed portion of my residuary estate shall be held, administered and distributed by the trustee of the________ Family Trust under the provisions of Article 2.0 of my Will; or

(c) If my wife does not survive me, then all of my residuary estate shall be held, administered, and distributed by the trustee of the __________Family Trust under the provisions of Article 2.0 of my Will.

The chief benefit of the disclaimer trust is its flexibility. The decision to fund the trust at all and, if at all, to what extent, may be deferred until the death of the first spouse, when the value of the estate and the amount of applicable exemption will be known factors, not educated guesses, and when (hopefully) the surviving spouse will have some better idea of the estate taxes that he or she will be facing. Unlike the traditional bypass trust, the disclaimer trust is designed in such a way that the surviving spouse may make a partial disclaimer and thus fine-tune the total amount of the estate passing to the trust.

Two caveats for disclaimer trusts:

(1) First, because funding of the trust is based on a qualified disclaimer made by the surviving spouse, all of the rules for qualified disclaimers must be satisfied. Thus, the surviving spouse may not have accepted the benefits of any part of the estate over which the disclaimer is exercised. In addition, like any qualified disclaimer, the decision must be made within nine months following the date of death and properly documented.[21]

(2) Second, <u>and this is very important</u>: the surviving spouse may not have a special power of appointment over any part of a disclaimer trust. This would create a general power of appointment requiring the trust principal to be included in the surviving spouse's gross estate and thereby defeating the purpose of the planning.

2. <u>DON'T name the estate as beneficiary of a retirement account or life insurance policy</u>.

A. <u>Retirement Accounts</u>.

There are two different problems with naming the estate as the beneficiary of a qualified retirement plan or account:

(1) <u>The Creditor Problem</u>. The Texas Property Code exempts virtually every type of qualified retirement plan or account from the claims of creditors against the deceased. Texas Property Code §42.0021. If the estate is named as the beneficiary on the beneficiary designation, however, the exemption does not apply. Thus, if the client has named "the estate" as his/her beneficiary, and if the client later dies with significant medical, credit card or other debt, he or she may have inadvertently subjected these exempt assets of the nonprobate estate to claims against the probate estate.

(2) <u>The Tax Problem</u>. Since 2002, the Internal Revenue Service has permitted designated beneficiaries of a retirement account other than a spouse to elect distributions under the beneficiary's life expectancy. Formerly, a non-spouse beneficiary was required to take a

[21] See: Texas Probate Code §37A; I.R.C §2518.

lump sum distribution over no longer than five years. This was the origin of the so-called "stretch IRA." If the beneficiary is a child, grandchild, or other person significantly younger than the client, the tax deferral savings resulting from stretching the term of the IRA over the beneficiary's life expectancy are potentially huge. [22]

This income tax deferral is not available, however, unless the beneficiary named on the designation is a so-called "designated beneficiary." This is a term of art under the IRS regulations; it includes individuals, certain trusts, but not estates. [23] What this means is that naming the estate as the designated beneficiary will result in the executor's being required to take a lump sum distribution, even if the children, grandchildren, or other persons for whom tax deferral would be advantageous would take the retirement account under the will.[24]

B. Life Insurance. The creditor problem outlined above also applies to life insurance policies, which would otherwise be exempt from the claims of creditors against the estate if a third party beneficiary other than the estate is named.[25]

C. What to do. You avoid both of these problems simply by never, ever naming the estate as the beneficiary.

If the surviving spouse or the children are to be the beneficiaries of the retirement account, name those persons as beneficiaries.

If the beneficiary of the account is to be a testamentary trust, you should name on the beneficiary designation form: "the Trustee of the [Name] Trust created under my Last Will and Testament of [date]." This will insure that the account passes directly to the trust and not as part of the probate estate.

There is also something that you can do in drafting the will to clarify the client's intent when insurance or retirement benefits are directed to pass to a testamentary trust. In order to counter any argument by a future creditor that the effect of such a designation is the same as naming the estate, I would recommend that you include in the will the following type of clause:

I may have designated the trustee named in my Will as the beneficiary of the proceeds of life insurance proceeds on my life or as the beneficiary of the proceeds of employee benefit plans, individual retirement accounts, or similar plans in which I have an interest. The trustee may take all steps necessary to collect the proceeds, and the receipt of the trustee

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[22] For an excellent and comprehensive discussion of this issue, see: Gerstner, Karen S., "Beneficiary Designations for Retirement Plans (Including IRAs) in View of the Final Minimum Required Distribution Regulations," South Texas College of Law Wills & Probate Institute (2004).
[23] Treas. Reg. § 1.401(a)(9)-4, A-1, A-3, and A-5; Treas. Reg. §1.401(a)(9)-8, A-11.
[24] There have been a number of Private Letter Rulings since 2002 in which the IRS has shown some generosity in allowing beneficiaries under the will to take advantage of certain tax deferral options when the client's intent was clear that those persons were intended to be designated beneficiaries. But this is a very expensive and uncertain method for correcting a problem which could easily be avoided at the planning stage.
[25] Texas Insurance Code Art. 1108.051.

shall be a full discharge to any party required to make payment of the proceeds. The trustee shall, unless the designation indicates otherwise, allocate the proceeds as though they had been part of my residuary estate remaining after payment of debts, taxes, and expenses of administration. These proceeds, however, shall not be considered a part of my testamentary estate, and shall not be liable for payment of debts, taxes, and expenses of administration of my estate.

3. DON'T overlook POD and JTWROS accounts.

A "P.O.D" account is an account payable on request to one or more P.O.D. payees on the death of the account owner. TPC §436(10). A joint account with right of survivorship is a joint account which provides for all sums remaining on deposit at the death of one owner shall belong to the surviving owner of the account. TPC §439. Both types of dispositions are non-testamentary in nature and will pass to the person designated regardless of the language in the will.

One of the most common mistakes that I see as a probate lawyer occurs when the attorney who drafted the will has failed to inquire about POD and JTWROS arrangements, or when the client subsequently sets up an account in such a manner without consulting anyone. Sometimes the client does not even know that he or she has established a JTWROS relationship, especially when the arrangement was created simply by the bank officer checking a box. While POD and JTWROS arrangements over small accounts can be very beneficial for planning purposes -- particularly in giving an executor money to pay funeral expenses, utilities and other expenses while he or she awaits probate of the will – they can be potentially disastrous if they affect a large portion of the total estate and are not properly coordinated with the will. For instance:

a. Client executes a will leaving her entire estate to her children, A, B and C, in equal shares, and she appoints all three as co-executors. Over half of client's estate consists of an investment account. Sometime after signing her will, client adds child A, who lives nearby, to her investment account as an additional signature party so that child A can pay her bills in the event of her incapacity. Without understanding what she is doing, client allows the financial advisor to check the JTWROS box for the account. At client's death, child A will receive a grossly disproportionate share of the estate, despite client's clear intent in her will, and child B and child C will be hiring their own counsel to investigate a cause of action against child A and maybe even client's lawyer.

b. Assume in the above example that the will contains a typical apportionment clause allocating all debts, expenses and taxes against the residuary estate. Also assume that client dies leaving significant unpaid credit card bills. Talk about "adding insult to injury": now child B and child C will see their reduced shares of the total estate reduced even further by a full one-third each of the debts.

c. Now assume we are dealing with a large, taxable estate. Husband and wife sign wills creating bypass trusts to protect their exemptions. Then husband dies. Unfortunately, the large investment account which husband's lawyer assumed would be available to fund the bypass trust just happens to be in both names under a JTWROS form. Since the investment account passes to wife outside of the will, it will be unavailable to fund the bypass trust. If the remaining assets available to fund the trust are insufficient to use all of husband's federal estate tax exemption, the family is faced with an underfunding problem and, unless another solution presents itself, a much larger estate tax when wife dies later.[26]

So what should you do? Maybe you can't do much about the client who inadvertently sets up the wrong type of account later. But when you are drafting the will you should definitely ask about ownership and if you are still uncertain you should ask to see the contract or signature card. If bypass trust planning is contemplated for a married couple, make sure that any account intended for funding the trust is set up as a tenancy in common account, not as JTWROS. This is another example of how effective will drafting requires us sometimes to look outside of the four corners of the will that we are preparing and determine the effect that the form of ownership of other assets will have on our work product.

4. <u>DON'T make gifts directly to minors or persons receiving government benefits</u>.

A. <u>Minors</u>. Most lawyers who draft wills know better than to provide directly for property to pass to a minor beneficiary. The problem is that sometimes this occurs accidentally. Suppose, for instance, that client executes a will leaving everything to her children, and the will contains the usual contingent bequest that, if a child predeceases the client and leaves descendants, the deceased child's share will pass to that child's descendants. Then one of the children dies, and client subsequently dies without changing her will. Now the probate lawyer is facing the possibility of setting up a guardianship for the minors to receive their distributions.

One solution is to include a trust to cover this contingency. But what if the client doesn't want to pay the extra cost for a trust, or does not want to lengthen the will for a contingency that she believes to be unlikely? An easy fix is always to include a clause in the will providing that any distribution made to a minor shall be made to a custodian for the minor appointed by the executor under the Texas Uniform Transfers to Minors Act (TUTMA). The provisions of TUTMA,[27] create a statutory trust for the benefit of a minor, under which a custodian may invest and manage inherited properties and make distributions to the minor for medical care, education, maintenance and support until the minor attains 21 years of age. TUTMA specifically authorizes the executor to distribute a bequest made to a minor under a will to a custodian for the minor, if the will expressly so states. If the testator has named a person as custodian, the distribution must

[26] One post-mortem solution to this problem would be for wife to sign a disclaimer, allowing the account to pass through the will and fund the bypass trust. This only works if the disclaimer is executed within nine months after the husband's death. Texas Probate Code §37A; I.R.C. §2518.

[27] Texas Property Code §141.001 et seq.

be made to that person. If the testator has not named a person in the document, the executor may designate a custodian.[28]

Here is a general provision for distribution to a custodian of a gift made to a minor under the will:

If any property is distributable under this Will to a minor person, I authorize my executor to make distribution to a custodian for the minor under the Uniform Transfers to Minors Act of Texas or any other state.

Another commonly used option with a testamentary trust is a “facility of payment clause,” which permits the trustee to make trust distributions in a number of ways, including specifically to a custodian for a minor under TUTMA:

During the term of a trust, the trustee may make any distribution from the trust (a) to the beneficiary, (b) to the guardian of the person or guardian of the estate of the beneficiary, (c) to any other person furnishing support, maintenance or education for the beneficiary or with whom the beneficiary is residing, for expenditure on the beneficiary's behalf, or (d) to a custodian for a minor beneficiary, as selected by the trustee, under the Uniform Transfers to Minors Act or similar statute of any state. Alternatively, the trustee may apply all or a part of the distribution directly to a third party for the beneficiary's benefit. However, no distribution shall be made that has the effect of discharging a legal obligation (including the obligation of support) of any person other than the beneficiary to whom the distribution is made.

Notice that this clause also permits the trustee to write a tuition check directly to the university or pay a medical bill directly to the hospital. This is a very popular provision for clients who want a grandchild to have the benefit of a trust without also helping an ex-son or daughter-in-law.

B. Government Benefit Recipients. If a recipient of certain government benefits receives a large bequest directly under a will, that person will no longer be eligible to receive such benefits. The most common scenario is when a parent wants to provide for a child who is receiving SSI disability payments, or a child who wants to provide for a parent who is receiving nursing home or in-home benefits under Medicaid. In either case, if the client does not want the beneficiary to lose access to those benefits, an alternate means of caring for that beneficiary should be considered.

Some clients prefer a more informal solution: make a special bequest to another family member -- a brother or sister of a disabled child, or the testator’s own sibling if the bequest is for an elderly parent – with precatory instructions to use the monies for the benefit of the person receiving benefits. A special request not to supplant, but to supplement government benefits may be included. The problem with this solution is that it is completely unenforceable, and if the

[28] Texas Property Code §141.006. It is possible for an executor to make such a designation even if the absence of a will provision, but there are limitations, most notably court approval if the value of the gift exceeds $10,000. Texas Property Code §141.007.

recipient decides to use the money in some way other than for the family member in need, nothing can be done about it.

The best solution often is a "special needs trust" or "supplemental needs trust." While compliance with the ever-changing eligibility rules of Medicaid and SSI is beyond the scope of this paper, any trust for a beneficiary who is presently receiving or may receive government benefits in the future should have the following minimal provisions[29]:

1. The trustee, for obvious reasons, should be someone other than the beneficiary.

2. Distributions from the trust should supplement government benefits; that is, the trustee is directed to make distributions for the needs of the beneficiary only to the extent that they are not covered by government programs in which the beneficiary is a participant.

3. A beneficiary should never have an enforceable right to any particular amount. Even a right to distributions based an ascertainable standard (health, education, maintenance or support) may disqualify a beneficiary from receiving benefits.[30] The only safe approach is to limit distributions to only those amounts the trustee determines, in his sole and absolute discretion, necessary or appropriate for the supplemental needs of the beneficiary.

4. Alternative provisions should be included for termination of the trust and distribution of the trust estate to other persons if the government eligibility rules change or if by regulatory fiat the governing agency decides that some currently accepted feature of the trust would disqualify the beneficiary from receiving further benefits. By the same token, if the trustee determines that the care obtained through the government program is so minimal that the trust should be used for the beneficiary even if it disqualifies him for the program, the trustee may be given the discretion to use the trust estate for the needs of the beneficiary in lieu of the government benefits. Either way, the decision to terminate the trust to avoid disqualification or to trigger disqualification to make the trust more accessible to the true needs of the beneficiary is a decision that must reside solely in the trustee.

5. DON'T forget to protect yourself by writing the client an exit letter after the will is drafted.

So far this paper has discussed techniques and strategies to make a better, more effective will for your client. Now I am going to give one pointer for protecting yourself as the draftsman. We all have to take responsibility for our work, but surely none of us intend to insure that our work will address the effect of future changes in the law on a client's will or other estate planning documents if that client does not retain us again for an update. Yet in this litigious society we all potentially hold ourselves out as insurers to the client and his or her estate if we do not formally end the attorney-client relationship after the client has executed his or her

[29] The statutory requirements for a valid special needs trust may be found in 42 U.S.C.§1396p(d)(4)(A).

[30] 40 T.A.C. §15.415(h)(1), Medicaid Eligibility Handbook §2313.3.

documents. If you do not end the relationship in a formal, documented manner, the client (or more commonly, his or her executor) may claim that you owed a continuing duty to keep the client informed of any changes to the law (free of charge, of course!) and that you failed in that duty by failing to advise the client that ______________________ [you fill in the blank]. These allegations are usually made after the client has died, when some unanticipated tax burden hits the estate and the beneficiaries are looking for someone to blame.

Of course, you do not want to say anything to offend or scare off the client. You do want the client to continue to contact you for periodic updates. And you do want to feel that you can send a letter to a client when you become aware of an important change in the law without feeling that you may be obligated to do so.

After preparing a will for a client, I always provide the client with a post-execution letter, giving general advice on when to consider changing the will and other matters of interest. At the end of that letter, I include the following language. To date, I have no knowledge of any client being offended by it or refusing to come back to me for updates:

I have appreciated the opportunity to assist you in this matter and have enjoyed working with you. During this process, you and you alone have been my client. I owe no duty to any of your family members or other possible beneficiaries (unless I represent them under a separate arrangement). I have no continuing duty to update your plan or otherwise represent you, though I have added your name and address to my client database and may send to you letters from time to time reminding you to update your documents or to inform you of any potentially important changes in the law. Of course, I look forward to working with you again in the future should you wish to hire me to help you with revising your estate plan or with another matter.