Top Ten Things to Do Now

Changes Texas probate and estate planning lawyers should make on September 1, 2011

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Most of the legislation passed by the 82nd Texas Legislature becomes effective September 1, 2011. Here are ten things an estate planning and probate attorney should do now to address the new legislation.

1. Change will forms to use streamlined one-step execution

SB 1198 amends Probate Code Section 59 to permit an optional new way for a will to be executed and be made self-proved -- one which requires the testator and two witnesses to sign only once. Attorneys should change their will forms to replace the attestation clause and self-proving affidavit with the new approved language. (The Texas Probate Web Site, http://texasprobate.com, has Word and WordPerfect versions for downloading.)

The method is optional, so attorneys may continue to use the traditional two-signature method. However, there seems to be little downside to switching to the new method. The new method will make execution errors much less likely, and it speeds up the signing ceremony. If the client moves to another state which does not recognize a combined attestation and self-proving affidavit, the will still will be just as valid as the two-signature variety, although it may not be considered self-proved. It is likely to be considered self-proved in that state, since Section 2-504 of the Uniform Probate Code permits combined attestations and self-proving affidavits, and the UPC has been enacted in one form or another in 20 states.

The new procedure is available for wills signed on or after September 1, 2011. For more information about this change, see the blog post on the Texas Probate Web Site.

2. Use all of the streamlined forms to speed up document signings

The 2011 change to Section 59 (allowing combined attestations and self-proving affidavits) completes a series of changes begun in 2009 that can speed up document signing ceremonies and save staff time. While updating the will form to use the one-signature method, also check the medical power of attorney, directive to physicians and declarations of guardian to assure that each takes advantage of the 2009 changes:

- The medical power of attorney may be acknowledged by a notary instead of witnessed by two witnesses. Tex. Health & Safety Code Sec. 166.154(b). . (The Texas Probate Web Site, http://texasprobate.com, has Word and WordPerfect versions for downloading.)

- The directive to physicians and family or surrogates may be acknowledged by a notary instead of witnessed by two witnesses. Tex. Health & Safety Code Sec. 166.032(b-1). . (The Texas Probate Web Site, http://texasprobate.com, has Word and WordPerfect versions for downloading.)

- The declaration of guardian in the event of later incapacity may contain a combined attestation and self-proving affidavit, making it necessary for the declarant and witnesses to sign only once. Tex. Prob. Code Sec. 679(k). (The Texas Probate Web Site, http://texasprobate.com, has Word and WordPerfect versions for downloading.)

- The declaration of guardian for children may contain a combined attestation and self-proving affidavit, making it necessary for the declarant and witnesses to sign only once. Tex. Prob. Code Sec. 677A(i).

As a result of the 2009 and 2011 changes, attorneys can streamline document executions:

- If the attorney is a notary, the attorney may meet with the client alone and supervise the signing of any trusts, the statutory durable power of attorney, the medical power of attorney, the directive to physicians, the HIPAA authorization, the funeral directive and any beneficiary designations.

- After completing those documents, the witnesses may enter the room for the signing of the will and the declarations of guardian using the new one-signature method.

3. Begin using affidavits in lieu of inventories

SB 1198 amended Section 250 of the Probate Code to permit independent executors and administrators to file an affidavit instead of a detailed inventory if there are no unpaid debts, except for secured debt, taxes and administration expenses, when the inventory is due. The independent executor or administrator still must prepare a verified inventory and deliver it to each beneficiary, but the public disclosure of estate assets and values may be avoided. . (The Texas Probate Web Site, http://texasprobate.com, has Word and WordPerfect versions of the affidavit in lieu of inventory for downloading.)

Affidavits in lieu of inventory may be used for the estates of decedents dying on or after September 1, 2011. For more information about this change, see the blog post on the Texas Probate Web Site.

4. Change wills to authorize affidavits in lieu of inventories

While it is clear that the legislature intended affidavits in lieu of inventories when the testator's will provided for independent administration, an anomaly in Section 145(b) of the Probate Code raises a possible argument that the required language creating independent

administrations negates the right to use an affidavit in lieu of inventory. Section 145(b) provides:

> Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement, and list of claims of his estate.

Texas attorneys routinely include this language in wills. A possible interpretation of this language is that, while Texas law might otherwise permit the independent executor to file an affidavit in lieu of inventory, the terms of the will nevertheless require the filing of an inventory. This is implausible and clearly contrary to legislative intent. It is likely to be clarified by 2013 legislation. In the meantime, Texas attorneys should modify this phrase in wills signed in the future to make it clear that the inventory must be filed only if required by law. It probably is overkill to require former clients to re-execute wills with the new language.

Here is the language I recommended:

> I direct that no action shall be had in any court exercising probate jurisdiction in relation to the settlement of my estate other than the probating and recording of my will and the return of an inventory, appraisement and list of claims of my estate; provided that, if the independent executor is permitted to file an affidavit in lieu of inventory under Texas law, I do not require the independent executor to file the inventory, appraisement and list of claims with the court.

Bill Pargaman recommended simply adding "...if required by law" to the end of the Section 145(b) language.

For more information, see the blog post on the Texas Probate Web Site.

5. Consider using a summary-form 128A notice

SB 1198 amended Section 128A to permit the executor to include a summary of key provisions in the required notice to beneficiaries instead of enclosing a full copy of the order and will. Under the revised statute, the executor either must enclosed a copy of the will and order or "a summary of the gifts to the beneficiary under the will, the court in which the will was admitted to probate, the docket number assigned to the estate, the date the will was admitted to probate, and, if different, the date the court appointed the personal representative." The summary option also may be used in waivers signed by beneficiaries in lieu of notice.

Should attorneys routinely use the new method? It will save postage and trees not to have to send copies of the order and will. On the other hand, it always is possible that a court later will consider the summary to be incomplete or insufficient. Also, while attorneys can standardize the sending of 128A notices with the will and order attached, use of the summary is likely to require special drafting and editing.

There were other changes to the statute requiring notice to beneficiaries. Fewer persons must be notified.

Old "long form" Section 128A notice and affidavit forms may be found on the Texas Probate Web Site. For more information about Section 128A changes, see the blog post on the Texas Probate Web Site.

6. Complete disclaimers for 2010 decedents by September 16

The tax law passed by Congress in 2010 extended the deadline for disclaiming property that would otherwise be received from a decedent dying between January 1, 2010, and December 17, 2010, until 9 months after December 17, 2010. The Texas legislature made corresponding extensions of the state deadlines for disclaimers. The deadline under federal and state law is September 17, 2011. Since September 17 falls on a Saturday, be sure to complete the disclaimer by Friday, September 16, since it is unclear that the Texas deadline would be extended to the following business day.

7. Make sure to follow the rules for Section 294(d) notices to unsecured creditors

SB 1198 made many changes affecting independent administration. As amended, Probate Code Section 146 makes it clear that Section 294(d) notices to unsecured creditors may be used in independent administrations to bar claims that are not made within 120 days of receipt of the notice. However, when used in an independent administration, the notice must state that a claim may be effectively presented by only one of the methods prescribed by Section 146. Section 146(b-4) prescribes these methods of giving notices by creditors:

- A written instrument that is hand-delivered with proof of receipt, or mailed by certified mail, return receipt requested with proof of receipt, to the independent executor or the executor's attorney;

- A pleading filed in a lawsuit with respect to the claim; or

- A written instrument or pleading filed in the court in which the administration of the estate is pending.

When representing independent executors, make sure the notice to unsecured creditors contains the proper language. When representing creditors, make sure to respond to the notice in one of the ways required by Section 146.

There is a form for Section 294(d) notices in independent administrations in Word and WordPerfect formats on the Texas Probate Web Site.

8. Check the power of sale before applying for the next independent administration

SB 1198 makes it clearer whether or not an independent executor or administrator has the power to sell real estate without the joinder of the beneficiaries. If the will does not contain a power of sale provision, Section 145A permits the distributees to agree to give the independent executor or administrator the power of sale. It is important to note that this consent must be obtained before the personal representative is appointed so that the order appointing him or her may state that the power of sale exists. If the personal representative does not obtain the consent of the distributees prior to appointment, it is too late -- each sale of real estate from the estate is likely to require the joinder of the beneficiaries.

Therefore, before applying for the next independent administration, check the will for a power of sale. If there is not a power of sale in the will, consider whether to ask the distributees to agree to the power of sale before filing the application.

The changes to the power of sale in independent administrations are discussed in a blog post on the Texas Probate Web Site.

9. Consider if the 2011 changes create new opportunities for elder law clients

Over the past several sessions, Texas statutes have been amended to make it easier for clients of elder law attorneys to qualify for government benefits programs. The 2011 changes open the door even further.

Now persons with physical disabilities only but with no mental incapacity may apply for the creation of a court-created trust under Section 867 of the Probate Code. This will make it easier for disabled individuals to utilize a special needs trust. The federal statute (42 U.S.C. Sec. 1396p(d)(4)(A)) requires that trusts be created by a parent, grandparent or court. It was unclear if a disabled person with no mental incapacity was eligible for an 867 trust. The 2011 changes make it clear that the trusts are available for disabled persons, who may apply for their creation directly, without the need for a guardianship. Disabled persons also may waive the annual accounting requirement otherwise applicable to 867 trusts.

It is easier than ever to get a qualifying individual's property into a pooled trust subaccount administered under 42 U.S.C. Sec. 1396p(d)(4)(C). Probate Code Section 911 lists the persons who may apply fo the establishment of a subaccount. The list does not include the trustee of a Section 867 trust. However, Section 868C permits the court to order the transfer of the assets of an 867 trust into a pooled trust subaccount, so the trustee may use that statute to, in effect, apply for the creation of a subaccount.

Section 865 of the Probate Code was amended to permit a guardian of the estate or any interested person to apply to the court to transfer a portion of a ward's estate as necessary to qualify the ward for government benefits, but only to the extent allowed by applicable state or federal laws, including rules, regarding those benefits.

Each of these changes was made by SB 1196, the guardianship bill supported by the Real Estate, Probate and Trust Law Section of the State Bar of Texas.

10. Review the new Estates Code

The current Probate Code will be repealed and replaced by the new Estates Code on January 1, 2014. The Texas Legislative Council has been working on the nonsubstantive codification of the Probate Code since 2007. The decedents' estates portion of the code was enacted in 2009. The guardianship and power of attorney portions were enacted in 2011. A corrections bill was passed in 2011. A final corrections bill will be enacted in the 2013 session prior to the January 1, 2014, effective date. Members of the Real Estate, Probate and Trust Law Section have been scouring the new provisions to see if any changes or corrections need to be made. REPTL probably will have a bill making changes in 2013.

Now is a good time to review the new Estates Code. The Texas Legislative Council's website has information about the new code and texts of the legislation. Direct any suggested changes or corrections to me or to Bill Pargaman so that REPTL may consider them.
