THE ATTORNEY PLANNING FOR PROBATE

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Basic Probate Primer: Decedents' Estates
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I. WHOM DO YOU REPRESENT?

A. WILL EXECUTION STAGE

1. Your client is usually the client executing the will;

2. Beware of elder law situations where a child solicits you to execute a parent's will.

   Example: Daughter of elderly parent comes to you and is concerned that mother is unable to fully care for herself. Daughter is also concerned about estate taxes and offers to pay you a consultation fee. You meet with mother and she wants to disinherit Daughter.

   You should make clear at the initial meeting with Daughter that you will be mother's attorney. Otherwise, you may have a conflict in interest.

B. DEATH OF CLIENT

1. Your client may be an heir, beneficiary or the executor of the estate;

2. If you represent the executor, remind family members that you do not represent them collectively. However, you want to advocate "free flow" of information and encourage everyone to ask questions.

   a. Consider copying family members with all correspondences;

   b. If problems develop between family members and the executor, advise family members to retain separate counsel.

C. ENGAGEMENT LETTERS AND JOINT REPRESENTATIONS

1. Generally, engagement letters should be signed by the clients at the initial estate planning meeting or sent to clients for signature after initial meeting. See sample engagement letter attached hereto as Exhibit “A”;

2. In husband-wife representation, consider sending a "joint representation" letter (or have clients sign a separate agreement) stating that you represent both parties and cannot keep one spouse's disclosures from the other spouse. See sample joint representation statement attached hereto as Exhibit “B”.

II. COMMON DRAFTING AND EXECUTION ERRORS

A. NON-TAX DRAFTING ERRORS

1. Failing to Account for Non-Probate Assets Passing Outside the Will. Assets in living trusts, subject to beneficiary designations, or held in joint tenancy with a surviving co-owner are not subject to the dispositive provisions of the will.

2. Errors in Naming the Fiduciary (i.e., Executor, Guardian or Trustee)

    a. A person is qualified to act as executor or administrator if such person has (i) attained the age of 18 years; (ii) is a resident of the United States; (iii) is not of unsound mind; (iv) is not an adjudged disabled person; and (v) has not been convicted of a felony. (755 ILCS 5/6-13; 5/9-1);

    b. Testator should consider asking the intended fiduciary whether he or she is willing to act before execution of the will;

    c. Corporate trust departments named as fiduciaries normally wish to review documents to evaluate whether they will accept appointment;

    d. Name at least one successor fiduciary to ensure that the executor, guardian or trustee will be the person the testator wants to act in such capacity, rather than having the court appoint a successor;

    e. For probate estates, if the named executor(s) is unable or unwilling to act, the rules relating to selection of administrators under 755 ILCS 5/9-3 apply and the probate administration is called "administration with the will annexed";

    f. 755 ILCS 5/9-1 was amended in 1997 to allow the appointment of non-resident administrators. However, a nonresident representative must file with the court a designation of resident agent.

3. Failing to Direct Independent Administration (755 ILCS 5/28-2)

    a. *Bias Toward Independent Administration* - Generally, unless the will expressly forbids independent administration or an interested part objects to independent administration, the court will grant independent administration. If the will directs independent administration, supervised administration shall be required only if the court finds there is good cause to require supervised administration;

    b. *Recommendation: Insert Clause Directing Independent Administration in*

Will.

4. Failing to Waive Surety Requirement With Respect to Bond (755 ILCS 5/12 et. seq.)

   a. An oath of office and bond is generally required of every individual representative (corporate trustees acting as representatives are required to file only an acceptance of office);

   b. Each bond must have as security (unless security is excused by the will) not less than two individual sureties acceptable to the court OR one surety company qualified to do business in Illinois and acceptable to the court;

   c. Amount of Bond -

      (1) Bond Secured by Surety Company - 1-1/2 times value of personal estate, plus additional amount as determined by the court having regard to income from real estate (usually 1-1/2 times annual income from real estate);

      (2) Individual Surety - twice the value of personal estate, plus an additional amount as determined by the court having regard to income from real estate;

   d. Typical Surety Company Annual Fee Charges: $200,000 personal assets equals $350,000 bond ($1,235 fee); $500,000 personal assets equals $750,000 bond ($1,860 fee); $1 million personal assets equals $1.5 million bond ($2,360 fee);

   e. Even though the will waives security, the court may require surety for the representative's bond in the following instances:

      (1) In the case of a nonresident executor (755 ILCS 5/6-13(b). However, in Cook County the court will generally excuse a nonresident executor from giving security on the bond if the requirement is excused under the will and an order is entered stating that no assets are to leave the state of Illinois without prior order of court.

      (2) Upon the court's own knowledge or the petition of an interested person if the representative is suspected of fraud or incompetence, or it is believed that the estate will not be sufficient to discharge all claims (755 ILCS 5/12-4(a));

(3) However, see procedures under 755 ILCS 5/12-7 whereby the bond of the representative is reduced to the extent assets are deposited with a bank subject to further court order. Limited use in decedents' estates.

f. *Recommendation: Waiver of Surety Clause in Will.* Since no surety is generally required of a person who is excused by the will from giving such security, it generally is best to have clause in the will waiving surety. This avoids the administrative expense of paying premiums to a surety company. However, the double-edged sword of not having surety is that there may be no "deep pocket" to replenish estate assets in the event of executor malfeasance or fraud.

5. Failing to Give Options as to When or How Children will Receive their Inheritances.

a. Outright to children at death of testator or surviving spouse;

b. "Separate Share" or "Pot" trusts for children, with inheritances distributed in stages to children based on predetermined ages (i.e., 1/3 at age 21; 1/3 at age 25; 1/3 at age 30);

c. Discretionary or "incentive" spray trusts;

d. Special Needs Trusts providing supplemental distributions to disabled beneficiaries without disqualifying the beneficiary for governmental benefits (760 ILCS 5/15.1).

6. Failing to Plan for the Second Marriage.

a. "Balancing act" between providing for the 2nd spouse and the children of the testator;

b. QTIP Marital Trusts;

c. Pre-marital agreements;

d. Separate estate plans (and attorneys) for each spouse?

7. Miscellaneous "Trouble Spots"

a. *Lapsing Gifts.* The general rule is that if a beneficiary dies before the death of the testator, unless the will provides otherwise the benefit will lapse. However, under the "Anti-Lapse Statute" (755 ILCS 5/4-11), if the deceased legatee is a descendant of the testator, such legacy passes to the descendants of the legatee per stirpes unless the will provides otherwise. This provision is generally limited to legacies under a will and does not apply to lapsed (or disclaimed) gifts under a non-testamentary trust. Moreover, benefits also "lapse" for various other reasons such as the murder of the testator by the beneficiary (755 ILCS 5/2-6) or the divorce of the beneficiary and the testator (755 ILCS 5/4-7(b));

b. *Common Disaster - The "Ultimate" Clause.* In smaller family groups, it is generally advisable to provide for contingent residuary takers if primary beneficiaries do not survive the testator. Without express provision in will, if there are no living residuary takers under will, the property passes by intestacy via the laws of descent and distribution. Common to have provision that if no named beneficiary is then living, the estate or trust shall be distributed ½ to Husband's heirs at law and ½ to Wife's heirs at law;

c. *Survival Period*. Unless the will provides otherwise, a beneficiary may inherit if he or she outlive the testator by a few seconds. Accordingly, it may be prudent to insert a survival period such as 30 days to 6 months in the will. Note that under Code Section 2056(b)(3), a survival period with regard to a surviving spouse cannot be greater than 6 months for purposes of the marital deduction. Furthermore, the Uniform Simultaneous Death Act provisions (755 ILCS 5/3-1) generally provide that if title to property depends upon priority of death and there is no other provision to the contrary, the property of each person shall be disposed of as if he had survived. In drafting estate plans for husband and wife, make sure that the survivorship clauses are "coordinated". For example, a husband and wife's respective wills should not both read that one is to survive the other if the order of deaths cannot be proved;

d. *Exoneration of Debts.* Unless the will provides otherwise, if real estate subject to an encumbrance is specifically bequeathed (or passes by joint tenancy, trust agreement or other non-testamentary instrument), the beneficiary takes it subject to the encumbrance without having the indebtedness paid from the estate of the testator. If the representative pays any such indebtedness, the estate is entitled to reimbursement from the beneficiary (755 ILCS 5/20-19);

e. *Ademptions and Advancements.* If lifetime gifts are being made to a beneficiary who is also a general legatee, it generally depends on the testator's intent whether the legacy is adeemed (i.e., revoked). Moreover, under 755 ILCS 5/2-5, a lifetime gift to a descendant is not an "advancement" counting against the descendant's expectancy unless so expressed in writing by the decedent or unless so acknowledged in writing by the descendant. Accordingly, it probably is prudent to draft a provision stating whether or not such gifts are meant to satisfy the testamentary bequest;

f. *Posthumous (i.e., afterborn) Children*. A posthumous child of a decedent shall receive the same share of an estate as if he had been born in his father's lifetime (755 ILCS 5/2-3);

g. *Failure to Properly Proofread Documents*;

h. *Failure to Properly Incorporate by Reference;*

i. *Failure to Provide for Anatomical Gifts.* Illinois Anatomical Gift Act (755 ILCS 50/1 et seq.) Most attorneys do not discuss this issue during the estate planning process. A recent poll showed that although 60% of those polled would be willing to make anatomical gifts, only 17% had signed donor cards. Moreover, these cards do not become available at the critical point when a donation could be made. Under the Illinois Anatomical Gift Act the gift may be made by will and is effective upon death, whether or not the will is probated. Furthermore, (i) the gift can also be made by a document other than a will if it is signed in the presence of 2 witnesses who certify that the decedent was of sound mind, knew the objects of his bounty and was not under undue influence; (ii) executing the form on the reverse side of the Illinois driver's license is sufficient; (iii) an agent under a health care power of attorney may make an anatomical gift; (iv) if the decedent did not specify an intent (and there is no clear indication that the decedent did not intend to be a donor) then the family may make such a gift. Priority is: surviving spouse, adult children, either parent, adult siblings, guardian of the person.

B. TAX DRAFTING ERRORS

1. Failure to Provide for Estate Tax Planning Utilizing the Unified Credit.

   a. *DO COMBINED ASSETS EXCEED THE UNIFIED CREDIT?* [1]

      If "NO", estate planning to utilize the unified credit for both spouses may not be necessary;

      If *"YES"*, consider recommending establishment of separate unified credit shelter trusts for both husband and wife in will or living trust;

   b. In 1998, for $1,250,000 joint estate, estate planning through credit shelter trusts may save at least $246,250 in estate taxes compared to a joint tenancy estate plan;

   c. If client does not wish to engage in estate planning even though assets exceed the unified credit, consider letter to clients memorializing client intention not to engage in estate planning.

2. Apportionment of Taxes & Expenses. The majority of wills and trusts use the "default" apportionment clause that taxes & expenses are paid from the residue without apportionment or reimbursement. Such "burden on the residue" draftsmanship typically presents a problem when:

   (1) Substantial non-probate assets pass to different beneficiaries than the probate assets; or

   (2) Significant specific bequests pass to individuals other than the residuary takers.

      Example: Hal dies in 1997 with a $2 Million Gross Estate triggering $588,000 in estate taxes. His assets consist of (i) probate assets of $1 Million, payable to his daughter as residuary taker under his will; and (ii) a $1 Million insurance policy payable to his son. Under a "burden on the residue" apportionment clause (without any directive apportioning estate taxes to insurance policies), the $588,000 tax is paid out of the residue, leaving daughter with only $412,000 and son

[1] Pursuant to the Tax Reform Act of 1997, the unified credit will be slowly increased to $1 million as follows: 1998 ($625,000); 1999 ($650,000); 2000 ($675,000); 2001 ($675,000); 2002 ($700,000); 2003 ($700,000); 2004 ($850,000); 2005 ($950,000); 2006 ($1,000,000).

with $1 Million.

3. Non-citizen Spouses . The estate tax marital deduction is generally unavailable for property passing to a non-citizen spouse unless such property is administered by a "Qualified Domestic Trust" (Code Sections 2056(d) & 2056A).

4. Miscellaneous "Trouble Spots"

   a. *Generation Skipping Taxes* ($1M GST exemption);

   b. *Closely held Businesses* (family succession);

   c. *Liquidity;*

   d. Diversification of Assets;

   e. *Environmental Liability;*

   f. Subchapter S Stock;

   g. Charitable Bequests.

C. ERRORS IN THE EXECUTION OF THE WILL

1. Failure to have Sufficient or Competent Witnesses. Only two witnesses need attest to the execution of a will (755 ILCS 5/6-4). However, some states require three witnesses and the use of three witnesses is generally advisable. Also, it should be easier to find two out of three witnesses. Furthermore, any legacy given to a witness (or spouse of a witness) is void unless the will can be proved by a sufficient number of witnesses other than the beneficiary (755 ILCS 5/4-6). The beneficiary may be compelled to testify as to the validity of the will, but is entitled to receive as much of the legacy as would have been given had the will not been proved.

2. Attestation - Failure to have Proper Attestation Clause. The execution and validity of a will is generally proved (in the absence of fraud, forgery, compulsion or other improper conduct) when each of two attesting witnesses to the will states that (i) the witness was present and saw the testator or some person in his presence and by his direction, sign the will in the presence of the witness or the testator acknowledged it to the witness as his act; (ii) the will was attested by the witness in the testator's presence; and (iii) the witness believed that the testator was of sound mind and memory at the time of signing or acknowledging the will

(755 ILCS 5/6-4(a)). The attestation clause should not vary from the statutory language. If statutory language is used, no affidavit for proof of will is needed, and unless there is an objection to admission of the will to probate, it can be admitted to probate without the testimony of the attesting witnesses.

3. Attestation - Failure for Testator to Sign or Acknowledge Will in the Witnesses' Presence.

4. Attestation - Failure for Witnesses to Attest to Will in the Presence of the Testator.

5. Place of Execution - Establish where will is to be executed. Benefit of executing documents in attorney's office is that witnesses may be located more easily if the attorney's partners or associates act as witnesses. If the attorney is not present during signing, detailed instructions as to execution should be given.

6. Miscellaneous "Trouble Spots"

   a. Testator/witnesses signing wrong will or not signing in proper places;

   b. Execution of duplicate original wills. Never advisable to execute duplicate original wills because if all originals are not located the general presumption may be that the testator destroyed one copy with the intention to revoke all copies;

   c. Execution supervised by clients or non-attorneys (rather than attorney);

   d. Beneficiaries present during execution may trigger claims of undue influence by beneficiary over testator.

7. General Suggestions as To Will Execution.

   a. Prefer witnesses who should survive the testator and can be located easily;

   b. Testator should initial or sign each page of will;

   c. Testator should state that the document he is signing is his will or trust;

   d. No witness should be an heir, legatee or fiduciary named in the will;

   e. If signature is by the testator's "mark," the attestation clause and body of will should reflect this fact;

f. Notarization of will is no longer required, although many attorneys prefer to have the will notarized.

III. MISCELLANEOUS ISSUES

A. SAFE-KEEPING & FILING OF WILL

1. Kept by Client.

a. Safe-deposit box is the preferred method of safekeeping.

(1) If the box is held in joint names, the surviving owner can enter the box without restriction;

(2) If the box is held solely by the decedent, the bank must be presented with an affidavit by an interested party pursuant to the procedure outlined in 755 ILCS 15/1.

b. Attorney should keep a photocopy of executed will in the file;

c. Attorney should ask client where will is to be kept.

2. Kept by Attorney.

a. Attorney may place will in safe-deposit box;

b. Some attorneys prefer to maintain a safe in their offices to retain original wills;

c. Receipt should be issued to client.

3. Corporate Executor - may be deposited with bank trust department for safekeeping prior to death.

4. Copies to Interested Parties*???* Consider sending copies of executed will or trust to the named executor, guardian or trustee. Moreover, it may be desirable to consult with these parties prior to execution to make sure they will accept their respective appointments.

5. *Filing of Will* - with clerk of the court within 30 days after death regardless of whether probate of the will is necessary. (755 ILCS 5/6-1). In Cook County, will must be filed at least 3 court days before hearing on a petition

for admission of the will to probate. (Cook County Circuit Court Rule 12.3 (a)).

6. Establishment of a Will Depository? H.B. 1658 (defeated in 1997) would have created a state-wide system for the depositing of wills of testators who cannot be located. The bill was drafted and proposed by the CBA Probate Practice Committee and it is generally hoped that it someday will become law.

B. A "PRE-AFFIDAVIT OF HEIRSHIP"

1. Obtain Family Information on family members and legatees (i.e, names, ages, addresses, social security numbers, etc.) since you will need to prove heirship once the estate is opened.

2. Review Rules of Descent and Distribution (755 ILCS 5/2-1 to 2-4)

   a. Generally
      (1) If surviving spouse and descendant of decedent, 1/2 of the estate to the surviving spouse and 1/2 to the descendants per stirpes;

      (2) If no surviving spouse, entire estate to decedent's descendants per stirpes;

      (3) If no surviving descendants, entire estate to decedent's spouse;

      (4) If no surviving spouse or descendants, the estate is divided between the decedent's siblings per stirpes and parents (with a single parent taking a "double portion").

   b. Half-blood relations are treated the same as whole blood relations.

3. Basic questions:

   a. Surviving spouse and/or children?

   b. If not, then parents and/or siblings?

   c. If not, then nieces and nephews?

   d. Are any of the heirs or beneficiaries minors or disabled persons?

e. Any predeceased family members?

f. How many times married?

C. **GATHERING ASSET INFORMATION**.

a. *Asset/liability Questionnaires to Clients Before Meeting?* May be helpful for clients to fill out questionnaires. Helps the executor or trustee to "marshall" the testator's assets. *However,* clients sometimes are intimidated by detailed questionnaires and will not fill them out. Alternative is to gather such information at client meeting.

b. *Types of Information to Inquire*

Assets

(1) Real Estate;
(2) Cash & Cash Equivalents;
(3) Stocks and bonds;
(4) Insurance;
(5) Tax-Sheltered pension plans;
(6) Business Assets;
(7) Inheritance potential;
(8) Tangible personal property;

Other Information

(9) Several years of income tax returns;
(10) Encumbrances and liabilities;
(11) Prior gift tax returns;
(12) Prior trusts established;
(13) Statements from brokerage accounts and IRAs;
(14) Life Insurance policies;
(15) Pension Plan and other beneficiary designations;
(16) Prenuptial Agreements;
(17) List of personal advisors, such as accountants, bankers, insurance agents;
(18) Date of acquisition and cost information;

c. *Recommendation - 3 Column Worksheet*

(1) 1st column - Husband's Assets;

(2) 2nd column - Wife's Assets;

(3) 3rd column - Assets held joint tenancy

(a) *Division of Assets between Husband and Wife* - If estate planning via unified credit shelter trusts is desired, develop funding plan to break up joint tenancies and "split" assets between husband and wife;

(b) *Consequence of "Non-Funded" Living Trust is Probate of Pour-Over Will*.

D. TRANSFERRING TITLE TO AUTOMOBILE

Generally, there are three ways in which title can be transferred with the Illinois Secretary of State if an automobile is registered in the individual name of the decedent:

1. Probate Estates Opened. Required Documents: (i) Decedent's title; (ii) certified letters of office; (iii) Form VSD-190, Application for Title and Registration; (iv) Form RUT-50, Proof of Compliance with the Vehicle Use Tax.

2. Small Estates Affidavit *(if value of the personal estate does not exceed $50,000).* Required Documents: (i) Decedent's title; (ii) Small Estate Affidavit (copy attached hereto as Exhibit "C"); (iii) death certificate; (iv) Form VSD-190, Application for Title and Registration; (v) Form RUT-50, Proof of Compliance with the Vehicle Use Tax.

3. Attorney's Affidavit *(625 ILCS 5/3-114)*. Attorney's Affidavit on the attorneys's letterhead stating: (i) the name and last address of the decedent; (ii) the date of death; (iii) the year, make and vehicle identification number (VIN) of the vehicle; (iv) to whom the vehicle is being transferred and the relationship to decedent, if any; (v) any other pertinent facts relating to the transfer of the vehicle. Furthermore, the same forms (other than the Small Estates Affidavit) must be submitted as in 2. above.

4. Joint Ownership. If the title is registered in joint tenancy, upon the death of the joint tenant, the surviving joint tenant should apply for title in his or her own name. Required Documents: (i) Decedent's title; (ii) death certificate (iii) Form VSD-330, Application Title marked "corrected" in order to remove the decedent's name from title; and (iv) Form VSD-190, Application for Title and Registration.

E. OTHER ISSUES

1. Spouse and Child Awards (755 ILCS 5/15-1 & 15-2)

   a. *Minimum Awards*. Awards are at minimum $10,000 for spouse and $5,000 for each minor or adult dependent child. If there is no surviving spouse the minimum award for the children are (i) $5,000 each; (ii) plus $10,000 generally divided equally among the children.

   b. *Awards Greater Than Minimum*. Awards may be larger than minimum if spouse or child establishes basis for support needs for the period of 9 months after the death of the decedent. A percentage of the prior year's income and evidence relating to lifestyle may be used as a basis to establish support needs.

   c. *Independent Administration*. The aforesaid minimum allowable spouse's or child's award may be paid by the independent representative without application to the court. An award exceeding the minimum also may be paid without application to the court unless the aggregate of all awards to spouse and child or children exceed 5% of the gross estate at date of death (755 ILCS 5/28-7).

2. Renunciation (755 ILCS 5/2-8) Explain to the surviving spouse his or her ability to renounce the will. Generally, renunciation must be filed within 7 months after admission of the will to probate;

   a. Computation of Renunciatory Share -

      (1) If decedent has no descendants, the spouse's renunciatory share is 1/2 of the net probate estate;

      (2) If decedent has descendants, the spouse's renunciatory share is 1/3 of the net probate estate;

   b. *Applies only to Probate Assets* - The Illinois renunicatory share currently applies only against the decedents net probate estate and generally does apply to assets outside of probate such as joint tenancy assets with surviving co-tenant, or assets subject to beneficiary designations. See Johnson v. LaGrange State Bank, 383 N.E. 2d 185 (Ill. 1978), for proposition that in the absence of fraud a spouse's renunciation right does not relate to assets transferred to a living trust before death. Illinois has no "augmented" estate for renunciation as in other jurisdictions.

3. Disclaimer (755 ILCS 5/2-7; Code Section 2518).

   a. *In General* - A Disclaimer is a refusal to accept an interest in property to which the disclaimant is entitled by virtue of gift, descent, bequest, contract, survivorship, or

otherwise. The effect of a disclaimer generally is to transfer the disclaimed interest as if the disclaimant had predeceased the decedent;

b. *Statutory Requirements under Internal Revenue Code Section 2518* - A "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property that satisfies the following four conditions:

(1) FORMAL REQUIREMENTS. The refusal is made in writing, identifies the interest disclaimed and is signed by the disclaimant or his legal representative;

(2) TIME - 9 MONTHS RULE. The written refusal is received by the transferor no later than nine months after the date on which the transfer creating the interest is made. For disclaimers of an expectancy under a will, the disclaimer should be delivered to the executor and an executed copy filed with the probate court. For disclaimers of real estate, the disclaimer should be delivered and an executed counterpart filed with the Recorder of Deeds. Exception for Minors: A beneficiary who is under 21 years of age has until 9 months after his 21st birthday in which to make a qualified disclaimer. (Treasury Regulations Section 25.2518-2(d)(3) and (4)).

(3) NO ACCEPTANCE OF BENEFITS. The disclaimant generally cannot accept the interest in property or any of its benefits before making the disclaimer. Acceptance is manifested by an affirmative act that is consistent with ownership of the interest. (Treasury Regulations Section 25.2518-2(d)(1)). Further, Section 2-7(e) of the Probate Act provides that acceptance must be affirmatively proved in order to constitute a bar to acceptance.

(4) NO DIRECTION OF BENEFITS. A disclaimer will not be qualified unless the disclaimed property passes, without any direction on the part of the disclaimant, to a person other than the disclaimant. Regulation Section 25.2518-2(e).

Example - Use of Disclaimer to "Salvage" the Unified Credit

Facts: In 1998 husband dies holding $1,250,000 in joint tenancy property. The result is that such property goes to wife, resulting in the “waste” of husband’s $625,000 unified credit. *Solution*: Wife should consider (within 9 months after the death of husband) disclaiming an amount of joint tenancy property up to $625,000. The disclaimed property would be distributed to heirs (children), thereby utilizing husband’s unified credit. If wife dies later in 1998, this technique could save at least $246,250 in estate taxes.