

THE CHARITY'S VIEW OF THE ESTATE PLANNING AND PROBATE PROCESS

Claire Collins Schwarz

Law Office of Claire Collins Schwarz

P.O. Box 720762, Dallas, Texas 75372

214.354.8479 claire.schwarz@sbcglobal.net

website: www.claire schwarzlaw.com

Claire Collins Schwarz

PRACTICE FOCUS: General counsel representation for tax-exempt entities with a concentration in probate matters.

REPRESENTATIVE CLIENTS: SPCA of Texas, Operation Kindness, People for Paws Humane Society, Critter Oasis of Monahans, Best Friends, Society for Animal Welfare Administrators, The Dallas Foundation, Texas Humane Legislation Network, Duck Team 6, Humane Society of Pecos

ACADEMIC

University of Texas, J.D.

Southern Methodist University, BBA and MBA

Ask your client!

- A British study, conducted in May 2013 by the Charities Aid Foundation, showed that if the will drafter does not ask if the testator wishes to make a charitable bequest, the testator will include a charitable bequest about 5% of the time. If the will drafter asks the testator if he/she wishes to make a charitable bequest, he/she will make the charitable bequest about 11% of the time. Then, if the will drafter asks the testator if there are any causes that he/she feels passionately about, charitable bequests increase to 15% of the time.

Know your charity

- Determine the charity's legal name. For instance, the SPCA of Texas is a comprehensive animal welfare agency and is not affiliated with any other entity and does not receive general operating funds from the City of Dallas, State of Texas, federal government, or any other humane organization. The SPCA of Texas is not the local chapter of the ASPCA.
- Does the charity operate locally or on a national basis?
- Is there a particular program that your client is interested in supporting? How long will that program last? Ask the charity.
 - “In the year 2030 all funds are to be given to the Society for the Prevention of Cruelty to Animals under the condition that the (SPCA) build a large No Kill animal shelter for the rescue of large dogs (50 lbs & over) named the John Doe Memorial Shelter. This shelter shall be as close as possible to a natural habitat with trees, grass, and a pond and caretakers with a special love for Dogs.”
- What is the charity's Tax Identification Number?

Know your charity

- What is the registered address/agent for the charity for notification purposes?
- Does your client have an established relationship with the charity?
Does your client want to have one?
- What assets are going to the charity? Will the charity accept them?
Especially important when devising mineral interests or other unusual assets.

Estate Planning Hiccups

- Remember to check all nonprobate assets to ensure that the named beneficiaries on those accounts follow the estate plan, e.g., brokerage accounts, bank accounts, insurance policies, pension plans, etc.
Insurance policy named ex-friend, not estate beneficiary
- Residual clause – Ensure that the residual clause reflects the disposition plan.
 - “I direct that all insurance policies, investments, real estate and other negotiable instruments, excluding those that have individual designated beneficiaries, and holdings, excluding personal property, be converted to cash and maintained as one (1) fund until distribution.”
 - “Any other property of mine that has not been disposed of under any other provision of this Will shall go and be distributed to my heirs-at law.”

Estate Planning Hiccups

- Decedent died in a fire caused by a defective fan. Heirs-at-law were not named as devisees in the will but sued to receive the wrongful death lawsuit proceeds.
- Will Formalities – still important! We had a form will where the entire estate was left to the SPCA of Texas only the witnesses to the will did not sign in the testator's presence. Testator died in a car accident and the wrongful death lawsuit proceeds went to her brother who had reportedly sexually molested her as a child.

Pet Trusts

What about the dogs, cats, birds, horses, snakes? What is the expected lifetime of those animals? Do you form a Pet Trust pursuant to TEX. PROP. CODE §112.037 (Trust for Care of Animal)? How much do you fund? Under TEX. PROP. CODE §112.059, if the trust corpus is less than \$50,000.00, the trustee may terminate the trust as uneconomical. Who will be the trustee, pet caretaker, remainder beneficiary, trust protector?

Pet Trust Issues – what happens when the executor refuses to fund the trust? What happens when the executor, who is also the sole will beneficiary and who is the pet trustee, collects the funds designated for funding the pet trust in his role as pet trustee and then denies that the pet trust is valid?

Pet Trusts

- “I give all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in the any manner entitled at the time of my death (collectively referred to as my “residuary estate”), as follows:
 - (a) If any of my household pets survive me, to the care of those household pets.
 - (b) If no household pets survive me, my residuary estate shall be paid and distributed to The Society for the Prevention of Cruelty to Animals of Texas.”

The pets survived the testator but there was no provision for distribution of the residuary estate following the pets death.

Where the fun begins – anticipating will contests

No contest clauses – do they ever work?

Why is the testator alienating his/her heirs-at-law from the will?

What is the testator's relationship with the charity? This will be examined in detail during the will contest.

Where is the original will going to be kept? In the safety deposit box?

Does anyone else have access or will gain access, such as the disinherited family member? **We had a disinherited son who claims that his father died intestate but the SPCA of Texas had the original will.**

Remember that the charity is a necessary party

- TEX. EST. CODE § 55.052 – Necessary Party. An institution of higher education, a private institution of higher education, or a charitable organization that is a distribute under a will is a necessary party to a will contest or will construction suit involving the will.

Don't forget the Office of Attorney General

The OAG has authority over the charitable institution via:

Common Law

Constitutional Law

Statutory Law (TEX. PROP. CODE § 123)

WHEN THE OAG MUST PARTICIPATE - TEX. PROP. CODE § 123.001. DEFINITIONS

- (3) "Proceeding involving a charitable trust" means a suit or other judicial proceeding the object of which is to:
- (A) terminate a charitable trust or distribute its assets to other than charitable donees;
 - (B) depart from the objects of the charitable trust stated in the instrument creating the trust, including a proceeding in which the doctrine of cy-pres is invoked;
 - (C) construe, nullify, or impair the provisions of a testamentary or other instrument creating or affecting a charitable trust;
 - (D) contest or set aside the probate of an alleged will under which money, property, or another thing of value is given for charitable purposes;
 - (E) allow a charitable trust to contest or set aside the probate of an alleged will;
 - (F) determine matters relating to the probate and administration of an estate involving a charitable trust; or
 - (G) obtain a declaratory judgment involving a charitable trust.

TEX. PROP. CODE § 123.001. DEFINITIONS

- (4) "Fiduciary or managerial agent" means an individual, corporation, or other entity acting either as a trustee, a member of the board of directors, an officer, an executor, or an administrator for a charitable trust.

TEX. PROP. CODE § 123.002.
ATTORNEY GENERAL'S PARTICIPATION

For and on behalf of the interest of the general public of this state in charitable trusts, the attorney general is a proper party and may intervene in a proceeding involving a charitable trust. The attorney general may join and enter into a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust.

TEX. PROP. CODE § 123.003. NOTICE

- (a) Any party initiating a proceeding involving a charitable trust shall give notice of the proceeding to the attorney general by sending to the attorney general, by registered or certified mail, a true copy of the petition or other instrument initiating the proceeding involving a charitable trust within 30 days of the filing of such petition or other instrument, but **no less than 25 days prior to a hearing in such a proceeding**. This subsection does not apply to a proceeding that is initiated by an application that exclusively seeks the admission of a will to probate, regardless of whether the application seeks the appointment of a personal representative, if the application:
- (1) is uncontested; and
 - (2) is not subject to Subchapter C, Chapter 256, Estates Code.

TEX. PROP. CODE § 123.003. NOTICE

- (b) Notice shall be given to the attorney general of any pleading which adds new causes of action or additional parties to a proceeding involving a charitable trust in which the attorney general has previously waived participation or in which the attorney general has otherwise failed to intervene. Notice shall be given by sending to the attorney general by registered or certified mail a true copy of the pleading within 30 days of the filing of the pleading, but no less than 25 days prior to a hearing in the proceeding.

TEX. PROP. CODE § 123.003. NOTICE

- (c) The party or the party's attorney shall execute and file in the proceeding an affidavit stating the facts of the notice and shall attach to the affidavit the customary postal receipts signed by the attorney general or an assistant attorney general.

TEX. PROP. CODE § 123.004

VOIDABLE JUDGMENT OR AGREEMENT

- (a) A judgment in a proceeding involving a charitable trust is voidable if the attorney general is not given notice of the proceeding as required by this chapter. On motion of the attorney general after the judgment is rendered, the judgment shall be set aside.
- (b) A compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust is voidable on motion of the attorney general if the attorney general is not given notice as required by this chapter unless the attorney general has:
 - (1) declined in writing to be a party to the proceeding; or
 - (2) approved and joined in the compromise, settlement agreement, contract, or judgment.

What the Charity is interested in --

TEX. EST. CODE §308.002 - REQUIRED NOTICE TO CERTAIN BENEFICIARIES AFTER PROBATE OF WILL

Within 60 days after the will has been admitted to probate, the personal representative of the estate has to provide notice of the bequest to the charity. The notice is to include a copy of the will and a copy of the Order admitting the will to probate.

TEX. EST. CODE §309.051

INVENTORY AND APPRAISEMENT

Within 90 days after the will has been admitted to probate, the personal representative of the estate has to file an inventory showing the estate's assets and provide you with a copy.

Real world experience – I was recently told by an IE's attorney that he didn't provide inventories to beneficiaries. I'm seeing a lot of POD bank accounts listed on the inventory which creates expectations among the beneficiaries.

TEX. EST. CODE § 404.001

ACCOUNTING

- (a) At any time after the expiration of 15 months after the date that the court clerk first issues letters testamentary or of administration to any personal representative of an estate, any person interested in the estate may demand an accounting from the independent executor. The independent executor shall furnish to the person or persons making the demand an exhibit in writing, sworn and subscribed by the independent executor, setting forth in detail:

TEX. EST. CODE § 404.001

ACCOUNTING

- (1) the property belonging to the estate that has come into the executor's possession as executor;
- (2) the disposition that has been made of the property described by Subdivision (1);
- (3) the debts that have been paid;
- (4) the debts and expenses, if any, still owing by the estate;
- (5) the property of the estate, if any, still remaining in the executor's possession;
- (6) other facts as may be necessary to a full and definite understanding of the exact condition of the estate; and
- (7) the facts, if any, that show why the administration should not be closed and the estate distributed.

TEX. EST. CODE § 404.001

ACCOUNTING

- (a-1) Any other interested person shall, on demand, be entitled to a copy of any exhibit or accounting that has been made by an independent executor in compliance with this section.
- (b) Should the independent executor not comply with a demand for an accounting authorized by this section within 60 days after receipt of the demand, the person making the demand may compel compliance by an action in the probate court. After a hearing, the court shall enter an order requiring the accounting to be made at such time as it considers proper under the circumstances.

TEX. EST. CODE § 404.001

ACCOUNTING

- (c) After an initial accounting has been given by an independent executor, any person interested in an estate may demand subsequent periodic accountings at intervals of not less than 12 months, and such subsequent demands may be enforced in the same manner as an initial demand.
- (d) The right to an accounting accorded by this section is cumulative of any other remedies which persons interested in an estate may have against the independent executor of the estate.

TEX. EST. CODE § 405.001

ACCOUNTING AND DISTRIBUTION

- (a) In addition to or in lieu of the right to an accounting provided by Section [404.001](#), at any time after the expiration of two years after the date the court clerk first issues letters testamentary or of administration to any personal representative of an estate, a person interested in the estate then subject to independent administration may petition the court for an accounting and distribution. The court may order an accounting to be made with the court by the independent executor at such time as the court considers proper. The accounting shall include the information that the court considers necessary to determine whether any part of the estate should be distributed.

TEX. EST. CODE § 405.001

ACCOUNTING AND DISTRIBUTION

- (b) On receipt of the accounting and, after notice to the independent executor and a hearing, unless the court finds a continued necessity for administration of the estate, the court shall order its distribution by the independent executor to the distributees entitled to the property. If the court finds there is a continued necessity for administration of the estate, the court shall order the distribution of any portion of the estate that the court finds should not be subject to further administration by the independent executor. If any portion of the estate that is ordered to be distributed is incapable of distribution without prior partition or sale, the court may:

TEX. EST. CODE § 405.001

ACCOUNTING AND DISTRIBUTION

- (1) order partition and distribution, or sale, in the manner provided for the partition and distribution of property incapable of division in supervised estates; or
- (2) order distribution of that portion of the estate incapable of distribution without prior partition or sale in undivided interests.

TEX. EST. CODE § 405.001

ACCOUNTING AND DISTRIBUTION

- (c) If all the property in the estate is ordered distributed by the court and the estate is fully administered, the court may also order the independent executor to file a final account with the court and may enter an order closing the administration and terminating the power of the independent executor to act as executor.

Trusts – don't forget to tell the remainder beneficiary

- After the trust is funded, notify the remainder beneficiary of:
 - the existence of the trust,
 - contents of the trust instrument,
 - the beneficiaries' right to receive income and/or principal from the trust, if applicable,
 - Material facts regarding any transaction in which the trustee has a personal interest,
 - Material facts regarding any transaction whereby by the trustee uses his fiduciary office to obtain any personal benefit or profit, and any breach of trust by the trustee,
 - The trustee's contact information.

Annual Trust Accountings

- Typically, once the charity is informed about the trust's existence, it will request an annual accounting. I typically request the annual financial statements showing all disbursements made by the trust during the prior year.

Releases – why do we have them?

- Self-dealing by Trustee/Independent Executor
 - Requesting that the beneficiary release the trustee for unknown and/or future acts;
 - Request for indemnity
- Requests for Releases for anyone other than Trustee/Independent Executor
 - Requests for release for Trustee/Independent Executor's attorney
 - Requests for release for Trustee/Independent Executor in his/her personal capacity
- Distribution conditioned upon signing a release

Examples

- Used in a proposed trust termination:

“SPCA of Texas, as one of the qualified beneficiaries under the XYZ Trust-1 Dated December 1, 1993 (“Trust”) hereby consents to the relief sought in the Complaint for Judicial Modification of Trust, waives the necessity of service of process and consents to the Court’s jurisdiction for the purpose of the entry of an order on the complaint, **waives an accounting as to the Trust, and does hereby remise, release, agree to defend and indemnify, and forever discharge the Trustee, John Doe, from all claims and demands whatsoever, in law or in equity, on account of or in respect to the Trust and all aspects of the estate of the lifetime beneficiary.**”

Releases – continued; no accounting provided

“The undersigned, hereinafter called “Beneficiary” hereby acknowledges receipt of funds in the amount of \$Zillion Dollars due and owing to the undersigned as a full disbursement of the Beneficiary’s portion of the Estate of Jane Doe.

This receipt is a release of the Estate of Jane Doe, the Executor Jane Smith, and Independent Executor’s Attorney and Independent Executor’s Attorney, P.C., and any and all persons acting for or on behalf of said Estate with respect to this disbursement.”

Releases – 1995 probate; husband died in 2017

“Enclosed is a Receipt and Release that states the amount you will receive from the estate. . . . Your check will be forwarded to you when the receipts signed by the beneficiaries and heirs are received.”

“This Receipt is also a Release of this Estate and of all persons acting for or on behalf of the Estate of Jane Doe, Deceased, particularly including, but not limited to, John Doe, Independent Executor of this Estate, the Estate of John Doe, and Mr. Attorney, Independent Executor of the Estate of John Doe, with respect to any and all claims or demands which it may have with respect to this Estate or any of its properties.”

Don't rewrite the will just because the primary beneficiary is a charity

- Decedent's family makes a demand for more money than what was devised to them under the will --

“I was out of the office Friday afternoon and did not read the email from Charity's attorney until this weekend. I must confess both utter shock and dismay and hence, my decision to wait a day to respond. The Family had thought and hoped that the charity would acknowledge the exceptional gift Decedent provided for them and extend a similar charity and generous spirit to Decedent's family given the losses, both emotional and economic, they sustained. ”

Same case, different attorney --

“Family attorney asked you to do something “fair” for the family. I asked the charity to sit down with the family members at the outset and discuss the situation, also with an eye toward fairness. If the charity wants to take such a step because it is receiving such a large, generous, and unexpected bequests, then it should do so in gratitude to a woman who worked hard throughout her career to earn the Zillion Dollars or more that the charity is planning to receive. . . . Offering free veterinary care to an elderly dog is a nice gesture, but it does not benefit any of the people for whom Decedent was a living, breathing sibling and aunt whom they loved.”

Same attorney, different case

This attorney wanted to know, during will contest settlement negotiations, why the SPCA of Texas wasn't being more generous with the family contesting the will since the SPCA's mission is to prevent cruelty to animals and the family, being humans, could be considered to be animals.

Distributions

- Keep the charity informed as to the status of the estate administration
- Ask the charity if it wants the bequest reduced to cash or to receive it in kind (stocks, etc.), partition (for mineral interests), or deed (real property transfers).
- How does the charity want to receive its distribution – a check or a wire? **We had an Independent Executor send us a distribution of \$100,000 in the form of a cashier's check in a regular envelope and it got lost in the mail.**

THANK YOU!

- Remember that the charity survives on bequests and is always very grateful to its donors
- The charity owes its duty of loyalty to the donor, not to the Independent Executor or the Trustee (unless he/she is a donor too!)