Avoid Probate Court: Head to Your Bank Instead

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There has been a growing trend among individuals and even estate planners to avoid having to go to the probate court. Even for those people who need wills, a large percentage of their assets will be transferred pursuant to beneficiary designations in account agreements at banks and credit unions, in IRA's and other qualified retirement plans, and through life insurance policies. Add a trust, and an even wider range of assets can be transferred outside the probate courts. What this non-probate disposition of assets means, of course, is that financial institutions are called upon to help a customer determine what type of account to use and, after death of the customer, review legal documents and carry out the transfer instructions.

In addition, more people are using simplified probate tools to avoid a formal probate. In Texas, small estates affidavit can be used when a person dies without a will and has $75,000 or less in personal assets, not including the homestead. If there is a will and there are no unpaid debts or a need for administration, the will can be admitted to probate under a unique Texas proceeding known as a "muniment of title." Under these procedures, no representative of the estate is appointed. Banks may be presented with a court certified copy of an affidavit for small estates or an order admitting a will to probate as a muniment of title. The financial institution may be called upon to review the documents and pay the funds in an account. These procedures are currently authorized by statute, but may become more widely used. A task force formed by the Supreme Court of Texas is considering promulgating forms for use by non-lawyers to make it easier for them to take advantage of these simplified procedures.

Even before the death of a customer, financial institutions may be involved with estate issues of their customers. With people living longer, there is a growing need to address how assets will be managed in the event of incapacity. Most families prefer having a family member act as trustee of a parent's estate, to the expensive and burdensome process of a court supervised guardianship in which the judge determines where a parent will live and approves payment of expenses, legal fees and court fees.

A power of attorney ("POA") is often used as an estate planning tool to avoid guardianships. The form of the POA may vary from state to state, but many statutes are modeled after the Uniform Power of Attorney Act of 2006. They promote the acceptance of POA's—and discourage their rejection by banks. A bank may refuse a POA only on the grounds listed in the statute and only within strict time limits. There may be penalties if a financial institution fails to comply with the new guidelines, including law suits and liability for attorney's fees.

Texas adopted a new POA statute in September of 2017. Under the new Texas statute, POAs executed in another state now must be accepted if their execution complies with the law of the state in which it was signed—a legal determination that must be made by financial institutions.

In addition, the powers of an agent under a POA may be significantly expanded. If specifically authorized in the POA, an agent in Texas may create, amend, revoke or terminate an inter vivos trust; make a gift; change the rights of survivorship; or change a beneficiary designation of an account. These "hot powers" allow an agent to completely alter the customer's testamentary intent as set out in the account agreements.

Against these new powers, a financial institution must weigh the potential for elder abuse. A family member may try to improperly influence the testamentary decisions of a parent or other relative. Persons without children or heirs may become the targets of fraud schemes. Texas law requires a person (including an employee of a financial institution) having cause to believe that an elderly person is in the state of abuse, neglect or exploitation (including financial fraud) to report the information to the proper authorities.

These legal changes come within the context of widely available documents on the internet. Forms for the preparation of wills, trusts (especially the popular "living trust") and POA's are readily available. Articles and purveyors of legal documents encourage their use. The use of these and other forms can be a huge benefit to persons who need estate planning but cannot afford legal counsel. At the same time, there are risks. Mistakes in the execution of documents may thwart the legal intent and raise new legal issues. On-line documents may not address the requirements of a particular state. Forms may be obsolete as legislatures change requirements. Individuals may not know that they are required to transfer title to an asset in order to achieve an intended disposition.

Employees of financial institutions increasingly are asked to decide difficult questions with limited information and in a short time frame. They are asked to fill the role of an advisor in setting up accounts. They may be asked to determine the validity of legal documents. In the event of a dispute involving ownership of assets, they also may be asked to make decisions regarding who has the authority to access or transfer funds, enter safe deposit boxes or distribute funds in an IRA. Examples include the following:

- If a financial institution reports suspected elder abuse, can it place a hold on the customer's account while an investigation is ongoing? If it is presented with a check signed by the suspected individual, can it return the item without risk of liability for wrongful dishonor of the check?
- An elderly person wants to prevent her spendthrift children from inheriting her estate by naming her minor grandchildren as POD beneficiaries of her account. After she dies, can the bank write checks to each of her minor grandchildren, the youngest of which is two?
- A daughter calls her mother's bank to warn that her brother has obtained a POA from their minimally competent mother, who is in a nursing home. She wants the bank to place a hold on the accounts. Can it do so without risk of a claim that is in breach of the account agreement?
- A husband opens an IRA solely in his name using profit sharing distributions from his wholly owned business. The wife files for divorce and demands that the bank transfer her community interest in the IRA to another bank. Should the bank follow her instructions?
- A wife wants to use her husband's POA to continue operating a family owned corporation and a limited liability corporation (LLC). The husband is the majority

shareholder and an officer of the corporation. He is also the sole member of the LLC. Can she use the statutory POA to make herself an officer of the family businesses?
- Husband and wife set-up a bank account in their names while living in Texas. They retire in Florida and set-up a revocable trust for their benefit under Florida law. The trust states that all personal bank accounts are held in trust. After the death of the last to die, a Florida trustee faxes a letter instructing the Texas bank to pay the funds from the Texas account to her. Does she have authority of assets in Texas?
- A court in Nevada issues an order instructing the bank, as trustee, to reimburse the state of Nevada for the funds it has expended in caring for the trust beneficiary, an incapacitated adult who lives in Nevada. Can this order be enforced against a trust in Texas?

These are all legal issues that must be addressed by financial institutions as part non-probate transfers of assets. Some of these issues used to be addressed in the courts. Customers of financial institutions now want to avoid them. Financial institutions should try to do the same! How can this be done?

First, financial institutions need to recognize that they are being given expanded responsibilities by these legislative and social changes. They may need to become more knowledgeable about statutory changes and new estate planning options, especially self-help tools, that are available to customers. They should train personnel on how to set-up accounts and how to respond to customer requests; develop appropriate policies and procedures to provide a backstop against unreasonable requests from customers (and sometimes attorneys); and develop internal mechanisms to funnel questions to the right people who are familiar with these issues.

Second, it is important to stay within the limits of being a bank, and not become an advisor. Employees of financial institutions should not attempt to provide legal advice and should not take on the role of counseling customers on how to do their estate planning. Otherwise, the employee and the financial institution may be vulnerable to a claim that they are acting as fiduciaries for the customer. Case law states that banks do not have a formal fiduciary relationship with their customers. Customers may view the relationship differently, however. When there is a problem, they may allege there was a "special relationship" with the bank and that they depended on the bank for advice and counsel for many years. They may also argue that because the bank had possession of the assets and determined who could access to them, it was the controlling party, giving rise to a higher duty of care. Whether or not these allegations have merit, they may be sufficient to raise a fact question, prevent a court from entering a summary judgment and allow the customer to go to the jury.

Third, even with vigilance on the part of the financial institution, their customers, family members of customers, and third parties will find new and creative ways to use estate planning techniques. When all else fails, call your lawyer.