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WHEN THERE IS A DEATH IN THE FAMILY
GENERAL INSTRUCTIONS AND RECOMMENDATIONS FOR 2024

[Keep this document with the Will, and read it IMMEDIATELY at or prior to the death of a loved one.]

If you are reading this, the death of a family member is either expected to occur soon, or has happened recently. In either case, please accept my sympathy and condolences in this difficult time, and I hope this process will go for you as smoothly and well as can be hoped. The death of a loved one is a tragedy, and brings a number of challenges we would really rather not have to deal with.

Usually, an attorney will not need to be consulted until the immediate matters (funeral service, obituary, burial arrangements) have been taken care of, but it might be a good idea to contact an attorney immediately prior to death (if possible) or immediately following death and before burial. Please give the following matters some thought:

I. PRE-DEATH PLANNING

CONVENIENT CHECKING/SAVINGS ACCOUNTS:

Is there at least one other person listed on the bank accounts for the purpose of writing checks in behalf of the owner, if the owner cannot do so? Be careful with this decision: a dishonest person could wipe you out and the bank will have no liability.

The best way to do this is with a “Convenience” account - i.e. you are the sole owner of the account and the other named party has authority to write checks for your benefit. There are other types of accounts: “P.O.D” (Pay On Death) or “Joint Survivorship” (see below). Make sure the second party also signs the bank’s signature card before you become sick or die.

These convenience accounts do not become invalid upon death unless the estate’s devisees, heirs or executor deliver a death certificate or other proof of death to the bank. It might be a good idea to wait to do that until the funeral has been paid for, as well as utility bills on the decedent’s home and other immediate expenses of the deceased.

WARNING TO COSIGNER: You are deemed a *fiduciary* and all self dealings are presumed to be in violation of such trust. Therefore, if any checks are to be cashed by or deposited into the cosigner’s account, it is best to have the account owner co-sign the check or have plenty of evidence to back up the bona fide nature of said transfer.

SAFETY DEPOSIT BOX:

A safe deposit box is the best place to keep the Will, powers of attorney, insurance policies, and other valuable documents. “Fire proof” metal boxes are only of limited use. Someone *else* should be named on the safe deposit box, and know where the key is located! You do not want to have to go apply for a court order to be able to get access to the Will. That person will have to sign the deposit box authority card. Failing to locate the key will cause the estate to incur the expense of having the lock drilled off and a new lock installed. The bank will not do this for free.

WILLS AND INSURANCE UPDATED:

Always have your Will reviewed periodically. Laws change and facts change. Named executors move off or refuse to serve. Check the beneficiary designations in your life insurance policies, especially if there has been a divorce since the policies were taken out. Check divorce decrees to see that any provisions in them relating to wills and bequests are complied with.

FUNERAL PLANS:

It is always wise to select the type of funeral service, grave plot, caskets, vaults, etc. well in advance of the death of a loved one. Fill in the "Funeral Instructions" form I have provided. That way you will not be pressured into spending more than a normal person would have done. One in grief cannot normally make a wise decision in this instance, and should have a mature, non-family member (who is very conservative with money - *your money*) assisting you in these decisions.

The funeral home is required by federal and state laws to make full disclosures of what burial services are required by law and what price ranges are available. Police escort may not be required in all instances. Limousine services may not be required. Read the required federal pamphlet carefully before signing a burial contract. Make sure the cemetery is perpetual care. Make sure the cemetery's records showing the burial sites will be available for several lifetimes.

REMEMBER: If you plan to use the decedent's remaining accounts to pay the funeral and burial expenses, including headstone expense, you may be limited to \$5,000.00 under the Estates Code. Of course, you can personally guarantee those expenses in excess of \$5,000.00. A funeral home can obtain a Probate Court order for Emergency Orders to pay up to \$5,000.00 the funeral expenses to be incurred.

Make sure your burial wishes state whether or not you wish a military service, burial in military plot, particular religious service, cremation, reading of certain poems, singing of favorite hymnals.

PRE-PAID FUNERAL/BURIAL PLAN:

If you have a prepaid plan, make sure the family and heirs are aware of it and know where the plan's policy/contract is located. Review it with the funeral home in detail. Make the funeral home explain any hidden/additional charges, and why you were not informed of them in advance?

LAST MINUTE ESTATE SAVINGS GIFTS:

Certain gifts can be made immediately prior to death, and they qualify for the annual \$18,000 exclusion per donee (as of the year 2024). Car titles can be signed over immediately prior to death. Deeds can be executed. But: it is a really good idea to get an attorney's advice before doing so, to make sure it fits in with your estate plan.

WARNING: Do not give IRAs or retirement benefits that would void any roll-over tax treatment.

WARNING: Do not give property that has appreciated in value since its purchase, as the donor's basis will become the donee's basis; whereas, if the property is transferred at death, its basis will be "stepped up" to the property's value at that time, which can save a lot of capital gains tax. The new basis at death also applies to the community property interest of the surviving spouse. However, if the property is still appreciating in value abnormally fast, it may be wise to give it away to lessen the value of the estate for estate tax purposes. [Example: Property bought in 1939 for \$50 per acre, now worth \$5,000 an acre, anticipated to increase to \$6,000 per acre in the near future. If it is donated to a person, the \$50 value becomes the donee's value, and if it is thereafter sold for \$6,000, a capital

gain of \$5,950.00 has occurred; whereas, if the property was inherited and sold for its value on date of death or alternate valuation date, there is no capital gain.]

If you are holding a promissory note or are the payee/seller under a contract for deed, then the above change of value at time of death rule does not apply. Giving away all or percentage interests in that note/contract would thus be a good idea, unless the donor is relying upon the monthly income produced by the note.

SURVIVORSHIP ACCOUNTS:

You can establish joint tenancy with right of survivorship (JTWROS) and/or P.O.D. (payable on death) accounts; however, the laws are very exact and such decisions should be done only upon advice of your legal counsel and tax adviser. One of the problems with these accounts is that if any of the P.O.D. payees die before the owner does, that share or interest will not go to the heirs of that payee, but will instead go to the survivors of those named in the account. This may not be what you really want. Even though a Will usually includes after-born and after-adopted children, P.O.D. accounts and/or survivorship accounts naming only the then-existing children will not include the after-born/after-adopted.

HOMESTEAD CONVEYANCE:

If the deceased does not have a surviving spouse and no surviving minor children, the deceased or his or her attorney-in-fact may want to consider conveying the homestead to the heirs prior to death. The homestead exemption that the decedent was entitled to does not survive him or her, and those judgments, liens or last-sickness creditors (including hospitals, nursing home, Medicare, Medicaid expenses) will become valid liens against all of the estate's assets, including the homestead. **Never** do this without first seeking competent advice from a state agency or your United States Congressman if that dying person has applied for or MAY apply for Medicaid benefits.

Normally, the homestead's value is not considered in your qualifying for Medicaid; however, if you convey it for less than its fair market value, then that conveyance may prevent qualifying for some time. Seek an immediate opinion from the state/federal offices, as these laws and regulations are constantly changing.

GIFTS OF PROPERTY:

Certain gifts can be made orally; but, how can you prove such to the IRS or to any other heir who was not so gifted? Do it in writing and have your signature notarized.

One of the first items the IRS will ask about is jewelry: "where is it? When was it given away and how can the estate prove such a pre-death gift?" The Estate Tax Return normally gives some value to normal jewelry (wedding rings, etc.); however, if it is missing on the return, the examining agent will be suspicious. Especially after asking for the decedent's copies of back homeowners insurance policies which have special coverage for "jewelry." This also applies to "guns" and other "art/hobby" collectibles.

Car titles no longer have to be notarized; however, mobile home titles do.

Do not rely upon the "gift causa mortis" rule (gift made in contemplation of death) to establish a death bed gift: it is very limited and must have eye witnesses (who will not want to get involved in a later family dispute). Normally there must be an actual delivery of title and/or possession at the time of making of the gift; and there should be an acceptance by the recipient.

A properly drafted deed, delivered “in trust” to a trustee or attorney-in-fact for the purpose of being recorded immediately prior to death or even after death has been held by the courts to be legal for transferring title, though not a Will. However, that can create a lot of problems: what if the donor forgets about the deed and, prior to death, either sells the property or gives it to the spouse or other heir. Then the pre-dated deed appears of record after death. This is not a good way to “avoid probate.”

II. DEATH OCCURS

NOTE: *The following contains advice and discussion about what to do, and things to think about, when the death of a loved one occurs. There is an additional document, called “**Death Has Occurred - Checklist and Information Sheet**” (either printed out, or in a PDF file on the flash drive) which has useful checklists and information sheets to work with. If you cannot find that document, let me know and I will send it to you immediately.*

OBITUARY NOTICE AND SOCIAL MEDIA:

Call for obituary notice prices first (the Dallas Morning News’s price may only justify a short message - two or three lines at the most); home town papers need be contacted for prices. The decedent also may have had various social media accounts such as Facebook, Twitter, or Instagram: if you can locate his or her log in information, it might be a good idea to post notifications on those accounts.

ACTUAL NOTICE:

Did the decedent make out a list of persons who were to be called? Check the Funeral and Memorial Instructions document provided: has it been filled out? Any family members of a prior marriage? Notice to proper parties for military burial, Catholic, etc?

BURIAL ARRANGEMENTS:

Have all of the pallbearers been called? Honorary pallbearers? Are they listed in the obituary?

A person can execute a document setting forth his or her wishes as to burial or cremation. If there are no such instructions, then the spouse has the sole decision as to type or expense of burial.

It is not wise to create a scene at the funeral services – life is too short. However, until the law is changed, the surviving spouse appears to have the right to say who can and cannot attend the funeral services. The other non-admittees may have their own separate services – without a body.

However, do be forewarned that lawsuits can be filed for “intentional infliction of mental distress” under these circumstances. Probate actions can be filed to ascertain who has authority to bury or attend, and so on. Is it worth the money or embarrassment? Does the church or funeral home’s own open-door policy prevail? Find out in advance.

IMMEDIATE BANK ACCOUNT PROTECTION:

In the event the decedent has executed any “convenience” account with another family member or friend, it may be wise to serve the bank with a certified mail letter and obituary copy, informing the bank of the death and that there is a possibility that the account solely belongs to the decedent and thus to the probate estate to be filed shortly.

Beware, that this could prevent access to these accounts for the purpose of paying funeral and burial expenses, utility bills, and other necessary expenses that will actually protect or benefit the estate or heirs.

IMMEDIATE ASSET PROTECTION ACTION:

Burglars read the obituary columns too. Beware! If the home becomes unoccupied or if the funeral service will be taking place out of town, it may be wise not to put an obituary notice in the paper until you return or omit the out-of-town services. Or, hire a security guard while you are gone. Church members are normally available for house-sitting during the ceremonies.

In some very few instances (especially if there are children by prior marriages), the anticipated heirs will suddenly appear and want to go through every drawer in the house. IF YOU ARE THE SPOUSE, YOU MAY REFUSE THEM ADMITTANCE. CALL THE COPS IF THEY TRESPASS. THE HOMESTEAD IS YOUR EXCLUSIVE POSSESSION. Even an executor cannot do this until after he or she has been qualified by the court.

Gather up all important papers and documents that may be laying around the home and take them immediately to your attorney. Hide family heirlooms, jewelry, special mementos. Hide the safety deposit box key.

DIVIDING OF HEIRLOOMS:

The above statement also applies. THERE SHOULD BE NO DIVISION (that is, THEFT) OR REMOVAL OF ANY OF THE ESTATE'S ASSETS UNTIL THE WILL HAS BEEN PROBATED AND THE EXECUTOR QUALIFIED. GIVE THE HEIRS DUE WARNING THAT THEFT CHARGES AND PROBATE CONTEMPT/SHOW CAUSE ORDERS CAN BE FILED.

Until the Executor is qualified, no one can take possession or control over the estate's assets except for a surviving spouse.

However, if all of the heirs, devisees and independent executor consent (*it is best to have it in writing*), then a property division can take place without waiting for probate. But, a warning: the Executor will thus become *personally* liable for any creditors or later found heirs who are damaged because of such premature divisions.

SALE/GIFT OF PAINFUL MEMORY ASSETS:

Often spouses and/or family members like to quickly dispose of vacation properties, motor homes, boats, clothing, sporting goods, guns, etc. within a short time of a death, because they bring back painful memories. WORD OF ADVICE: WAIT AT LEAST TWELVE MONTHS OR LONGER BEFORE MAKING THAT DECISION, OTHERWISE YOU MAY REGRET HAVING MADE SUCH AN EARLIER DECISION.

Further, such sales are normally "distress" sales and bring less than fair market value. Certain "friends" will make offers to relieve you of certain items of the decedent that "they" deem you no longer have a use for.

WILL IN SAFE DEPOSIT BOX:

If the will is in a safe deposit box and the bank will not give it to the surviving spouse, heirs or executor, you can require the bank to deposit the same with the local probate court; or, you may file an emergency order forcing the bank to deliver it to the named devisee, executor or to the judge.

PRINT COPIES OF THE WILL FOR EACH FAMILY MEMBER TO HAVE (OR GIVE EVERYONE AN ELECTRONIC COPY); OTHERWISE THEY WILL SUSPECT YOU ARE HIDING SOMETHING. The estate's attorney may legally refuse to discuss the will or probate procedures with anyone other than the executor, since the courts have held the estate's attorney is solely representing the estate and

its executor and not the devisees/heirs. An attorney could thus be subject to dire problems by trying to represent all of the parties, as a few attorneys have learned the hard way. Thus, the attorney may require a written waiver from all involved parties before attempting to advise any non-executor spouse or heir/devisee regarding his/her rights.

Also, make copies for said family members of all of the probate documents that are being submitted to the Probate Court or to the IRS. They can, after a statutory period of time has passed, require such reporting. An executor will probably receive from the attorney a list of duties and time schedules to follow.

LIFE INSURANCE POLICY IN SAFE DEPOSIT BOX:

The same rule as cited immediately above applies to the bank releasing the life insurance policies. The policies must be delivered to the beneficiary, executor or the to the court. Do not allow the original policies out of your possession, as generally the original policy must be filed with the application for benefits.

EMERGENCY ORDERS:

If there is a need to bury the decedent but the only available funds are in a bank or savings account with no convenience account established, then it may become necessary to go to the Probate Court for an emergency order to release up to \$5,000.00 of the decedent's funds for burial purposes.

WARNING: The law allowing such action provides for attorney's fees to be awarded the funeral home against the estate; and it does not allow the heirs to recover their attorney fees or court costs. Therefore, suggest to the funeral home that it apply for the order; but only after you find out their attorney's normal fee for doing so.

GOODS IN STORAGE: Sometimes the decedent will have goods in storage and if the storage bill is not timely paid, the goods will be sold at public auction. An emergency order can be obtained from the Probate Court to temporarily enjoin (stop) any such sale, to obtain a list of the items and their value, and to ascertain the amount owed. The law does not provide for an order to make the bank release funds for the purpose of paying the storage bill; but, the temporary injunction can delay foreclosure until an executor/administrator is appointed. (If there was a convenience account, this could be avoided also.)

OBTAINING DEATH CERTIFICATES:

Get at least ten (10) or more death certificates. Count one certificate for each of the following: (1) the estate's attorney; (2) each life insurance policy; (3) each tract of land being taxed on the tax rolls; (4) each car in the name of the decedent; (5) each boat, trailer, mobile home, etc. that has a title certificate in the decedent's name; (6) each retirement account; (7) each bank account and savings account; (8) each safe deposit box; (9) the IRS; (10) the Estate Tax Return; (11) the Social Security Administration; (11) each employer/employee benefit plan; (12) each credit life/credit disability insurer; and (13) each heir/devisee who desires to have one (give them photocopies).

NOTIFYING AGENCIES:

Social Security: You need to immediately notify Social Security of the death; and, if a payment/deposit was made after death, then it must be returned "uncashed" if possible.

Texas Department of Transportation: Texas Driver's License department requires notice (they may get this information from the Bureau of Vital Statistics anyway).

Credit Card Issuers: Credit Card Issuers require notice (they may not need a death certificate). However, if the credit is in both names, the credit card issuer may want to reissue new cards to the surviving spouse or may refuse to do so because the surviving spouse's credit-worthiness is not acceptable without the decedent's joined credit-worthiness. Let the credit card company know you are aware of your rights under the Federal Fair Credit Act.

Insurance Companies: Car insurance carriers, home insurance carrier, and similar accounts may require notification.

REAL ESTATE ("AD VALOREM") TAXES:

A surviving spouse who is between 55 and 65 years of age may continue the "old age exemption" that the decedent had been declaring for the homestead for previous years. This will not apply if the surviving spouse moves to a different house (unless, of course, he or she is already 65 years of age).

It is the duty of the surviving spouse to render the *ad valorem* (real estate and other property) taxes in the survivor's name as of January 1st of the year immediately following death. However, for the year of the decedent's death, such exemption was established as of January 1st of that year and death does not terminate such exemption.

The only problem is: if the surviving spouse is 65 and thus qualifies for both the homestead and old age exemption, the filing of a change of ownership notice (Form 25.25) will trigger a response from the local appraisal district, who will require the surviving spouse to: send them a change of ownership form; send them a copy of that person's birth certificate; send them a copy of their marriage license; send them a copy of the original deed; send them a certified copy of the last will and testament and order of probate (Heaven forbid if the title passed under an Affidavit of Heirship or other "irregular" proceeding). It might be best to simply leave that situation alone, since the exemptions are qualified for.

DISCLAIMERS:

The Texas Estates Code and Federal Income Tax Code allows a devisee in a Will or a beneficiary of a trust, survivorship account or P.O.D. account to file a QUALIFIED DISCLAIMER within NINE MONTHS of death. These provisions provide another way to lessen that devisee's taxable estate. It is to be hoped that the Will, Trust and other accounts provide for such a contingency; otherwise, the disclaimer vests the disclaimed interest in the descendants of the party filing the disclaimer. The Federal Circuit Courts and Tax Court are almost unanimous that such disclaimers are effective as far as Estate Taxes and QTIP elections are concerned. However, such a disclaimer may not be effective if any heir/devisee has a pending bankruptcy pending or said death occurred within six months after the adjudication of bankruptcy was signed by the court.

ESTATE TAX RETURNS:

In the event a decedent's estate is **\$13,610,000** or more (as of the present date in 2024), a FEDERAL ESTATE TAX RETURN MUST BE FILED WITHIN NINE MONTHS OF DEATH! It is ESSENTIAL to remember that the taxable estate includes all benefits passing on account of a person's death -- including living trusts, survivorship accounts, retirement accounts, death bonuses, life insurance, and so on.

Failing to file the estate tax returns timely may lose the Qualified Terminable Interest Property ("QTIP") Election; and could mean the loss of the marital deduction. And only by filing a federal

estate tax return can one elect to transfer any unused exemption (in this case, called a "DSUE") to a surviving spouse.

Those families who conveyed everything into a family trust (assuming nothing was left out, including jewelry, dogs, cars, and so on) in an attempt to avoid a probate action may not contemplate hiring an attorney or tax adviser until that deadline has passed. This could be *disastrous*. The trust seminar salespersons often fail to mention these problems.

Further, if there is real estate situated in other states or countries, then there will be penalties for not timely filing *their* inheritance tax returns.

PROBATE or NOT TO PROBATE:

In some rare instances it may not be necessary to file probate actions. That decision should only be made after all of the facts have been disclosed to your attorney.

Heirship Action: In some instances, if there is no Will, an Heirship Proceeding may be required before the bank or stock company will release an asset. This may be required by a title company before issuing an owner's title insurance policy. These actions are expensive.

Heirship Affidavits: In some instances simple affidavits of heirship signed by the spouse and at least two non-heirs who knew the decedent for most of his/her lifetime, will be sufficient—at least if a title company is involved. However, they may not be sufficient if there is a pending wrongful death action or survivorship action pending in behalf of the decedent, or if a stock transfer agent refuses to honor the heirship affidavits.

Small Estates: If the estate is worth less than \$75,000.00 (not counting the homestead and other exempt assets), a small estate affidavit may be filed with the probate courts; however, this can involve considerably more complication than it sounds, especially in Dallas County.

Dependent Administration of Estate: To be avoided if at all possible, because it involves annual bonds, annual accountings, administrator fees, appraisals, court costs, etc., etc., etc. However, this may be required if there is no will or there is a defective will.

This memorandum is certainly not all inclusive or definitive, and is not a complete dissertation as to all the things that need be considered or done. The facts and legal advice of each family situation are different and cannot be made specific herein; therefore, general terms are given.

Also, please consider that this memorandum is provided in the year 2024, and realize that laws, decisions and rules change more often than not. Therefore, some or all of the above advice may no longer be applicable at the time you read this.

Sincerely yours,

Michael A. Koenecke