

ESTATE PLANNING and BUSINESS SUCCESSION PLANNING

What Texas Small-Business Owners Should Know

By Dirk Moore



A complete succession plan is a crucial aspect in the long-term sustainability of any small or mid-sized business. A key element of any business succession plan is the implementation of appropriate estate and disability planning documents. These questions and answers will help you understand the basics about estate planning and business succession.

WHAT HAPPENS IF A TEXAS RESIDENT DIES WITHOUT A VALID WILL?

When a Texas resident dies without a valid will, all of that person's property, which is subject to probate, passes pursuant to provisions in the Texas Probate Code. Additionally, the Texas Probate Code provides an order of priority among those individuals who are able to serve as the personal representative of the estate—the person charged with settling an estate. Given the increased frequency of second marriages and blended families, it is not uncommon for the Probate Code to provide for a different outcome than most people, especially those with a surviving spouse, would have chosen

had they put an appropriate estate plan in place. Many people are under the impression that they do not have enough assets to worry about having a will or doing any estate tax planning. But the probate process when someone dies without an estate plan in place can be more expensive and burdensome—not to mention that there are a number of non-tax reasons to have a complete estate plan in place.

WHAT PART OF A PERSON'S PROPERTY IS SUBJECT TO PROBATE?

Broadly speaking, any property that a person owns in his or her own name is subject to the probate process, with a few notable exceptions (such exceptions being referred to as “non-probate property”). First, any property that passes by beneficiary designation (insurance, annuities, individual retirement accounts, and so on) is non-probate property. Other types of holdings that would constitute non-probate property include payable- or transfer-on-death accounts (also known as “POD” or “TOD” accounts), joint tenancy with rights of survivorship accounts (also known as “JTWROS” accounts), and revocable trusts. There are certainly appropriate instances for using these “probate avoidance” means of transferring property upon a person’s death.

But it is possible in Texas to conduct the probate process largely free from court control by providing for the independent administration of your estate in your will (this is also a possibility for the estates of persons dying without a will, although there will have to be agreement among all heirs and the deceased will have no say in who is appointed). If a Texas administration is not categorized as “independent,” virtually all actions in connection with the settlement of a person’s estate would be subject to prior approval by the probate court, which can obviously be a cumbersome and expensive process. In most instances, a properly drafted estate plan will provide for independent administration, and the Texas probate process is not as expensive in such instances as many people believe it is.

IF A PERSON HOLDS ALL HIS OR HER ASSETS IN SUCH A WAY AS TO MAKE ALL OF IT NON-PROBATE PROPERTY, WHY SHOULD THAT PERSON WORRY ABOUT HAVING AN ESTATE PLAN?

As noted, the Texas probate process is generally neither as expensive nor as cumbersome as many people believe it is. Certainly, legitimate

reasons exist for using some of the probate-avoidance methods of transferring property on your death, including issues related to privacy. Probate records are public records, so probating a will results in that will being accessible by anyone in the probate clerk’s records. If privacy is a concern, a revocable living trust

ISSUES TO CONSIDER

before meeting with an ESTATE-PLANNING ATTORNEY

The following are examples of issues you should think through prior to meeting with your estate-planning attorney, along with examples of information you should gather and bring to your consultation:

Appointment of guardian(s) for minor children. If you have children under 18, the guardian is an individual or couple whom you appoint to raise your children in the event that both you and your spouse should die. Whom do you want to appoint as guardian to raise your children if both you and your spouse die? Who should serve as a successor guardian if the person or couple initially named is unable to serve?

Appointment of executor(s). The executor is the person you appoint to settle the affairs of your estate. Frequently, the surviving spouse is named as the executor, either alone or with a co-executor. If the surviving spouse cannot or does not want to act as executor, adult children, a bank, another relative, or a very reliable and longtime friend may be named as executor. Whom do you want to appoint as executor of your estate? Who should serve as a successor executor if the person initially named is unable to serve?

Appointment of trustee(s). You may wish to establish a trust within your will to provide for your beneficiaries until they reach a certain age. Generally speaking, such a trust will have no effect and will not be funded until your death (or, in the case of married individuals, until the death of the surviving spouse), at which time the trustee(s) you name will

disburse the funds as necessary for the health, education, maintenance, and support of your beneficiaries. Using a trust to receive any assets passing to minors should, if properly drafted, obviate the need to have a guardian appointed to manage the minor's property—Texas guardianship being an expensive process. Whom do you want to appoint as trustee? Who should serve as a successor trustee if the person initially named is unable to serve?

A **financial power of attorney** (aka “durable power of attorney” or “general power of attorney”) provides that your designated agent will handle your financial matters specifically while you are incapacitated. This is designed to avoid a costly guardianship proceeding. Usually, the spouse of the incapacitated individual is named as the designated agent. Whom do you want to have serve as your agent? Who should serve as successor if your designated agent is unable to serve?

A **medical power of attorney** designates an agent who may make medical decisions for you in the event of your incapacity. Again, the spouse of the incapacitated person is usually named as the agent. Whom do you want to have serve as your designated agent? Who should serve as a successor if your designated agent is unable to serve?

Gather all information related to your financial assets, including a personal financial statement, a list of all the insurance policies you own, information on all your retirement accounts (IRAs, 401(k)s, etc.), copies of any gift tax returns filed by you, information related to any expected inheritances, and a list of all real property you own, wherever located.

may be appropriate, although most estate plans that utilize a revocable living trust also make use of a very simple “pour-over” will that transfers all of a person's property not held by their revocable living trust into that trust upon their death. Additionally, it is possible in Texas for a person to protect the assets they leave to their beneficiaries from those beneficiaries' creditors, so that the beneficiaries can enjoy and make use of their inheritance throughout their lifetimes without attachment by creditors. This type of planning can be accomplished through a properly drafted will or revocable living trust. Finally, death is not the only time an estate plan comes into play. As you age, your chances of becoming disabled increase. A properly drafted and complete estate plan addresses how your property is to be managed if you are temporarily or permanently disabled. This can be accomplished by putting appropriate powers of attorney in place and, in some instances, a revocable living-trust arrangement is appropriate.

WHY SHOULD A SMALL OR MID-SIZED BUSINESS OWNER BE PARTICULARLY CONCERNED WITH HAVING AN ESTATE PLAN IN PLACE?

Often it is the business owner who brings most, if not all, of the value to their business in their personal dealings over extended periods of time with clients and customers. The sudden death or disability of the business owner could result in the business being largely without direction or leadership. Often such a loss translates to the client and customer base. Making sure that you have a succession plan in place, which may include some key-man insurance plans, is critical to preserving the value of the business that is built up over time by the owner. A business-succession plan should be a part of any comprehensive business plan. Most business owners work hard to build up their businesses with an eye to providing for income and financial security for themselves and their families, both during their lives and after they pass away. Often the business owner will have family members, or even a key employee, whom they envision taking over the operation of their business in the event of their retirement, disability,



or death. The Texas Probate Code certainly doesn't provide for any business-succession planning. A qualified attorney will be able to assist a business owner with succession planning, and a comprehensive estate plan is a key part of any business-succession plan.

HOW OFTEN SHOULD AN ESTATE PLAN BE UPDATED?

Any time a person has a significant change in financial or health status or a change occurs in their family status (birth of children, divorce, and marriage and divorce of children, to name a few), that person should revisit his estate plan to make sure it is still appropriate. As a general rule, I tell clients that in addition to the above-mentioned events, they should revisit their estate planning every three to five years, or if they hear about changes to the estate tax laws in the news. It is also appropriate for business owners to revisit their estate plans in advance of any sale or merger of their business.

ANY TIME A PERSON HAS A SIGNIFICANT CHANGE IN FINANCIAL OR HEALTH STATUS OR A CHANGE OCCURS IN THEIR FAMILY STATUS

(birth of children, divorce, and marriage and divorce of children, to name a few), that person should revisit his estate plan to make sure it is still appropriate.”

WHAT SHOULD A BUSINESS OWNER OR EXECUTIVE LOOK FOR IN HIRING AN ESTATE PLANNING ATTORNEY?

There are a number of factors to consider, and reputation is certainly one of them. Business owners are often best served by an attorney who has working relationships, whether through their own law firm or otherwise, with other professionals who can address any legal issues outside of their clients' estate-planning needs. Typically, over time a business owner will encounter legal

issues related to real estate transactions, business formations, business contracts and other agreements, and employment law. Additionally, most estate-planning attorneys will be able to assist their clients in finding the accounting and financial-planning advisors that are a good fit for that particular client's needs. **N**

Dirk Moore can be contacted by email at dmoore@hwa.com. A full biographical profile for Moore is available at www.hwa.com.