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**LIGHTING THE WAY TO THE EXIT:
DRAFTING TO FACILITATE TERMINATING
DISTRIBUTIONS BY FIDUCIARIES**

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- Speaker/Author: *Don't Let the Door Hit You on the Way Out: Funding Agreements, Receipts and Releases, and All That Jazz*, State Bar of Texas 26th Annual Estate Planning & Probate Drafting Course, 2015; Attorneys in Tax and Probate, 2015; Austin Bar Association's Estate and Probate Section, 2016; Houston Bar Association's Probate, Trusts and Estates Section, 2016
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- Speaker: *The Brave New World of Estate Planning*, Houston CPA Society 2014 Spring Accounting Expo, 2014
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LIGHTING THE WAY TO THE EXIT: DRAFTING TO FACILITATE DISTRIBUTIONS BY FIDUCIARIES

I. INTRODUCTION- BOILERPLATE GETS A BAD NAME

If you have taken a flight recently, you may have tuned out or put your headphones on when the safety speech came on over the speakers or on the video in front of you. But we all know what the flight attendants say:

This plane has eight exit doors, four on each side of the aircraft. All exits are marked with an exit sign overhead. As you locate the two exits nearest your seat, please remember that they may be behind you. If you must evacuate the aircraft, exit path lights on or near the floor will illuminate and guide you to the exit. Look for a change in color or an exit sign to indicate that you have reached an exit.¹

And although it is unlikely you thought much about it at the time, thank goodness that someone thought to light the way to the exit. If an emergency really were to occur, it would be vital that you have clear indications about what to do and where you should go.

A fiduciary² administering its estate³ often feels the same way about those tedious "boilerplate" provisions in the back of the Will⁴ or other testamentary instrument. Who needs to read those? Fiduciary appointment sections? Definitely. Dispositive provisions? Indubitably. But the so called "boilerplate" sections are often ignored. That is, until a question comes up, at which point those provisions can become absolutely imperative.

It is even easy for a drafting attorney to forget about the provisions at the back of a Will or revocable trust (collectively throughout this article "testamentary instruments"). Doubtless at some point someone put a lot of thought into drafting those sections, so they are probably fine, right? However, the so-called boilerplate provisions can have a lot of power, and it is important for a drafting attorney to evaluate them when preparing any testamentary instrument for a client.

This article will focus on the provisions in a Will or revocable trust that help facilitate distributions by the fiduciary, specifically when making terminating distributions from the fiduciary's estate at the death of

the testator or settlor. "Lighting the way to the exit," if you will.

In theory, the fiduciary should gather up the assets of its estate, perform the required actions in the probate court (if any), pay all of the just debts and liabilities of its estate, and then distribute the remaining estate assets to the distributees. But in practice, it is not always that cut and dried. What happens if the fiduciary is unsure what assets are distributable from its estate? What if there are ongoing expenses of the administration of an estate? What if the beneficiary receiving the distribution is a minor? What if a beneficiary needs or is requesting distributions before the estate is fully administered? What if the fiduciary is confident in a decision to distribute some, but not all of the estate property? When these questions come up, the first answer should always be to read the testamentary instrument.

When drafting a testamentary instrument, an attorney should anticipate these questions and determine whether the document should contain specific directives or instructions addressing the issues. If the drafting attorney has given attention to these matters, the fiduciary may find answers to many of its questions by just consulting the document, which can make the fiduciary's job much easier.

First, this article will address the importance of knowing the default provisions for estates and trusts if the testamentary instrument is silent, and when those default rules can be changed. Next, general questions posed by a fiduciary before distributions are made and how to address those questions will be outlined. The article will then discuss provisions that can be included in testamentary instruments to give a fiduciary clear instructions regarding distributions. Lastly, special considerations when terminating distributions are made to trusts will be addressed.

The author would like to gratefully acknowledge Barney Jones for granting permission to use language from his *FlexDraft*® document assembly system throughout this article. Provisions from *FlexDraft*® have been footnoted "FD."

II. UNDERSTANDING DEFAULT PROVISIONS AND WHEN TO CHANGE THEM

It is important for a drafting attorney to be knowledgeable about the default provisions that will

¹ Portions of this excerpt taken from various United Airlines in-flight safety videos found at <http://inflightssafetyvideos.com/category/airlines/united-airlines/> (2016).

² Throughout this article the term "fiduciary" is used to refer to any independent personal representative of a probate estate or trustee of a trust.

³ Throughout this article, references to the "estate" of a fiduciary mean the particular probate or trust estate being administered by the fiduciary. Any references to the administration of a decedent's probate estate will focus on distributions in the context of an independent administration.

⁴ Any reference to a "Will" in this article includes any codicil thereto.

apply if the Will or revocable trust is silent. The attorney can then make a decision regarding whether the instrument should include a provision overriding or changing the default provision, or addressing the issue if there is no default law.

The default rules for decedent's estates can be found in the Texas Estates Code. However, many of the default provisions may be overridden by the terms of a testator's Will or a trust instrument. *See, e.g.*, TEX. ESTS. CODE § 255.302 (stating that a Will can override the general rule that a devisee takes property subject to debts secured by it); § 355.109(c) (providing that the terms of a Will can supersede the general order in which a decedent's property is subject to debts); § 124.005(b) (providing that the general rules regarding apportionment of estate taxes do not apply to the extent that a decedent provides otherwise in a written testamentary instrument); and § 121.001 (stating that a Will or other instrument may override the default 120-hour survival requirement).

The Texas Trust Code, found in Subtitle B of the Texas Property Code, sets out the default rules with respect to trusts. However, the terms of a trust instrument prevail over any provision in the Texas Trust Code, with the exception that the terms of a trust instrument may not limit the following:⁵

- The requirements imposed under Texas Property Code Section 112.031 (that that a trust may be created for any purpose that is not illegal and that the terms of the trust may not require the trustee to commit a criminal or tortious act or an act contrary to public policy⁶);
- The applicability of Texas Property Code Section 114.007 to an exculpation term of a trust (limiting exculpation clauses in certain circumstances⁷);
- The periods of limitation for commencing a judicial proceeding regarding a trust;
- A trustee's duty:
 - With regard to an irrevocable trust, to respond to a demand for an accounting made under Texas Property Code Section 113.151 if the demand is from certain beneficiaries, or
 - To act in good faith and in accordance with the purposes of the trust;
- The power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:

- Modify, reform, or terminate a trust or take action under Texas Property Code Section 112.054,
 - Remove a trustee under Texas Property Code Section 113.082,
 - Exercise jurisdiction under Texas property Code Section 115.001,
 - Require, dispense with, modify, or terminate a trustee's bond, or
 - Adjust or deny a trustee's compensation if the trustee commits a breach of trust; or
- The applicability of Texas Property Code Section 112.038 (regarding forfeiture clauses⁸).

The terms of a trust instrument also may not limit any common-law duty to keep a beneficiary of an irrevocable trust who is 25 or older informed at any time during which the beneficiary is entitled or permitted to receive distributions from the trust or would receive a distribution from the trust if the trust were terminated.⁹

Generally, most default provisions regarding the disposition of a decedent's estate or a trust may be overridden by the Will or trust instrument. Accordingly, if it makes sense for the client that the default provision be changed, the drafting attorney should do so. The key is for the attorney to be aware of the default rules and the way that the testamentary instrument addresses them.

III. ADDRESSING GENERAL QUESTIONS POSED BEFORE DISTRIBUTIONS CAN BE MADE

A. Overview.

There are numerous things a fiduciary will have to consider when determining whether it is appropriate to make a terminating distribution from its estate. Going through the analysis regarding whether a distribution may be made can at times bring up more questions than answers.

Issues that the testamentary instrument can address to make the analysis easier for the fiduciary include defining the property to be distributed under the instrument, providing for receipt and disposition of any nonprobate property, clarifying any property's liability for debts, administration expenses, and taxes, and identifying any conditions precedent to a beneficiary's receipt of property, such as survival by the beneficiary by a certain period of time.

⁵ TEX. PROP. CODE § 111.0035(b).

⁶ TEX. PROP. CODE § 112.031.

⁷ *See* TEX. PROP. CODE § 114.007.

⁸ *See* TEX. PROP. CODE § 112.038.

⁹ TEX. PROP. CODE § 111.0035(c).

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