University of Texas School of Law
65th Annual Taxation Conference
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Estate Planning Workshop

Panelists: **Steve R. Akers, Dallas**
Steven D. Baker, Austin
Arielle Pranger, Houston
Mickey Davis, Houston
Gene Wolf, El Paso

Moderator: **Stanley Johanson, Austin**

A. Communicating with clients. This may be a good time to send a letter along the following lines to your clients:

Dear ____

Our records show that you signed your estate planning documents in ____. As you know, Congress recently enacted a comprehensive tax bill that made major changes in our income tax, estate tax, and gift tax laws. These changes may have affected your estate plan. Also, the Texas legislature recently made significant changes relating to powers of attorney and other estate planning instruments. Finally, revisions may be appropriate due to changes in the family, as by the birth of a new family member, the death of a family member, marriages or divorces within the family, changes in financial circumstances, or by other factors such as changes in your goals and desires.

This may be a good time for you to review your estate plan, to be sure that it is still consistent with your planning objectives. If you would like my assistance in reviewing your estate plan and related documents, please give me a call.

With best regards,

1. Do you like this idea? Do you have any suggested improvements, grammatical or substantive, in my proposed message?

2. Should such a message be sent by email or by letter?

    a. If the latter, it would be best to wait until after the first of the year, when mailboxes are less likely to be filled with catalogs, Christmas cards, etc.

B. Speaking of powers of attorney…

1. **Appointment of more than one agent?** Under new Estates Code §751.021, a principal may name two or more co-agents, each with the authority to act independently of the other unless otherwise provided. What are the pros and cons of naming (say) two daughters, one of whom lives in Austin and the other in Dallas, as co-agents under a durable power? If they are appointed, should they given the power to act unilaterally or jointly—either across the board or with respect to particular transactions?

a. Under §751.023, in addition to naming a successor agent (no change there), a principal may delegate to his or her agent the authority to name a successor agent. Good idea?

2. **Compensation?** Unless the power provides otherwise, an agent is entitled to reasonable compensation as well as reimbursement for expenses. §751.024. What do you think of that?

3. **"Hot" powers**. New Estates Code §751.031(b) provides that a durable power of attorney may grant an agent the following powers: To (1) create, amend or revoke a trust, (2) make gifts, (3) create or change survivorship provisions, (4) create or change beneficiary designations on bank accounts, P.O.D. designations, and other nonprobate transfers, and (5) delegate authority under the power.

   a. Under what circumstances (if any) might you want to advise the client to grant one or more of these "hot" powers to her agent?

4. **Statutory Durable Powers of Attorney**. Several modifications were made in the statutory durable power of attorney form. What is your practice: Do you employ (i) the statutory durable power of attorney form or (ii) a personally tailored form—and why? If you use a personally tailored form, have you updated your form to comply with the recent statutory changes?

5. **In the client interview, how much time do you spend explaining the scope, etc., of the power or attorney?** (Why does this matter? Or why does the professor thinks it matters?)

6. **Advising the agent as to her powers and duties**. If the client wants to name (and names) Trusted Daughter as agent, how do you communicate to Trusted Daughter the powers and duties she will have as agent without establishing an attorney-client relationship—or do you *want* to create an attorney-client relationship with Trusted Daughter?

C. **Use of the HEMS ascertainable standard distribution power in trust drafting—when the estate has been (functionally) repealed for most of our clients.** The Power of Appointment Act of 1951 gave us the "ascertainable standard" exception to the general power of appointment rule. Under §2041(b)(1)(A), "[A] power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment." If a beneficiary holds an ascertainable standard invasion power over trust principal, the good news is that since the beneficiary does not hold a general power, the trust property will not be includible in the beneficiary's gross estate for estate tax purposes.

1. Well … that *used* to be good news. But in today's world, where the estate tax has been repealed for many of our clients regardless of what is in the tax bill that Congress ends up enacting—a $5.49 million estate tax exemption (or will it be $11 million?), functionally making it $11 million (or $22 million?) for spouses—for most clients the tax focus in planning has shifted to income tax issues and the "new basis at death" rule of §1014.

   a. It has long been a standard drafting practice to employ the HEMS standard in giving a beneficiary an invasion power (and as a means of giving guidance to an independent trustee even though there are no general power of appointment concerns), perhaps with additional language suggested by the §2041 regulations,