Special Considerations in Preparing Estate Planning Documents for Military Personnel

Synopsis: Military Personnel, to include retirees and the family of military personnel, present unique challenges in preparing estate planning documents. It is our professional and ethical duty to adapt to those unique client needs. To further complicate the matter, this class of clientele can be broken down into distinct sub-groups with differing legal needs that require different legal strategies.

I. Where are the land mines?

Given the uniqueness of military personnel in the high-tempo, rapid deployment, non-traditional counseling and document preparation challenges found in today’s military environment, we need to discuss the land mines that military lawyers and those in civilian practice need to know about when meeting and preparing estate documents.

A. The obvious
   1. Domicile versus Home of Record
      a. These are not the same! HOR is a military concept and is based on point of entry into military service or possibly statement of intent to have as a domicile in the future. Domicile is a legal concept of residence plus intent to have it as a primary or principal residence. (Brief discussion on legal indicia of domicile intent).
      b. Practical considerations: Where is the Will likely to be probated?
         1) The use of that jurisdiction’s requirements for executor, bond, and attestation / self-proving provisions. Most soldier’s will have all personal property and most, if not all, real property in the state from which they are based out of). This will make probate cheaper and more efficient. (Discussion of independent administration in Texas.)
         2) Effect of 10 USC §1044d (military testamentary instruments (military attestation and self-proving affidavits): “A military testamentary instrument is exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a state and has the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate.” Discussion of DOD Directive, to include the following requirements - executed in the presence of a military legal assistance counsel acting as a presiding attorney. Includes a self-proving affidavit.
      c. State law relevancy with powers of attorney.
         1) Where are the powers of attorney likely to be used?
         2) What special powers are needed? Eg, pawn shop powers for military; different powers for elderly. Health care proxies.
d. Special issues with military retirees - spending time in more than one state.

2. The effect of the military environment on meeting with clients and drafting the documents; Nothing could be more different for the military practitioner!
   a. With SRPs it is mass production. There is no real private client counseling. There is also severe time constraints. The key estate planning is more or less a triage for their legal issues: To what extent can we be competent practitioners? The answer may turn on the scope of the representation. (Discuss standardized documents)
   b. Other deployment issues and their effect on drafting legal documents. Execution mistakes in that type of environment.
   c. In non-deployment situations, what do you do when you feel your office lacks the expertise to draft what the client wants or needs? Questions about local laws and procedures? Legal issues that require on-going legal advice may be problematic. Is turning them to the yellow pages the answer? Know the experts in your community.

3. Integration of SGLI and other non-testamentary transfers into the estate plan: We have to look at estate planning macroscopically - not just the Will and the request from the client. Competency and professionalism requires that we make the client aware of how non-testamentary transfers such as life insurance, retirements accounts, JTWROS, pay-on-death, transfer-on-death, life estate deeds, etc. are handled. Pour-overs to testamentary trusts need to have detailed instructions.

B. Not so obvious land mines
1. Bias against living trusts? When clients come in wanting to avoid probate, do you discuss living trusts with them? Often times the answer is no. Does competent practice of estate planning require the legal assistance officer to be versed in documents they might not do?
   a. Cons of living trusts in a military environment
      1) Lack of expertise - How much do you need to know in order to give competent legal advice?
      2) Lack of legal continuity - Living trusts may last many years. Even at creation there is a lengthy client education process and sometimes a lengthy funding process.
   b. Pros of living trusts in a military environment
      1) Probate avoidance, especially in multiple jurisdictions. This is particularly true when military members have been stationed in multiple states and acquired real estate holdings.
2) Guardianship avoidance, especially with military retirees. Often times they are seeking counsel on the advisability of trusts with outside counsel.

2. Software issues - reliance on standardized forms and overly complex estate planning software can mean that we aren’t reviewing the documents as closely as possible.

2. What are the rewards? To wrap up, drafting for those who go into harm’s way, their families that also make huge sacrifices of time, effort, and piece of mind, and retirees who have demonstrated their commitment by a career in the military, all deserve our very best efforts. We can feel good that we have leveraged our legal skills to a very different, very challenging, and very worthwhile cause.