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Texas Probate

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Introduction

Probate is not a subject pleasant to dwell upon. It forces us to face our own mortality and that of our loved ones. However, if you care about the ones you leave behind it is a topic we must all face eventually. As real estate professionals we must also be generally familiar with the terminology and basic issues faced by our clients and customers when dealing with the sale and purchase of real property upon a person's passing. Just as in the general practice of our profession, we must know enough about the law to bring up the correct questions at the correct time, all the while avoiding the unauthorized practice of law.

From time to time real estate agents are asked to sell real property after a person has passed away. At such times it is essential that agents know the basics of probate and be both willing and able to deal with the heirs, devisees, lawyers, and even the probate court when marketing such properties. All too often the heirs want to jump the gun and sell property before they are authorized to do so, or worse yet, it turns out they are not the ones to receive the property as they assumed. All of these issues we will discuss, and more.

Lloyd Hampton and Lloyd Hampton Real Estate Education is not providing legal advice on probate issues. Mr. Hampton is not an attorney. Our purpose in this course is to introduce real estate licensees to the basic terminology and issues in probate law. Naturally, questions will arise dealing with your own life and with your practice. The input of an attorney, one preferably board certified in probate law, should be consulted.

Mr. Hampton has been the executor of several estates and in each instance was led through the process by one of Texas' most distinguished attorneys practicing probate law. His name was James (Jimmy) Brill. Mr. Brill was admitted to the bar in 1957. Mr. Brill has passed away and his practice has been "inherited" by his associate, Alyssa McCreight. She has since joined the firm of Schlanger Silver, LLP located at 109 North Post Oak Lane, Suite 300 Houston, Texas 77024 and may be reached at 713-735-8517 or amccreight@schlangersilver.com. Alyssa is a native Houstonian and was admitted to the State Bar of Texas in 2014. She joined Mr. Brill as an associate. Her work concentrates primarily on Estate Planning, Probate, Real Estate, and Business Planning. Alyssa graduated cum laude from South Texas College of Law Houston.

A great resource is the book "How to Live and Die With Texas Probate" to which Mr. Brill was a contributor. You can easily find the book online.

The Purpose of Probate

When someone dies in Texas an artificial entity is created called "the estate of……." This estate has income, pays bills, file tax returns, just like the deceased did.

Texas statutes on probate are contained in the Texas Estates Code which may be found on the Texas Legislature's website, www.capitol.state.tx.us. Probate means "to test and to prove." In our context it means to test and prove the existence of a valid will. First you will need a Death Certificate. But probate goes further. In addition to establishing the validity of a will the probate process handles issues such as:

1. Establish the validity of a will.
2. Appoint a qualified person to represent the estate.
3. Collect the assets of the estate.
4. Prepare an inventory of the estate.
5. Prepare estate, inheritance, and income tax returns.
6. Paying the debts of the estate.
7. Selling property of the deceased to pay those debts.
8. Determine who is to receive the assets of the estate.
9. Distributing the assets of the estate.
10. Closing the estate.

The Steps of Probate:

Step 1: Filing with The Court. The process is actually fairly easy to start. Whether a will is present or not, an application for probate must be filed with the proper Texas probate court in the county where the decedent resided.

Step 2: Posting Notice of Probate Administration. After the probate application is filed, there will be approximately a two-week waiting period before a hearing is held for the application. During this time, the County Clerk will post a notice at the courthouse stating that a probate application was filed to serve as notice to anyone who may contest the will or administration of the estate. If no contests are received, the probate court proceeds in opening the administration.

Step 3: Validating the Will. After the waiting period, a hearing will be presided over by a Texas probate judge. He or she will legally recognize the decedent's death and the jurisdiction of the court over the case; verify that the decedent had a valid will or that there was no will; and appoint an administrator or verify the person named as executor.

Step 4: Inventory of Assets. Once an executor or administrator is officially named to the estate, that person must catalogue and report all the assets held by the estate.

Step 5: Notify beneficiaries. If the decedent had a valid will, the executor would notify beneficiaries of the estate. In the event no will was filed, the probate court is charged with the task of determining heirship in Texas.

Step 6: Notify Creditors. Most decedents leave behind debts that must be resolved out of their estate. Medical bills, mortgages, household expenses, etc. will be paid from the estate. Before they are paid, however, creditors must be notified of the decedent's death by the estate's executor and given the opportunity to file claims against the estate. This can be done with a notice published in the local newspaper.

Step 7: Resolving Disputes. If family members or other potential beneficiaries are contesting a will in Texas or file other grievances, these will be heard by a probate court judge and resolved before the estate can be finalized.

Step 8: Distributing Assets. Once the debts and expenses of the estate are resolved and any contests of the will are cleared up, the remaining assets of the estate are then distributed to the beneficiaries.

Can a Will be Contested?

According to Texas Probate Code Section 93, an interested party can legally dispute a will's validity by filing a formal lawsuit. Under the code, an individual only has 2 years to contest a will. In this particular situation, the clock begins to run towards the statute of limitations after the will has been admitted into probate.

There are four main reasons why an interested party would want to contest a Texas will:

1. Lack of Testamentary Capacity

Testamentary capacity is the legal term describing a person's legal ability to make or alter a valid will. Testamentary capacity becomes an issue when someone claims that the testator — the person who made the will — did not understand what was happening.

2. Undue Influence

Undue influence is exactly as it sounds — someone placing influence on the will maker and inappropriately swaying the decisions of the will maker. Undue influence is tested by examining if the testator made a will different than they normally would have. Undue influence in estate planning can be difficult to prove because the will maker is often unavailable to be in court answering questions concerning influences during the will-making process.

3. Due Execution

Execution of a will takes place when the creator signs the document. There are specific steps and formalities that must occur under Texas law. If these are not followed, lack of due execution is a reason to contest a will in Texas. Lack of a witness or a missing signature are examples of missed steps in the will execution process.

4. They Don't Like What's In the Will!

This is probably the most common refrain but will get you nowhere when a valid will is produced. It doesn't matter what the deceased said, promised, or intended. Nor does "fairness" come into the discussion.

The Terminology of Probate

As in any industry or area of endeavor there is terminology specific to that topic. In probate there are a number of what we will call "paired concepts" that we will examine. These include:

1. Formal marriage vs. common law marriage
2. Separate property vs. community property
3. Homestead vs. non-homestead
4. Probate estate vs. non-probate estate
5. Testate vs. intestate
6. Devise vs. descent
7. Devisee vs. heir
8. Formal will vs. holographic will
9. Executor vs. administrator
10. Executor vs. independent executor
11. Joint tenancy vs. tenancy in common

1. Formal marriage vs. common law marriage

Formal marriage in Texas is one performed by a person empowered by the state to do so. These persons include a priest, minister, rabbi, mullah, or other religious authority, a judge, or even the captain of a ship.

Common law marriage is one formed informally under the Texas Family Code §2.401.

> PROOF OF INFORMAL MARRIAGE. (a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

2. Separate property vs. community property

Separate property is any property owned before marriage or received after marriage by gift, inheritance or personal injury judgment, and property made separate by the contractual agreement of husband and wife.

Community property is anything else acquired during marriage that is not separate property and includes the revenue from separate property (unless the couple have a written agreement to the contrary).

3. Homestead vs. non-homestead

Homestead is the principal residence of a family in Texas. The urban homestead is the home plus 10 acres. The rural homestead may contain 200 acres for a married couple and 100 acres for a single person. The homestead protection is automatic and requires no oath or paperwork to establish. In addition, a business may be run out of the homestead. The Texas Constitution, Article 16, §50 states:

(a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:

(1) the purchase money;
(2) the taxes due thereon;
(3) an owelty of partition;
(4) the refinance of a lien against a homestead;
(5) work and materials in constructing new improvements;
(6) home equity loans;
(7) reverse mortgages; and
(8) a loan on a mobile home converted to real property.

Non-homestead would simply be any other home not considered the homestead of the owner.

CHAPTER 102. PROBATE ASSETS – Sec. 102.004. LIABILITY OF HOMESTEAD FOR DEBTS.
If the decedent was survived by a spouse or minor child, the homestead is not liable for the payment of any of the debts of the estate, other than those listed in Article 16, Section 50.

4. Probate estate vs. non-probate estate

Probate estate is that property that was owned by the deceased that is subject to probate proceedings. Much like the distinction between community property and separate property, probate property is any property not considered non-probate property.

Non-probate estate includes insurance, employee benefits such as annuities and retirement benefits, social security, bonds, property held as joint tenants with the right of survivorship, exempt property such as the homestead for the surviving family, and property held in trust.

5. Testate vs. intestate

Testate means that you died with a will.

Intestate means you died without a will.

6. Devise vs. decent

Devise means that property passed to you by a will.

Descent means that property passed to you when there was no will.

7. Devisee vs. heir

Devisee is a person named in a will to inherit property.

Heir is a relative of the deceased that inherits when there is no will.

8. Formal will vs. holographic will

Formal will is a will that is in writing, usually drawn by an attorney, signed by the deceased, and witnessed by two or more creditable witnesses that are at least 14 years of age.

Holographic will is a will entirely in the handwriting of the deceased and does not require witnesses.

9. Executor vs. administrator

Executors are appointed by the deceased in the will to oversee the settlement of the estate.

Administrators are appointed by the probate court to oversee the settlement of the estate of a person who died intestate.

10.Executor vs. independent executor

Executors settle an estate under the direct supervision of the probate court.

Independent executors are approved by the probate court to settle the estate without the direct supervision of the probate court.

11.Tenancy in common vs. joint tenancy

Joint tenancy is one of two forms of joint ownership of property by unmarried persons in Texas and includes:

1. Undivided interests
2. Shares must be equal
3. Has right of survivorship
4. Interest passes to other owners
5. Does not require probate
6. Overrides a will

Tenancy in common is the more common form of joint ownership of property by unmarried persons in Texas and includes:

1. Undivided interests
2. Shares that may be unequal
3. No right of survivorship
4. Interests passes to heirs
5. Requires probate
6. Assumed in Texas law

Case Study – Holmes vs. Beatty (290 S.W. 3d 852, Tex, 2009)

- Thomas & Kathryn Holmes were married in 1972. During their marriage, they amassed over $10 million in accounts and securities.
- Kathryn died in 1999. Her will appointed Douglas Beatty, her son from a previous marriage, as independent executor of her estate.
- Thomas died about 9 months later. His son, Harry Holmes, also from a previous marriage was appointed independent executor of Thomas' estate
- All of the accounts and certificates were variously listed as "JT Ten"; or "JT WROS," which indicated that all of the accounts were established as joint tenants with right of survivorship, not as tenants in common.

- Beatty wanted community property. Holmes argued right of survivorship.
- The Texas Supreme court said they both signed on the accounts, and “JT TEN” or “JT WROS” appeared next to both signatures. This was sufficient to create joint tenancy with right of survivorship.
- Thomas’s kids got it all and Kathryn’s kids got nothing!

Case Study – Holmes vs. Beatty (290 S.W. 3d 852, Tex, 2009) Continued……..

An amendment to Section 439 of the Texas Probate Code in 2011 changed this situation moving forward.

(b) A written agreement signed by both spouses will create a right of survivorship if it includes any of the following phrases:

(1) "with right of survivorship";
(2) "will become the property of the survivor";
(3) "will vest in and belong to the surviving spouse"; or
(4) "shall pass to the surviving spouse."

(d) *A survivorship agreement will not be inferred from the mere fact that the account is a joint account or that the account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language.*

Lessons to be Learned

1. You should have a will.
2. You should have a formal will drawn by a qualified Texas attorney.
3. You should choose your executor.
4. The executor should be an independent executor.
5. Have a “self-proving affidavit”.
6. Each spouse should have a will.
7. Keep the will updated.
8. Let several people know of the existence of the will.
9. At least one other person needs access to the will (i.e., can sign on the bank box).
10. Divorce negates any provision concerning the ex-spouse.

Contents of a Will

A well written will should include the following provisions:

1. Statement of residence
2. Appointment of an executor
3. Provision for independent administration
4. Provision for payment of debts and taxes
5. Provision for disposing of property
6. Provision for alternate disposition of property
7. Provision for common accident or successive deaths
8. Powers for the executor
9. Provision for guardianship
10. Contingent management provision
11. Required formalities
12. Self-proved will

When There's No Will

By Judon Fambrough

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If you die without a will (intestate) and have assets subject to probate or if you die testate but do not dispose of all your assets in the will, how is this property divided?

In Texas, distribution depends on:

- whether the property is real or personal, separate or community and
- whether you are survived by a spouse, children (or their descendants), or any next of kin.

Distribution of <u>Separate</u> Property

Distribution of separate property is described in Section 38 of the Texas Probate Code. It comprises two categories, real and personal. Three variables determine the distribution.

- Is there a surviving spouse?
- Are there surviving children (or their descendants)?
- Are there surviving relatives such as parents, brothers and sisters, aunts, uncles or grandparents?

Spouse Only and No Children (or their Descendants)
If you die intestate survived by a spouse and no children (or their descendants), your spouse gets all your separate property, both real and personal property.

Spouse and Children (or their Descendants) Only
If you are survived by a spouse and children (or their descendants), your spouse receives one-third of the separate personal property (the cattle and the machinery), and the children (or their descendants) get the remaining two-thirds. As to the separate real property (the farm), your spouse receives a life estate in one-third of the land. Your children (or their descendants) get two-thirds of the real property immediately and the remaining one-third when the spouse dies. The issue of what happens to the primary residence located on the premises is discussed later.

Spouse and Parents (or their Descendants) Only, No Children
If you are survived by a spouse and your parents or their descendants (meaning your brothers and sisters), your spouse gets all your personal property and half of the separate real property. The parents or their descendants share in the other half of the real property according to the degree of kinship described later. If you have no surviving spouse, then there is no differentiation between how real property and personal property is divided. It goes together.

Children (or their Descendants) Only
If you are survived solely by children and no spouse, all your separate property, real and personal, goes to your children (or their descendants).

Parents (or their Descendants) Only
If you are survived by your father and mother, no spouse and no children (or their descendants), your separate property, both real and personal, will be divided equally between your father and mother. If only one parent is alive and you have no surviving brothers or sisters (or their descendants), then all your separate property goes to the surviving parent. However, if you have surviving brother(s) or sister(s) (or their descendants), then the surviving parent gets half the separate property, and your brother(s) and sister(s) (or their descendants) share in the other half.

Brothers and Sisters Only
If you have no surviving spouse, no surviving children (or their descendants), and no surviving father or mother, then all your separate property, whether real or personal, goes to your surviving brothers and sisters or their descendants.

Maternal and Paternal Grandparents (with Possible Descendants)

If there is no surviving spouse, no surviving children (or their descendants), no surviving parents and no surviving brothers or sisters (or their descendants), your separate property is divided equally between your maternal and paternal grandparents. If the only survivors are your four maternal and paternal grandparents, half of the property goes to each side of the family. Each grandparent receives one-fourth of your separate property or one-half of the half going to that side of the family. If one grandparent is dead and he or she had no surviving descendants, the surviving grandparent on that side of the family gets one-half of the separate property. But, if a deceased grandparent had surviving descendants, such as your aunts and uncles or cousins and nephews, then the surviving grandparent gets one-fourth, and the descendants of the deceased grandparent share in a fourth.

No Maternal or Paternal Grandparents

If both the maternal and paternal grandparents are dead (and both had descendants), the descendants on each side of the family share in the half of the separate property going to that side of the family. If one set of grandparents is deceased and had no descendants, the descendants on the other side of the family share in all the separate property. According to the statute, the distribution of the separate property never extends to the great-grandparents or their descendants. If no descendants of your maternal or paternal grandparents can be found, (and you have no other survivors mentioned earlier) the separate property transfers (escheats) to the state of Texas.

Distribution of <u>Community</u> Property (Marital)

The rules of descent and distribution associated with community property are simple compared with separate property. The reason is twofold. First, the law makes no distinction between real and personal community property. Both are treated the same. Second, the distribution is limited to the surviving spouse and/or the deceased's surviving children (or their descendants). While there may be no surviving children, there will always be a surviving spouse: otherwise, no community property can exist. Rules for distributing community property when the first spouse dies intestate are found in Section 45 of the Texas Property Code. In the opening example, the community property consists of the home and the vehicles.

Surviving Spouse Only

If you die intestate survived by a spouse and no children (or their descendants), your spouse gets your half of the community property, regardless of whether it is real or personal. The surviving spouse becomes vested with all the property that was formerly community property. It now becomes the surviving spouse's separate property.

Surviving Spouse and Children (or their Descendants) Only
The presence of surviving children (or their descendants) changes the distribution. If all your surviving children (or their descendants) are from this marriage and none from prior marriages or out of wedlock with someone other than your surviving spouse, your spouse still gets your half of the community property as before. However, if any of the surviving children (or their descendants) are from another marriage or out of wedlock with someone other than your surviving spouse, then all your children (or their descendants), regardless of origin, receive your half of the community property. The surviving spouse keeps his or her half. The statute states it this way. Your spouse gets your half of the community property if "all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse." The statute adds, "In every case, the community estate passes charged with the debts against it." In other words, whoever gets the property gets the responsibility for paying debt (or lien) against it. Because the debt (or lien) follows the community property, the recipient(s) may wish to disclaim or renounce the inheritance when the debt approximates or exceeds the value of the property. The procedure is outlined later.

Children (or their Descendants) Only
The statute does not address this situation because if there is no surviving spouse, then there can be no community property to divide. If there is no surviving spouse, all the deceased's property is his or her separate property and will be distributed according to Section 38 discussed earlier.

Special Rules In specific situations, special rules apply. Here are four.

(1) Per Capita or Per Stirpes? (Section 43, TPC) When a group such as all your brothers or sisters (or their descendants) is entitled to receive property, how is the property apportioned among them? For example, assume you have three children (A, B and C) from two marriages. A has no children, B has one child and the C has four children. You die intestate. How is your half of the community property divided among them? If all three of your children survive you, each receives one third of your half of the community property. Each stands in the first or same degree of inheritance (Section 43). The distribution is on a per-person or per-capita basis. But what happens if the B and C predecease you, and only A is living? Here, A stands alone in the first degree of inheritance. So, A still gets one third of your half of the community property. The surviving children of B and C share in the portion that otherwise would have gone to the parent had he or she survived. B's surviving child gets one-third of one-half of the community property that would have gone to B. C's four surviving children each get one-fourth of the one-third of the one-half of the community property that would have gone to C. This is known as a per stirpes distribution. What happens if all three of your children predecease you? Now who stands in the first or same degree of inheritance? This would be

your grandchildren. Remember, those standing in the first or same degree receive property on a per capita basis. Thus, each of the surviving five grandchildren receives one-fifth of your one-half of the community property on a per capita basis. What if one or more of the grandchildren predecease you? How does this affect the distribution? It depends on whether the predeceased grandchildren had any survivors (your great-grandchildren). Assume two of the five grandchildren predeceased you and neither had any descendants. In this event, the remaining three grandchildren each receive one-third of your half of the community property per capita. If one of the two predeceased grandchildren had a surviving child, then the property is split four ways. Each of the three surviving grandchildren gets one-fourth of the one-half per capita, and the great-grandchild gets the other one-fourth per stirpes (the part that would have otherwise gone to your grandchild had he or she survived).

(2) Adoptees

Another special rule deals with adoptees (Section 40, TPC). Are they treated differently from natural biological children when an adoptive parent dies intestate? The answer is no. Adoptees are treated as natural descendants of the parents who adopted them. And, should the case arise, the parents can receive property through the adopted child. It goes both ways.

What about the biological parents? Can the adoptees still receive property by descent and distribution from their biological parents? The answer is yes, but the biological parents cannot receive property from or through the adopted child. It only goes one way. There is one exception. The previous rules apply to adopted minor children. According to statute, a couple can adopt another adult with his or her consent. Likewise, one adult can adopt another adult, and one spouse in a marriage can adopt an adult without the other spouse's consent or joining in the adoption (Sections 162.501 through 162.507, Texas Family Code). That being said, here is the exception. The adopted adult is viewed as the son or daughter of the adoptive parent (or parents). But the adopted adult can no longer inherit from his or her biological parents. Only adopted minor children can do this.

(3) Disclaimers and Renunciations

There is another special rule regarding disclaimers and renunciations (Section 37A, TPC). Any person entitled to receive property by devise (by will) or by inheritance (by descent and distribution) may disclaim or reject the receipt of the property in whole or in part. The right of rejection extends not only to the recipient but to his or her legal guardian, personal representative, independent executor or a person acting under a durable power of attorney that authorizes disclaimers. The disclaimer must be in writing and acknowledged before a notary or anyone authorized to take acknowledgments. The disclaimer must be irrevocable and filed in the probate court where the deceased's will is being or has been probated. If there is no probate, the statute specifies where the disclaimers must be filed. Unless the deceased's will specifies otherwise (when dealing with devised property), the disclaimed property passes

as if the person filing the disclaimer predeceased the maker of the will. A disclaimer could affect whether property is distributed per capita or per stirpes described earlier.

(4) Homestead Property

One special rule or exception applies when real property serves as the primary residence for the married couple. Texas homestead laws afford special protection to the surviving spouse and the deceased's minor children. The Texas Constitution and Texas statutes protect the surviving spouse and minor children from eviction when, upon the death of the first spouse, title to the homestead passes, in whole or in part, to a third party by will or by inheritance.

In either case, Texas homestead laws give the surviving spouse the right to live in the home (the primary residence) for the rest of his or her life (a life estate) without eviction. The law gives the same benefit to the deceased's minor children until they become adults. Consequently, possession of the homestead when devised or inherited by anyone other than the surviving spouse is suspended until the surviving spouse dies or abandons the home and/or the minor children reach adulthood. The law does not allow the partitioning of the homestead between the surviving spouse and the minor children.

Seven Ways to Avoid Probate

By Judon Fambrough

According to some writers, the disposition of property by will and the subsequent need for probate should be avoided at all costs. While this may be a consideration, anyone contemplating a probate-avoidance technique should be aware of all options. Obviously, the best choice depends on each situation.

1. Spousal Right-of-Survivorship

One way to avoid probate in Texas comes from a Nov. 3, 1987, amendment to the Texas Constitution (Article 16, Section 15). The amendment permits spouses to agree that all or a part of their community property belongs to the survivor when the first spouse dies. The property passes automatically without the need of probate. The Texas Probate Code elaborates on the process (Chapter XI, Part 3). The creation of spousal right-of-survivorship, as it is sometimes called, has associated problems. First, only community property can be used. Second, federal gift and estate taxes become a problem when the second spouse dies. Every person is given a lifetime exemption that varies frequently but is generally $1 million or more, free and clear of gift and estate taxes. Once a person's estate exceeds this amount, the excess is subject to a progressive tax. Unless the surviving spouse can reduce the combined estates to less than the lifetime exemption before death, a severe tax problem may be encountered.

2. Life Estates

Another probate-avoidance technique involves life estates. A life estate is a unique form of ownership whereby one person, known as the life tenant, maintains exclusive possession and use of the property for life. Another person, known as the remainderman, receives ownership of the property immediately upon the life tenant's death. No probate is needed for the transfer. Suppose a widow has 200 acres or a home that she wants her daughter to have when she dies. She can deed the property to the daughter and retain a life estate. The widow becomes the life tenant, the daughter the remainderman. When the widow dies, the daughter automatically receives title to the property without probate.

3. Living Trusts

A more complex process of avoiding probate involves living trusts. A living trust is one implemented while the owner of the property is alive, as opposed to a testamentary trust implemented by will at the owner's death. A trust, like a corporation, is a separate legal entity that can continue after a person dies. Unlike a corporation, it does not have an unlimited life. It cannot last more than one life in being plus 21 years. This is sometimes referred to as the rule against perpetuity. Basically, the property owner (the settlor) conveys all property to the trust. The trustee of the trust holds legal title and manages the property for the benefit of the settlor or some other designated beneficiary. When the settlor dies, the trust may or may not terminate, depending on the terms of the trust instrument. Either way, no probate is required because the settlor owns no property at death. All the property belongs to the trust. The settlor must be sure to transfer all property to the trust before death. Otherwise probate cannot be avoided. One note of caution, however. Trusts face the highest federal income tax rate and substantial annual administrative costs may be charged.

4. Affidavit of Heirship

The fourth technique involves drafting and filing an affidavit of heirship when someone dies intestate (without a will). The technique is more an afterthought than a preplanned strategy.
When the owner dies, the heirs do not administer the deceased's estate but rather file an affidavit of heirship executed and sworn to by a knowledgeable person or persons. The affidavit discloses, among other things, the deceased's: (1) relationship to the affiant and the affiant's name, (2) birth and death dates, (3) marital history, (4) history of surviving heirs, (5) history of residency and (6) inventory of the estate. The technique has its drawbacks. According to Texas statutes, the affidavit is not effective until it has been of record for five years. However, title companies generally will rely on the affidavit immediately once it is filed of record if the estate is relatively small.

5. Durable Power of Attorney

The final way to avoid probate, similar to the affidavit of heirship, is not a planned strategy but one seized when the opportunity arises. When entering an estate plan, one document generally drafted and signed is a durable power of attorney. Each spouse grants (or clothes) the other with the power to manage the affairs of the other should he or she become incompetent. The judicial appointment of a guardian is avoided. Should one spouse become incompetent or comatose, the surviving spouse, using the durable power of attorney, may remove all the property from the other's estate before death. No probate is needed because the individual dies without property.

6. Transfer on Death Deed (TODD)

An owner may pass real property to beneficiaries without probate by executing & recording a TODD. A TODD is revocable regardless of what the deed states. It may not be made under a power of attorney. A TODD conveys property without covenant of warranty therefore a beneficiary takes property subject to all encumbrances. However, a beneficiary may disclaim the interest. A will cannot revoke a TODD but a divorce negates one. The law establishes requirements to be met for a TODD as well as forms and procedures to be used.

7. Having non-probate assets

As discussed earlier, one may have non-probate assets such as insurance, employee benefits such as annuities and retirement benefits, social security, bonds, property held as joint tenants with the right of survivorship, exempt property such as the homestead for the surviving family, and property held in trust.

Small Estate Affidavit

ESTATES CODE TITLE 2. CHAPTER 205. SMALL ESTATE AFFIDAVIT

Sec. 205.001. ENTITLEMENT TO ESTATE WITHOUT APPOINTMENT OF PERSONAL REPRESENTATIVE.

The distributees of the estate of a decedent who dies intestate are entitled to the decedent's estate without waiting for the appointment of a personal representative of the estate if the estate assets, excluding homestead and exempt property, exceed the known liabilities of the estate, excluding any liabilities secured by homestead and exempt property, if:

(1) 30 days have elapsed since the date of the decedent's death;

(2) no petition for the appointment of a personal representative is pending;

(3) the value of the estate assets, excluding homestead and exempt property, does not exceed $50,000;

(4) an affidavit that meets the requirements of Section 205.002 is filed with the clerk of the court that has jurisdiction and venue of the estate;
(5) the judge approves the affidavit as provided by Section 205.003; and
(6) the distributees comply with Section 205.004.

Sec. 205.002. AFFIDAVIT REQUIREMENTS.
An affidavit filed under Section 205.001 must:
(1) be sworn to by:
(A) two disinterested witnesses;
(B) each distributee of the estate who has legal capacity; and
(2) show the existence of the conditions prescribed by Sections 205.001(1),(2),(3); and
(3) include:
(A) a list of all known estate assets and liabilities;
(B) the name and address of each distributee; and
(C) the relevant family history facts concerning heirship that show each distributee's right to receive estate money or other property.

Sec. 205.006. TITLE TO HOMESTEAD TRANSFERRED UNDER AFFIDAVIT.
(a) If a decedent's homestead is the only real property in the decedent's estate, title to the homestead may be transferred under an affidavit that meets the requirements of this chapter. The affidavit used to transfer title to the homestead must be recorded in the deed records of a county in which the homestead is located.

Muniment of Title

ESTATES CODE TITLE 2. ESTATES OF DECEDENTS; DURABLE POWERS OF ATTORNEY
SUBTITLE F. WILLS CHAPTER 257. PROBATE OF WILL AS MUNIMENT OF TITLE

Sec. 257.001. PROBATE OF WILL AS MUNIMENT OF TITLE AUTHORIZED.
A court may admit a will to probate as a muniment of title if the court:
(1) is satisfied that the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate; or
(2) finds for another reason that there is no necessity for administration of the estate.

Sec. 257.051. CONTENTS OF APPLICATION GENERALLY.

(a) An application for the probate of a will as a muniment of title must state the following:

(1) each applicant's name and domicile;

(2) the testator's name, domicile, and, age, on the date of the testator's death;

(3) the fact, time, and place of the testator's death;

(4) facts showing that the court with which the application is filed has venue;

(5) that the testator owned property and identify such;

(6) the date of the will;

(7) the name and residence of any executor and witness to the will;

(8) any children survived the testator and the name of each of those children;

(9) the estate does not owe a debt, other than on real estate;

(10) whether a marriage was dissolved after the will was made; and

(11) whether the state, a governmental agency of the state, or a charitable organization is named in the will as a devisee.

Sec. 257.053. ADDITIONAL APPLICATION REQUIREMENTS WHEN NO WILL IS PRODUCED.

If an applicant cannot produce the will in court, the application must state:

(1) the reason the will cannot be produced;

(2) the contents of the will, to the extent known; and

(3) the name, age, marital status, address, and relationship to the testator, if any, of:

(A) each devisee;

(B) each person who would inherit as an heir of the testator in the absence of a valid will; and

(C) in the case of partial intestacy, each heir of the testator.

Real Estate Licensees Selling Real Property for an Estate

There are two primary issues faced by real estate agents when selling real property for an estate.

First, is the person you are dealing with empowered to list and sell (or lease) the property? Too often the heirs want to jump the gun and put the property on the market as soon as possible. Too often, they do not have the authority to do so! To know for sure simply ask for a copy of *letters testamentary* from an executor or *letters of administration* from an administrator. Without these letters it is recommended that you check with an attorney before proceeding.

The second issue is the Seller Disclosure of Property Condition form. There is a common misunderstanding on the street that if the owner inherited the property then he or she does not have to provide the disclosure. This is not true. The executor or administrator is exempt, not the heir or devisee. The Texas Property Code §5.008 makes this clear.

The Seller's Disclosure Notice and Probate (Texas Property Code §5.008)

(d) The notice shall be completed to the best of seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required by the notice is unknown to the seller, the seller shall indicate that fact on the notice, and by that act is in compliance with this section.

(e) This section does not apply to a transfer:

(1) pursuant to a court order or foreclosure sale;

(2) by a trustee in bankruptcy;

(3) to a mortgagee by a mortgagor or successor in interest, or to a beneficiary of a deed of trust by a trustor or successor in interest;

(4) by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a deed of trust or a sale pursuant to a court ordered foreclosure or has acquired the real property by a deed in lieu of foreclosure;

(5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;

(6) from one co-owner to one or more other co-owners;

(7) made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors;

(8) between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree;

(9) to or from any governmental entity;

(10) of a new residence of not more than one dwelling unit which has not previously been occupied for residential purposes; or

(11) of real property where the value of any dwelling does not exceed five percent of the value of the property.

Some Final Questions:

1. **What happens to a sales contract when one of the parties dies between contract and closing?**
   Nothing. The contract is binding on the estate of the deceased.

2. **What happens to a listing contract or buyer rep agreement when either the principal or broker dies?**
   Agency contracts are terminated at the death of the client (buyer or seller) or the broker.

3. **How soon must a will be submitted to probate?**

Sec. 256.003. PERIOD FOR ADMITTING WILL TO PROBATE; PROTECTION FOR PURCHASERS.
(a) A will may not be admitted to probate after the fourth anniversary of the testator's death unless it is shown by proof that the applicant for the probate of the will was not in default in failing to present the will for probate.
(b) Letters testamentary may not be issued if a will is admitted to probate after the fourth anniversary of the testator's death.
(c) A person who, in good faith, purchases property from a decedent's heirs after the fourth anniversary of the decedent's death shall be held to have good title to the interest that the heir or heirs would have had in the absence of a will.

4. **What happens if a will is produced after 4 years?**

Sec. 256.103. PROCEDURE WHEN APPLICATION FOR PROBATE IS FILED AFTER LETTERS OF ADMINISTRATION ARE GRANTED.
(a) A lawful will of a decedent that is discovered after letters of administration have been granted on the decedent's estate may be proved in the manner provided for the proof of wills.
(b) The court shall revoke the previously granted letters of administration.
(d) An act performed by the first administrator before the executor described by Subsection (b) or the administrator with the will annexed described by Subsection (c) qualifies is as valid as if no will had been discovered.

Some final suggestions:
In addition to having a qualified Texas attorney drawing the will, it's a good idea to have some other documents prepared such as medical power-of-attorney, directive to physicians, and a medical information sheet including doctors, pharmacies, all medications with dosages, and persons to contact in case of an emergency.

Conclusion

Real estate professionals stand ready to provide real estate services to the public. As professionals, we must be competent in those areas in which we do business. Selling property for an estate requires specialized knowledge and an understanding of the probate process. As always, agents must not practice law and must know when to refer clients and customers to attorneys and when to seek such legal input ourselves.

Remember that our role is simply to market the property and give the parties advice on real estate issues as provided under our real estate license. We must not give the public estate planning or other legal advice.

There are also significant tax issues involved in planning and executing an estate. These issues should be referred to qualified tax attorneys and CPAs.