PROBATE OVERVIEW

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Cheap Funerals

- In which state are funerals the cheapest?
  A. Texas
  B. Mississippi
  C. Nevada
  D. Arizona
In which state is probate the most complex?

- A. California
- B. Texas
- C. Oregon
- D. Alaska
Which state has the longest life expectancy at over 81 years?

A. Kansas
B. Hawaii
C. Nevada
D. Florida
Agenda

- History of property distribution at death.
- Overview of Texas law of intestate succession.
- Summary of Texas law of wills.
- Basic probate steps.
History of Property Disposition

Upon Death
History of At-Death Property Disposition

- 1. Physical Strength and/or Finding
2. Bury with Decedent
3. Intestate Succession

Diagram courtesy of the Daily Telegraph
4. Wills
History of At-Death Property Disposition

5. Will Substitutes

- Trust
- Joint Tenancy
- Life Insurance
Overview of Texas Law of Intestate Succession
When does intestacy occur?

1. As to person – total intestacy

2. As to property – partial intestacy
Starting point = Was intestate married at time of death?

- If yes, follow “community” and “separate” property schemes.
- If no, follow “individual” property scheme.
Community property is property:

- Property acquired during marriage through working.
- Income from property owned before marriage.
- Each spouse owns \( \frac{1}{2} \) of the community property.
1. No surviving descendants

- Surviving spouse inherits all of deceased spouse’s community property.
- Thus, surviving spouse ends up owning all community property.
2. At least one surviving descendant

- Only marital descendants = SS inherits all of DS’s community (SS ends up owning all community property).

- At least one non-marital descendant = DS’s descendants inherit DS’s community (SS inherits none of the community; SS still has his/her ½).
Married Intestate Separate Property

Separate property consists of:

- Property owned before marriage.
- Property acquired during marriage by:
  - Gift
  - Under a will
  - As an heir under intestacy
1. At least one surviving descendant
   - Personal Property =
     - Surviving Spouse = 1/3
     - Descendants = 2/3
   - Real Property =
     - Surviving Spouse = Life estate in 1/3
     - Descendants = 2/3 (outright) plus remainder of SS’s life estate.
2. No surviving descendants

- **Personal Property =**
  - Surviving Spouse = 100%

- **Real Property =**
  - Surviving Spouse = ½
  - Parents, siblings, and their descendants = ½ using the individual property scheme.
    - Note: If no parents or their descendants, then all to SS.
Individual property is all property of a person who is not married at the time of death.
1. Descendants
2. Parents
3. If one parent predeceased, ½ to surviving parent and ½ to siblings and their descendants. [If none, all to surviving parent.]
4. If both parents predeceased, all to siblings and their descendants.
5. Grandparents and their descendants, etc.
Summary of Texas Law of Wills
Basic Elements

- 1. Legal Capacity
- 2. Testamentary Capacity
- 3. Testamentary Intent
- 4. Formalities
1. Legal Capacity
Legal Capacity

1. 18 years old or older.
2. Is or has been lawfully married.
Legal Capacity

- 3. Is a member of the armed forces at time of will execution.
2. Testamentary Capacity

“sound mind”
1. Understand what doing
Elements of Testamentary Capacity

3. Know general nature and extent of property.
4. Know natural objects of bounty.
5. Achieve above four elements simultaneously.
3. Testamentary Intent
“Intent” not “in tent”
Testator must intend the very instrument the testator executes to be the will.
4. Formalities

Introduction
Formalities depend on type of will

- Attested (witnessed)
- Holographic (handwritten)
4. Formalities

Attested Will
Formalities Overview

1. Written
2. Signed
3. Witnessed
1. In Writing

- No requirement regarding what written on or with.
2. Signed by Testator

- Any symbol executed or adopted by the testator with present intent to authenticate the will.
3. Attestation

- Number = at least two
Capacity of Witnesses

- Legal Capacity
  - Above 14
Capacity of Witnesses

- Attestation Capacity
  - Credible; qualified to testify in court
Capacity of Witnesses

4. Knowledge

- Publication not required (witnesses do not need to know they are witnessing a will)
1. Witnesses attest in presence of testator?
   - Required in Texas.
2. Witnesses attest in each other’s presence?

- Not required in Texas.
3. Testator signs (or acknowledges a prior signature) in presence of witnesses?

- Not required in Texas.
Witness as Beneficiary

1. Effect on will

- None – will remains valid.
2. **Effect on beneficiary’s gift**

- Void, unless an exception applies.
3. Exceptions

a. If beneficiary is also an heir, beneficiary receives smaller of will and intestate share.

b. Will is otherwise established (e.g., another witness).

c. Corroboration by disinterested and credible person.
Self-Proving Affidavit

- Substitutes for in-court testimony of witnesses when will probated.

- Saves time, expense, and inconvenience when probating will.

- Does not “strengthen” the will.
4. Formalities

Holographic Wills

[wholly in decedent’s handwriting]
In about 50% of the states including Texas, removes the attestation requirement.
Basic Probate Steps
1. Title Transfer
   Alternatives to Full Probate
   - Determination of heirship, if intestate.
   - Probate will as muniment of title, if testate.
   - Short forms (e.g., small estate affidavit)

2. Creditor Payment
   - Death as the “final bankruptcy”
If the proceeding is contested, you may “get rid” of the case by either:

- Transferring to District Court, or
- Requesting assignment of a Statutory Probate Court Judge.
Who Performs Administration?

- Personal representative:
  - Executor = will
  - Administrator = intestate

- Must be appointed by a court (that’s you!)
Who Performs Administration?

Legal Requirements
- Not incapacitated
- Not a convicted felon
- Not a non-resident of Texas
- Not a corporation not authorized to be a fiduciary in Texas
- Not a person the court finds “unsuitable”
Overview of Administration Process

1. Determine if Decedent Left a Will

- Home and office
- Safe deposit box
- Significant individuals
- Clerk of the court
2. Proper Applicant

- Prepares and files application
- Pays filing fee
Overview of Administration Process

3. Proper Notice

- Clerk of Court gives notice according to applicable law.
- Most often, just posting on the court house door or a nearby bulletin board.
4. Hearing

- Court conducts hearing on application.
  - Determines validity of will, or
  - Determines that decedent died intestate.
- Court appoints personal representative unless:
  - Muniment of title.
  - Determination of heirship only.
  - Abbreviated [e.g., small estate affidavit]
- Court determines type of administration
  - Dependent
  - Independent [most common]
5. Personal representative qualifies

- Takes oath of oath.
- Posts bond, unless testator waived it or PR is a corporation.
- Obtains letters testamentary (if will) or letters of administration (if intestate) from clerk.
6. Personal representative gives notices

- To will beneficiaries.
- To creditors.
7. Personal representative collects and preserves the decedent’s probate property.
8. Personal representative prepares inventory, appraisement, and list of claims.
   - Court reviews and approves (or not).
     - If independent administration, rest of process is outside of court supervision unless someone complains.
9. Personal representative manages decedent’s property
10. Certain property is protected from creditors

- Homestead
- Exempt personal property
- Family allowance
11. Personal representative pays claims
Overview of Administration Process

12. If property remains after paying creditors, personal representative distributes to heirs or beneficiaries.
Questions?