2019 Probate Academy

INTESTATE SUCCESSION

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Failure to Execute a Will
Will or No Will?

Chief Justice United States Supreme Court
Warren Burger
Will or No Will?

President of the United States
Abraham Lincoln
"The King"
Elvis Presley
Will or No Will?

Beatles
John Lennon
Will or No Will?

Anna-Nicole Smith
Playmate and Howard Marshall’s widow
Michael Jackson
“King of Pop”
Will or No Will?

Prince
“Bad” Reasons No Planning Done

1. Lack of property
1. Lack of property
2. Misunderstanding of what will happen without planning
“Bad” Reasons No Planning Done

1. Lack of property
2. Misunderstanding of what will happen without planning
3. Cost, time, and effort
“Bad” Reasons No Planning Done

1. Lack of property
2. Misunderstanding of what will happen without planning
3. Cost, time, and effort
4. Admission of mortality
"Bad" Reasons No Planning Done

1. Lack of property
2. Misunderstanding of what will happen without planning
3. Cost, time, and effort
4. Admission of mortality
5. Reluctance to divulge private facts
History of At-Death Property Disposition

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

- Are you married?
  - Yes: Your estate worth more than $125,000?
    - Yes: Spouse gets everything.
    - No: Do you have children?
      - Yes: Assets shared equally between them.
      - No: Spouse gets $125,000 and a life interest in the remainder. Children get the rest.
  - No: Do you have children?
    - Yes: Assets shared equally between them.
    - No: Do you have parents?
      - Yes: Assets shared equally between them.
      - No: Spouse gets $125,000, 1/2 of the balance, and 1/2 shared between brothers or sisters.

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

- 4. Wills
History of At-Death Property Disposition

- 5. Will Substitutes

- Trust
- Life Insurance
- Joint Tenancy
- IRA
- 401K
When does intestacy occur?

- 1. As to person – total intestacy
- 2. As to property – partial intestacy
Intestate Succession

- Common Law Split:
  - Crown = real property
  - Church = personal property
Descent = succession to real property
Intestate Succession -- Terminology

- Distribution = succession to personal property
Heir = person who receives property from an intestate decedent
Overview

1. What law applies?
2. Are any potential heirs subject to special rules?
3. Who are the heirs and how much does each receive?
4. Other intestacy issues.
Step One – What law applies?

1. Personal Property
   - Law of intestate’s domicile at the time of death.

2. Real Property
   - Law of situs of real property.
1. Posthumous Heir (heir born after intestate’s death)
   - Must be in gestation (in the womb) at the time of the intestate’s death.
2. Adopted heirs

- If adopted while a minor:
  - Inherits from and through adoptive parents.
  - Inherits from and through biological parents.
  - When adopted person dies, adoptive family inherits (not biological family).
2. Adopted heirs

- If adopted while an adult:
  - Inherits from and through adoptive parents.
  - Does not inherit from and through biological parents.
2. Adopted heirs

Possibility of unanticipated result:

- Mother and Father have Child in 1985.
- Mother dies in 1990.
- Father marries Step-Mother in 1995.
- In 2005, Step-Mother adopts Child.
- In 2018, Father dies intestate.
- Is Child an heir?
2. Adopted heirs

- Must raise claim within four year statute of limitations.
- Texas Supreme Court has held that discovery rule does not apply.
3. Non-Marital Children

- Mother = child inherits; no higher burden.
- Father = child may inherit if satisfies higher burden.
- Texas Supreme Court has held that discovery rule does not apply.
Step Two – Do particular facts raise issues effecting heir determination or distribution?

4. ART Children

- Children born as the result of alternative reproduction technologies.
- As inheritance law unclear and may result in a no-inheritance relationship, have both individuals who want to be parents of the child adopt the child.
5. Step-Children

- Not heirs.

- Unless, can “transform” them into children by adoption by estoppel.
6. Half-Blooded Heir

- Collateral heirs who share only one parent in common.
- Modern rule = irrelevant
- Texas (Scottish) rule = each half-blood receives half as much as each whole-blood
Step Two – Do particular facts raise issues effecting heir determination or distribution?

6. Half-Blooded Heir
Step Two – Do particular facts raise issues effecting heir determination or distribution?

- 7. Non-United States Citizen
  - Irrelevant.
8. “Unworthy” Heirs
   A. Forfeiture
      - Abolished by Texas Constitution.
   B. Civil Death
      - Does not exist in Texas.
   C. Corruption of the Blood
      - Abolished by Texas Constitution.
8. “Unworthy” Heirs

D. Heir Kills Intestate
   - Texas does not have a slayer statute (except for life insurance).
   - Murdering heir precluded from inheriting by imposition of constructive trust remedy.

E. Suicide
   - Irrelevant.
8. "Unworthy" Heirs

F. Bad Parent

- Discretionary with court.
- Intestate child must be under age 18.
- Evil acts proved by clear and convincing evidence.
- Evil conduct:
  - Abandon and fail to support for three years.
  - Knowingly abandoned pregnant mother.
  - Criminally responsible for death or serious injury to a child (not necessarily the intestate child).
9. Bad Spouse

1. Divorce pending at the time of intestate spouse’s death based on his/her lack of mental capacity.

2. Divorce not pending at time of death but:
   a. Decedent married < 3 years.
   b. Application < 1 year after spouse’s death.
   c. Ground = lack of mental capacity at time of marriage.
   d. Decedent never recovered and recognized the marriage.
Step Three – Was Intestate Married?

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

[Warning: If intestate died before 1/1/1993, rules are different.]
1. Descendants
Intestate Succession
Individual Property

- 1. Descendants
- 2. Parents
1. Descendants
2. Parents
3. If one parent predeceased, \( \frac{1}{2} \) to surviving parent and \( \frac{1}{2} \) to siblings and their descendants. [If none, all to surviving parent.]
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.
Intestate Succession
Individual Property

1. Descendants
2. Parents
3. If one parent predeceased, $\frac{1}{2}$ to surviving parent and $\frac{1}{2}$ 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., etc., etc. ["laughing heirs"]
1. Descendants
2. Parents
3. If one parent predeceased, $\frac{1}{2}$ to surviving parent and $\frac{1}{2}$ 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., etc., etc.
6. If no heirs, escheat to State of Texas.
1. No surviving descendants

SS inherits all of DS’s community [SS ends up owning all community property].
2. At least one surviving descendant

- Only marital descendants
  - SS inherits all of DS’s community property (SS ends up owning all community property).
2. At least one surviving descendant

- 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).
1. At least one surviving descendant

- **Personal Property =**
  - Surviving Spouse = 1/3
  - Descendants = 2/3
1. At least one surviving descendant

- 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%
2. No surviving descendants

- 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.
Distribution Methods

- When there are heirs from more than one generation, you must determine how the state allocates among the different generations.

- Three approaches.
1. Per Stirpes

- Divide into shares at first generation, even if no one from that generation survives.

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Intestate

  /         \
 /           /
C  D         E
  ¼         ¼
e         ½
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• Divide into shares at first generation with a surviving member.

Intestate


C  D

1/3  1/3

E

1/3
3. Per Capita at Each Generation

- Treat like-related individuals the same.

Intestate

A [deceased]
  / 
 C   D
 2/9 2/9

B [deceased]
  /
 E
 2/9

C 1/3
  /
 F

Per stirpes & per capita with representation

1/6 1/6 1/3
Other Intestacy Issues

1. Survival
   - Heir must survive intestate by 120 hours.
   - If not, heir is treated as if heir predeceased the intestate.
2. Ownership as tenants in common
   - Awkward to own undivided interests in every item of inherited property.
   - Actions of 2017 Texas Legislature
     - Enactment of Uniform Partition of Heirs Property Act
     - Procedure for a co-tenant heir to adversely possess property against other co-tenants.
3. Advancement

- If heir received a properly document (in writing) advancement, heir’s share in estate is reduced.
4. Disclaimer

- Heir must disclaim before accepting any benefits.
  - The prior “9 month from date of death” rule now applies only to disclaimers for federal tax purposes.

- Property then passes as if disclaiming heir predeceased the intestate.
5. Equitable Conversion

- Real property treated as personal property, or
- Personal property treated as real property.

Example = between (1) signing of real property sales contract and (2) closing
  - Important if contract pending for separate real property at time of the owner’s/intestate’s death.
Questions?