INTESTATE SUCCESSION:

WHAT EVERY TEXAS LEGAL PROFESSIONAL NEEDS TO KNOW

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Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
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SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (7th ed. 2019); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2018); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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INTESTATE SUCCESSION: WHAT EVERY TEXAS LEGAL PROFESSIONAL NEEDS TO KNOW

I. INTRODUCTION

The ability to specify the new owners of property upon death is an important and powerful privilege that each state grants to its citizens. The odds are, however, that you have not executed a will and if so, you would be in good company. Many famous and wealthy people have died intestate including President Abraham Lincoln and Texas billionaire Howard Hughes. Surveys reveal that between 60-75% of Americans die intestate. Intestacy causes the decedent's property to pass to those individuals whom the state government believes the decedent would have wanted to receive the decedent's probate estate upon death. None of the decedent's family members or friends are allowed to present evidence to show that the decedent actually wanted his or her property to pass to them or to a charity.

II. REASONS MOST TEXANS DIE INTESTATE

Why do so many Texans fail to take advantage of their ability to write a will and control how their property is distributed upon death?

A. Lack of Property

One of the most commonly cited reasons people do not have wills is that they own very little property. There are, however, very important reasons for everyone, even persons with limited estates, to have a valid will. For example, the surviving parent of a minor child has the ability to nominate a guardian for the child's person and property in the parent's will. This is better than forcing the court to make the selection because the court may choose a person the parent would not have wanted to control the child's personal or financial affairs. Another reason to have a will is that just because the estate is small now, does not mean it will not be large at the time of death. A person could win the lottery or a mail order sweepstakes, inherit a hefty sum of money under intestacy, be a significant will beneficiary, or land a high-paying job. Additionally, the person could die in a manner which gives the person's estate a winnable survival action against the individual or business that contributed to the death, such as a drunk driver or the manufacturer of a defective vehicle.

B. Unaware of Importance

Many people are naive about the critical importance of having a will. They simply wander through life without giving thought to what happens to their property upon death. Perhaps worse, other individuals have serious misconceptions about at-death property distribution.

C. Indifference

Apathy is a contributing factor to why some people do not prepare a will. As the cliché goes, "You can't take it with you," and thus some people simply do not care.

D. Cost

An attorney-drafted will requires a person to spend money which the person might rather spend on the necessities of life or recreation. Many people cannot afford even the "bargain" wills some attorneys offer, and people with sufficient resources to incur the cost may have "better" things to do with their money.

E. Time and Effort

Even for simple estates, the will preparation process requires a significant investment of time. Here is a typical scenario. The client has an initial meeting with you. As you start to gather the information you need to write the will, you will often discover that the client has not given thought to all aspects of property disposition (e.g., secondary recipients if the primary beneficiaries die before the client) or may need to supply you with additional documentation (e.g., adoption decrees, divorce papers, property appraisals, etc.). Thus, after the client leaves, the client must both ponder various aspects of the estate plan and gather material for your review. The client then gets this information to your office in person or by mail, telephone, e-mail, or fax. You then conduct a second formal meeting, review a rough draft of the will, and engage in a more detailed discussion of options. In a straightforward situation, this may be when the client signs the will. In many cases, however, one or more additional meetings are necessary. If you consider the client's time spent on preparing, traveling, waiting, and meeting, you can appreciate that will preparation requires clients to sacrifice sizable blocks of time and expend considerable effort.

F. Complexity

Wills may become extremely complex, especially if the estate is large enough to trigger tax consequences. It is probably safe to say that most potential testators do not view complexity as a stimulating challenge. Rather, complexity tends to dampen any enthusiasm that may exist about executing a will.

G. Admission of Mortality

In the past, many people believed that they would not live long after executing a will, even if they were then in good health. For many, this belief persists today. Because "personal death is a thought modern [individuals] will do almost anything to avoid," people procrastinate (usually indefinitely) the preparation of a will as a conscious or unconscious defense against admitting their own mortality. Thomas Shaffer, *The "Estate Planning" Counselor and Values Destroyed By Death,* 55 IOWA L. REV. 376, 377 (1969).

H. Reluctance to Reveal Private Facts

To prepare a good will, you must inquire into your client's personal and private matters. For example, you need to know about children born out of wedlock, the value of property, medical conditions such as a diagnosis of AIDS, cancer, or Alzheimer's, and family situations (e.g., marital discord and infidelity, uneasy relationships with children, etc.). Your client may not want to open his or her private life for your inspection.

III. HISTORICAL BACKGROUND

Early in the evolution of civilization, societies developed customs and laws to control the transmission of a person's property after death. Our modern intestacy laws are traced originally to the Anglo-Saxons. The Norman Conquest of 1066 A.D. played a significant role in the development of these rules. William the Conqueror was irritated that English landowners refused to recognize his right to the English Crown after his victory. Accordingly, William took ownership of all land by force and instituted the Norman form of feudalism. Under this system, the Crown was the true owner of all real property with others holding the property in a hierarchical scheme under which lower ranked holders owed various financial and service-oriented duties to higher ranked holders.

As a result, real property became the most essential element in the political, economic, and social structure of the Middle Ages. The Crown and its tough royal courts controlled the *descent* of real property. The basic features of descent included the following rules. (1) Male heirs inherited real property to the exclusion of female heirs unless no male heir existed. The reason underlying this discriminatory preference for male over female heirs was based on the feudal incidents of ownership. One of the primary duties of lower ranked holders of property was to

provide military service to higher ranked holders. Under the then existing social climate, women were deemed unable to perform these services and thus were not able to inherit realty if a male heir existed. (2) If two or more males were equally related to the decedent, the oldest male would inherit all of the land to the total exclusion of the younger males. This is the rule of *primogeniture*. Primogeniture was applied because the Crown thought it was too impractical to divide the duty to provide military services as well as to subdivide the property. (3) If there were no male heirs and several female heirs, each female heir shared equally.

Before the industrial revolution, personal property was of lesser importance. There were no machines or corporate securities about which to worry. Instead, most chattels were of relatively little value such as clothing, furniture, jewelry, and livestock. Thus, the Crown permitted the church and its courts to govern the *distribution* of personal property. The ecclesiastical courts based distribution on canon law which had its foundation in Roman law. In general, personal property was distributed equally among equally related heirs. There was no preference for male heirs and the ages of the heirs were irrelevant.

After centuries of movement toward a unified system, the English Parliament passed the Administration of Estates Act in 1925 which abolished primogeniture and the preference for male heirs as well as providing uniform rules for all types of property. Most intestacy statutes in the United States make no distinction based on the age and sex of the heirs nor between the descent of real property and the distribution of personal property. However, Texas and a few other states retain this latter common law principle and provide different intestacy schemes for real and personal property under certain circumstances. See generally Darien A. McWhirter, *The Ancient Origins of Texas Probate Law*, 49 TEX. B.J. 1061 (1986).

IV. BASIC DISTRIBUTION SCHEME

Chapter 201 of the Estates Code governs what happens when a person dies without a valid will or dies with a valid will which does not encompass all of the person's probate estate. When this happens, the person's probate property which is not covered by a valid will is distributed through intestate succession. A person may die totally intestate, that is, *intestate as to the person*, if the person did not leave any type of valid will. A person may also die partially intestate, that is, *intestate as to property*, if the person's valid will fails to dispose of all of the person's probate estate.

The intestate distribution scheme in Texas is derived mainly from four sections of the Estates Code: § 201.001 (distribution of property of an unmarried decedent), § 201.002 (distribution of the separate property of a married decedent), § 201.003 (distribution of the community property of a married decedent), and § 201.101 (determination of the type of distribution). Below is a summary of these sections assuming that the decedent died on or after September 1, 1993.

A. Individual Property Distribution (Unmarried Intestate)

The distribution of the property of an unmarried intestate is governed by Estates Code § 201.001. Real and personal property are treated the same.

1. Descendants Survive

If the unmarried intestate is survived by one of more descendants (e.g., children or grand-children), then all of the intestate's property passes to the descendants. See § D, below, for a discussion of how this distribution is done.

2. No Descendants Survive But a Parent Survives

The following distributions occur if the unmarried intestate has no surviving descendants but does have at least one surviving parent.

a. Both Parents Survive

If both parents survived the intestate, each parent inherits one-half of the estate.

b. One Parent Survives Along With a Sibling or a Sibling's Descendants

If only one parent survives and the intestate is also survived by at least one sibling or a descendant of a sibling (e.g., niece or nephew), then the surviving parent receives one-half of the estate with the remaining one-half passing to the siblings and their descendants. See § D, below, for a discussion of how this distribution is done.

c. One Parent Survives but No Sibling or Descendant of a Sibling Survives

If one parent survives and there is no surviving sibling or a descendant of a sibling, then the surviving parent inherits the entire estate.

3. No Surviving Descendants or Parents

If the unmarried intestate is survived by neither descendants nor parents, then the entire estate passes to siblings and their descendants. See § D, below, for a discussion of how this distribution is done.

4. No Surviving Descendants, Parents, Siblings or Their Descendants

If the unmarried intestate has no surviving descendants, parents, siblings or their descendants, the estate is divided into two halves (moieties) with one half going to paternal grandparents, uncles, cousins, etc. and the other half to the maternal side. Texas does not have a laughing heir statute preventing these remote relatives from inheriting. If one side of the family has completely died out, the entire estate will pass to the surviving side. See *State v. Estate of Loomis*, 553 S.W.2d 166 (Tex. Civ. App.—Tyler 1977, writ ref'd).

5. No Surviving Heir

If the unmarried intestate has no surviving heir, the property will escheat to the state of Texas under Property Code § 71.001.

B. Distribution of Community Property of Married Intestate

The distribution of the community property of an intestate who was married at the time of death is governed by Estates Code § 201.003. Real and personal property are treated the same.

1. If No Surviving Descendants

If the married intestate has no surviving descendants, then all community property is now owned by the surviving spouse. The surviving spouse (1) retains the one-half of the community property that the surviving spouse owned once the marriage was dissolved by death and (2) inherits the deceased spouse's one-half of the community.

2. If Surviving Children or Their Descendants

Community property is distributed as follows if the married intestate has at least one surviving child or other descendant.

a. No Non-Spousal Descendants

If all of the deceased spouse's surviving descendants are also descendants of the surviving spouse, then the surviving spouse will own all of the community property, that is, the surviving spouse retains his or her one-half of the community and inherits the other half. Note that for spouses dying before September 1, 1993, the deceased spouse's one-half of the community property was not inherited by the surviving spouse. Instead, the deceased spouse's share passed to the deceased spouse's descendants.

b. Non-Spousal Descendants

If any of the deceased spouse's surviving descendants are not also descendants of the surviving spouse, then the community property is divided. The surviving spouse retains one-half of the community property, that is, the one-half the surviving spouse already owned by virtue of it being community property. The descendants of the deceased spouse inherit the deceased spouse's one-half of the community property. All of the deceased spouse's descendants are treated as a

group regardless of whether the other parent is or is not the surviving spouse.

C. Distribution of Separate Property of Married Intestate

Unlike most states, Texas in Estates Code § 201.002 has retained a vestige of the common law distinction between the descent of real property and the distribution of personal property.

1. Surviving Descendants

a. Personal Property

The surviving spouse receives one-third of the deceased spouse's separate personal property with the remaining two-thirds passing to the children or their descendants. These interests are outright.

b. Real Property

The surviving spouse receives a life estate in one-third of the deceased spouse's separate real property. The rest of the property, that is, the outright interest in two-thirds of the separate real property and the remainder interest following the surviving spouse's life estate passes to the deceased spouse's children or their descendants.

2. No Surviving Descendants

a. Personal Property

If there are no surviving descendants, all separate personal property passes to the surviving spouse.

b. Real Property

(1) Surviving Parents, Siblings, or Descendants of Siblings

If there are no surviving descendants but there are surviving parents, siblings, or descendants of siblings, the surviving spouse inherits one-half of the separate real property outright with the remaining one-half passing to the parents, siblings, and descendants of siblings as if the intestate died without a surviving spouse (that is, this one-half passes using the same scheme as for individual property).

(2) No Surviving Parents, Siblings, or Descendants of Siblings

If the intestate has no surviving descendants, parents, siblings, or descendants of siblings, the surviving spouse inherits all of the separate real property.

D. Type of Distribution

Whenever individuals such as children, grandchildren, siblings and their descendants, cousins, etc. are heirs, you must determine how to divide their shares among them. See Estates Code § 201.101.

1. Per Capita

If the heirs are all of the *same degree* of relationship to the intestate, then they take per capita, i.e., each heir takes the same amount. For example, if all takers are children, each receives an equal share. If all children are deceased, then each grandchild takes an equal share.

2. Per Capita by Representation

If the heirs are of *different degrees* of relationship to decedent, e.g., children and grandchildren, the younger generation takers share what the older generation taker would have received had that person survived. For example, assume that Grandfather had three children; two of whom predeceased Grandfather. One-third passes to the surviving child, with one-third passing to the children of each deceased child (grandchildren). If each deceased child had a different number of grandchildren, the shares of the grandchildren will be different. For example, if one deceased child had two children, each gets one-sixth; if the other deceased child had three children, each would receive one-ninth.

E. Examples

1. Wilma, a widow, dies intestate survived by her only son, Sammy, and her father, Frank. Wilma's entire estate passes to Sammy.

2. Harry, a widower, dies intestate survived by his mother, Mary, and his two brothers, Bruce and Bob. One-half of Harry's estate passes to Mary. Bruce and Bob each receive one-quarter.

3. Husband (H) and Wife (W) have three children, Amy (A), Brad (B), and Charles (C). All three children are married and have children of their own. A has one child, Mike (M). B has three children, Nancy (N), Opie (O), and Pat (P). C's children are Robert (R) and Susan (S). H died intestate with both community and separate property. In addition, H owned real and personal property of each type.

a. How would H's property be distributed? All of H's community property is now owned by W; W keeps the one-half she owned by virtue of it being community property and W inherits H's one-half. W receives one-third of H's separate personal property. Each of A, B, and C receive 2/9 of H's separate personal property. W receives a life estate in one-third of H's separate real property. Each of A, B, and C receive 2/9 outright in H's separate real property as well as one-third of the remainder in W's life estate.

b. Assume that both B and C predeceased H. How would H's property be distributed? All of H's community property is now owned by W; W keeps the one-half she owned by virtue of it being community property and W inherits H's one-half. W receives one-third of H's separate personal property. A receives 2/9 of H's separate personal property, each of N, O, and P receive 2/27 and each of R and S receive 1/9. W receives a life estate in one-third of H's separate real property. A receives 2/9 outright in H's separate real property plus one-third of the remainder in W's life estate. Each of N, O, and P receive 2/27 outright in H's separate real property plus 1/9 of the remainder in W's life estate. Each of R and S receive 1/9 outright in H's separate real property plus 1/6 of the remainder in W's life estate.

c. Assume that A, B, and C predeceased H. How would H's property be distributed? All of H's community property is now owned by W; W keeps the one-half she owned by virtue of it being community property and W inherits H's one-half. W receives one-third of H's separate personal property. Each of the six grandchildren (M, N. O, P, R, and S) receive 1/9 of H's separate personal property. W receives a life estate in one-third of H's separate real property. Each of the six grandchildren receive 1/9 outright in H's separate real property plus 1/6 of the remainder in W's life estate.

d. How would the distributions be made under the facts in (a), (b), and (c) assuming that A's mother is X instead of W? Only the distribution of community property in each case is different. In each situation, W would only retain her one-half of the community. H's share of the community property passes to his descendants because not all of his descendants are descendants of W. In (a), each of A, B, and C would get 1/6 of the total community (1/3 of H's one-half). In (b), A would receive 1/6, each of N, O, and P, 1/18, and each of R and S, 1/12. In (c), each grandchild would receive 1/12 of the total community.

4. Mother and Father, now deceased, had three children, Arthur, Bill, and Chris. Arthur died survived by his wife, Peggy, and their two children, Linda and Ken. Bill is unmarried and childless. Chris is married to Wendy and they have no children. Chris died intestate with both community and separate property. In addition, Chris owned real and personal property of each type. How would Chris' property be distributed? Wendy receives all the community property, all separate personal property, and one-half of the separate real property. Bill receives ¼ of the separate real property and Linda and Ken each receive 1/8 of the separate real property.

V. TREATMENT OF POTENTIAL HEIRS

A. Posthumous Heirs

Posthumous heirs are heirs who are born after the intestate dies. The 2015 Legislature amended Estates Code § 201.056 to provide that a posthumous heir must be in gestation at the time of the intestate's death to obtain inheritance rights. This amendment precludes the use of the decedent's sperm, eggs, or embryos to produce heirs who are born years or decades after the

intestate's death. In addition there are no longer different rules for lineal and collateral posthumous heirs.

B. Adopted Individuals

The ability of a person to adopt a non-biological person and cause that person to be treated as a biological child was recognized thousands of years ago by societies such as the ancient Greeks, Romans, and Egyptians. However, the concept of adoption was beyond the grasp of common law attorneys and courts. The idea that a person could have "parents" other than the biological mother and biological father was unthinkable. In fact, English law did not recognize adoption until 1926. Accordingly, modern law relating to adoption developed in the United States with Vermont and Texas taking the lead when their legislatures enacted adoption statutes in 1850.

Estates Code § 201.054 details the effect of adoption on intestate distribution. The rights of three parties are at issue: (1) the adopted child; (2) the adoptive parents; and (3) the biological parents. Adopted children will inherit from and through the adoptive parents and, unlike in many states, also from and through the biological parents if the child was adopted as a minor. Adoptive parents are entitled to inherit from and through the adopted child. The inheritance rights of the biological parents, on the other hand, are cut off—biological parents do not inherit from or through their child who was given up for adoption. See also Family Code §§ 162.017 (adoption of minors) and 162.507 (adoption of adults).

The 2005 Legislature made a significant change with respect to the law governing inheritance by a person who is adopted as an adult. Under prior law, there was no difference between the inheritance rights of a person who was adopted as a minor and a person who was adopted after reaching adulthood, that is, both types of adopted individuals inherited not only from their adoptive parents but also retained the right to inherit from their biological parents. Effective with regard to intestate individuals who die on or after September 1, 2005, the adopted adult may no longer inherit from or through the adult's biological parent. See Estates Code § 201.054(b) & Family Code § 162.507(c).

This amendment may lead to an absurd result. For example, assume that Mother and Father have a child in 1985. Mother dies in 1990 and Father marries Step-Mother in 1995. As time passes, Child and Step-Mother become close and shortly after Child reaches age 18, Step-Mother adopts Child. If Father dies intestate, Child will not be considered an heir because the statute provides that an adopted adult may not inherit from a biological parent.

A decree terminating the parent-child relationship may specifically remove the child's right to inherit from and through a biological parent. See Family Code § 161.206.

Adoption by estoppel, also called *equitable adoption*, occurs when a "parent" acts as though the "parent" has adopted the "child" even though a formal court-approved adoption never occurred. Typically, the "child" must prove that there was an agreement to adopt and the courts will look at circumstantial evidence to establish the agreement. Thus, when the "parent" dies, the adopted by estoppel child is entitled to share in the estate just as if an adoption had actually occurred. The acts of estoppel must have begun while the child was a minor. See *Dampier v. Williams*, 493 S.W. 3d 118 (Tex. App. – Houston [1st Dist.], no pet.).

Despite apparent clear statutory language to the contrary, the Texas courts consistently held that when an adopted by estoppel child dies, the child's property passes to the biological family rather than to the adoptive family as is the case when a formally adopted child dies. See *Heien v. Crabtree*, 369 S.W.2d 28 (Tex. 1963). The 2017 Legislature changed the definition of "child" to expressly include an equitably adopted child and added language including equitably adopted children in the adoption statute which effectively overrule this case. Estates Code §§ 22.004 & 201.054(e).

A child who wishes to inherit as an adopted child needs to make a timely assertion of his or her claim. Civil Practice & Remedies Code § 16.051 (four year statute of limitations). The discovery rule does not apply. As stated by the Supreme

Court of Texas in *Little v. Smith*, 943 S.W.2d 414 (Tex. 1997):

> The Court is sensitive to the desires of many adopted children to find their biological parents, and we recognize that adopted children have inheritance rights from and through their natural parents unless those rights are terminated during the adoption proceedings. We are constrained to conclude, however, that the legislative determinations in several arenas dictate that claims for inheritance and any derivative claims must be asserted within the statutory limitations periods.

C. Non-Marital Individuals

At common law, a child born outside of a valid marriage was considered as having no parents (*filius nullius*). Thus, a non-marital child did not inherit from or through the child's biological mother or father. Likewise, the biological parents could not inherit from or through the child. However, the non-marital child did retain the right to inherit from the child's spouse and descendants. If the child died intestate with neither a surviving spouse nor descendants, the child's property escheated to the government.

This harsh treatment of non-marital children, formerly referred to by pejorative terms such as illegitimate children or bastards, has been greatly alleviated under modern law. In the 1977 United States Supreme Court case of *Trimble v. Gordon*, 430 U.S. 726 (1977), the Court held that marital and non-marital children must be treated the same when determining heirs under intestacy statutes. The Court held that discriminating against non-marital children was a violation of the equal protection clause of the 14th Amendment.

One year later, the Supreme Court retreated from its broad holding in *Trimble*. In the five-four decision of *Lalli v. Lalli*, 439 U.S. 259 (1978), the Court held that a state may have legitimate reasons to apply a more demanding standard for non-marital children to inherit from their fathers than from their mothers. The Court cited several justifications for this unequal treatment including the more efficient and orderly administration of estates, the avoidance of spurious claims, the maintenance of the finality of judgments, and the inability of the purported father to contest the child's paternity allegations.

Estates Code § 201.051 permits the non-marital child to inherit from and through the biological mother (and vice versa) without any difference in the amount of maternity proof from that which a marital child is required to produce. On the other hand, Texas imposes higher standards on a non-marital child to inherit from the father. Section 201.052, in conjunction with the Family Code, enumerates how a person may be considered the child of a man and thus entitled to inherit such as when the child is born during marriage or within 300 days after the marriage ends, there is a court decree of paternity, the man adopts the child, or the man executes a statement of paternity.

Texas also permits the non-marital child to prove paternity after the purported father has died. In an attempt to limit the number of false claims, Texas imposes a higher standard of proof of paternity in post-death actions, that is, there must be clear and convincing evidence of paternity. DNA evidence is especially helpful in making this determination.

A child who wishes to inherit as a non-marital child needs to make a timely assertion of his or her claim. Civil Practice & Remedies Code § 16.051 (four year statute of limitations). "[T]he discovery rule does not apply to heirship and inheritance claims brought by non-marital children." *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494 (Tex. 2010)

D. Children From Alternative Reproduction Technologies

Modern medical technology permits children to be born via reproduction techniques that involve more than the traditional two people or years after the death of one of the parents. Examples of these methodologies include (1) *artificial insemination* (donated semen artificially introduced into the mother's vagina or uterus), (2) *in vitro fertilization* (donated egg and donated semen combined in a laboratory with the resulting embryo transferred to a donee), (3)

gamete intrafallopian transfer (donated egg and donated sperm combined in a donee's fallopian tube), and (4) *embryo lavage and transfer* (fertilized egg removed from the donor and transferred to the donee's uterus).

Several options exist regarding the parentage of children born as a result of these techniques. The father could be (1) the supplier of the genetic material (sperm), (2) the husband of the supplier of the female genetic material (egg), or (3) the husband of the woman who gestates the child. Likewise, the mother could be (1) the supplier of the female genetic material, (2) the wife of the man who supplies the male genetic material, or (3) the woman who gestates the child even though this woman did not supply any genetic material (a surrogate mother).

Family Code §§ 160.701-.707 resolve some, but not all, of the issues which arise regarding the individuals whom the law will treat as the parents of children conceived by means of assisted conception. Generally, the donor of the sperm or egg is not considered as a parent and the birth mother is deemed to be the mother. For the child to have a father, the father must be married to the mother and the father must (1) provide the sperm, (2) consent in a record signed by both husband and wife to the assisted reproduction, or (3) openly treat the child as a child.

The 2003 Texas Legislature authorized gestational agreements between a surrogate mother and the intended parents in Family Code §§ 160.751-160.762. If the agreement is properly validated, the woman who gave birth to the child will not be treated as the child's mother. Accordingly, this child would not inherit from or through the birth mother. Instead, the mother and father of the child will be the intended parents and inheritance rights will accrue accordingly.

E. Stepchildren

A stepchild is a child of a person's spouse who is not a biological or adopted child of the person. Stepchildren may not inherit from their stepparents under Texas law.

F. Half-Blooded Collateral Heirs

The term "half-blood" refers to collateral relatives who share only one common ancestor. For example, a brother and sister who have the same mother but different fathers would be half-siblings. On the other hand, if the brother and sister have the same parents, they would be related by the "whole-blood" because they share the same common ancestors.

At common law, half-blooded heirs could not inherit real property from a half-blooded intestate although they were entitled to inherit personal property. This strict rule with its emphasis on blood relationships has been modified by the states. States adopt one of three modern approaches: (1) The majority of states have totally eliminated the distinction between half- and whole-blooded relatives in determining inheritance rights. Thus, half-blooded collaterals inherit just as if they were of the whole-blood. (2) Some states like Texas adopt the Scottish rule which provides that half-blooded collaterals receive half shares. (3) A few states permit half-blooded collateral heirs to inherit only if there is no whole-blooded heir of the same degree. Remember that the distinction between whole and half-blooded heirs is relevant only if distribution is being made to collateral heirs of the intestate.

A simple way to determine the proper distribution to half and whole-blooded heirs under Estates Code § 201.057 is to calculate the total number of shares by creating two shares for each whole-blooded heir and one share for each half-blooded heir. Each whole-blooded heir receives two of these shares and each half-blooded heir receives one. For example, if there are three sibling heirs, Whole Blood Arthur, Half Blood Brenda and Half Blood Charlie, four shares would be created (two for Arthur and one each for Brenda and Charlie). The estate would be distributed with Arthur receiving two shares (1/2 of the estate) and Brenda and Charlie receiving one share each (1/4 of the estate).

G. Non-United States Citizens

At common law, a non-citizen could not acquire or transmit real property through intestacy. This

rule made sense because the landowner owed duties to the Crown which would be difficult to enforce if the landowner was not a citizen. On the other hand, non-citizens from friendly countries could both acquire and transmit personal property through intestacy.

Under Estates Code § 201.060, non-citizens are treated no differently than citizens when it comes to inheritance rights. Note, however, that during the World Wars, the United States government restricted the inheritance rights of citizens of enemy nations.

H. Unworthy Heirs

1. Forfeiture

Forfeiture refers to a common law principle which caused all the property of a person who was convicted of a felony to be forfeited to the government so there was no property for the person's heirs to inherit. Article I, § 21 of the Texas Constitution prohibits forfeiture and Estates Code § 201.058(a) restates this prohibition. Note, however, that under federal law, a person convicted of certain drug offenses forfeits a portion of the person's property to the government. 21 U.S.C. § 853.

2. Civil Death

Under the law of some states, persons who are convicted of certain serious crimes, especially if the sentence is for life, are treated as being civilly dead. A civilly dead person may lose a variety of rights such as the ability to contract, the right to vote, and the right to maintain a lawsuit. The issue which then arises is whether the person's property passes to the heirs as if the person had actually died. Texas does not recognize civil death and thus property passes to a person's heirs only upon a biological death. See *Davis v. Laning*, 19 S.W. 846 (1892).

3. Corruption of the Blood

Corruption of the blood refers to a common law principle which prevented a person from inheriting land if the person was convicted or imprisoned for certain offenses, especially treason and other capital crimes. Article I, § 21 of the Texas Constitution prohibits corruption of blood and Estates Code § 201.058(a) restates this prohibition. Accordingly, an imprisoned person, even one on death row, may inherit property.

4. Heir Killing Intestate

To prevent murderers from benefiting from their evil acts, most state legislatures have enacted statutes prohibiting murderers from inheriting. These provisions are often referred to as *slayer's statutes*. Estates Code § 201.058(b), however, only applies if a beneficiary of a life insurance policy is convicted and sentenced as a principal or accomplice in willfully bringing about the death of the insured. Texas courts resort to the constructive trust principle to prevent the murdering heir from inheriting. Legal title does pass to the murderer but equity treats the murderer as a constructive trustee of the title because of the unconscionable mode of its acquisition and then compels the murderer to convey it to the heirs of the deceased, exclusive of the murderer. See *Pritchett v. Henry*, 287 S.W.2d 546 (Tex. Civ. App.—Beaumont 1955, writ dism'd).

5. Suicide

The property of a person who committed suicide was subject to special rules at common law. If the intestate committed suicide to avoid punishment after committing a felony, the intestate's heirs took nothing. Instead, the real property escheated and personal property was forfeited. However, if the intestate committed suicide because of pain or exhaustion from living, only personal property was forfeited and real property still descended to the heirs. Article I, § 21 of the Texas Constitution abolishes these common law rules and thus the property of a person who commits suicide passes just as if the death were caused by some other means. Estates Code § 201.061 restates the Constitutional provision.

6. Disqualification of "Bad" Parent

Under certain circumstances, a bad parent will not be able to inherit from his or her minor child or, in some cases, from any minor child under Estates Code § 201.062 effective only with

regard to an intestate who dies on or after September 1, 2007.

a. Conditions Triggering Disinheritance

(1) Court Order

Even if all of the conditions of disinheritance are met, the disinheritance is not automatic. It must be declared by the court.

(2) Deceased Child Under Age 18

If child lives until age 18, disinheritance does not occur regardless of the parent's bad acts. The reason underlying this condition is that once the child reaches age 18, the child may now write a will.

(3) Evil Acts Triggering Disinheritance

The statute provides three types of evil acts which may act to support a court judgment disinheriting a parent.

- The parent voluntarily abandoned and failed to support the child in accordance with the parent's obligation or ability for at least three years before the date of the child's death and had not yet resumed support by time of the child's death.
- The parent voluntarily and with knowledge of the pregnancy, abandoned the mother and did not provide adequate support or medical care for the mother during the period of abandonment before the birth of the child and has remained apart from and has failed to support the child since birth.
- The parent was convicted or placed on community supervision for being criminally responsible for death or serious injury to "a" child according to a laundry list of penal statutes.

(4) Evil Acts Proved By Clear and Convincing Evidence

The parent's evil acts must be proved by more than preponderance of the evidence but do not need to be demonstrated beyond a reasonable doubt.

b. Effect of Disinheritance

The evil parent will be treated as having predeceased the child.

c. Potential Problems With Statute

(1) Unconstitutional, In Part

The portion of the statute which prevents a person from inheriting from his or her own child if the parent has been convicted of one of the enumerated crimes may be unconstitutional. Article I, § 21 of the Texas Constitution provides that "[n]o conviction shall work * * * forfeiture of estate."

In Opinion No. GA-0632 issued May 30, 2008, the Attorney General of Texas concluded that "the courts would probably find Probate Code section 41(e)(3) [Estates Code § 201.062(a)(3)] violative of article I, section 21 when applied to bar a wrongdoer's inheritance" unless the conduct would trigger other recognized legal doctrines such as a constructive trust.

Note that Texas does not have a slayer statute applicable to an intestate heir or will beneficiary who murders the intestate or testator to accelerate receiving the property (Estates Code § 201.058(b) applies only in the life insurance context of a beneficiary murdering the insured). Instead, the Texas courts prevent unjust enrichment by imposing a constructive trust so that title to the ill-gotten property actually passes to the murderer who then holds the property as a constructive trustee for the individuals who are "rightfully" entitled to it.

(2) Too Narrow

Disqualification occurs only if the bad acts are done by a parent. Thus, if another heir such as a grandparent or sibling engages in the evil acts, the heir may still be able to inherit.

(3) Too Broad

Section 201.062(a)(3) (the conviction provision) references "a child," not "the child" like

§ 201.062(a)(1) and (a)(2). Accordingly, a person could be precluded from inheriting from a child for conduct that did not involve the intestate child. The Attorney General's opinion discussed above recognizes this issue in footnote 3 but indicated that it did not need to be addressed because of the conclusion that the entire subsection is unconstitutional.

7. Setting Aside Marriage

The 2007 Legislature added what is now Estates Code §§ 123.101 to 123.104 to authorize a court, under certain circumstances, to deem a decedent's current marriage void for lack of mental capacity even after the decedent has died. This section was designed to "undo" marriages entered into due to the actions of conniving and/or abusive caregivers.

a. Types of voidable marriages

(1) Proceeding pending at time of death

If a Family Code proceeding to void a marriage based on lack of mental capacity is pending at the time of death (or if the court has been asked to do so in a pending guardianship proceeding), the court may declare the marriage void despite the death of the decedent. The court must apply the same standards as for an annulment under the Family Code.

(2) Proceeding not pending at time of death

If a proceeding to void a marriage based on lack of mental capacity is not pending at the time of death, the court may nonetheless deem the marriage void if all of the following conditions are met:

- The decedent entered into the marriage within three years of the decedent's death.
- An interested person files an application to void the marriage on the basis of lack of mental capacity within one year of the decedent's death.
- The court finds that the decedent lacked the mental capacity to consent to the marriage and understand the nature of any marriage ceremony that might have occurred.
- The court does not determine that after the date of the marriage, the decedent gained the mental capacity to recognize the marriage relationship and actually recognized the relationship.

b. Result if marriage deemed void

The surviving partner of the void marriage is not considered as the decedent's surviving spouse for any purpose under Texas law. For example, the surviving partner would not be able to receive an intestate share of the estate or claim homestead rights.

VI. OTHER INTESTACY ISSUES

A. Choice of Law

Issues regarding the transfer of real property at death are governed by the law of the state in which the land is located. On the other hand, the law of the decedent's domicile at the time of death governs personal property matters. Thus, you may need to apply the probate law of several states to determine the proper distribution of a decedent's estate.

B. Passage of Title

If there is more than one heir, they each hold title to every asset as tenants in common. For example, if three children inherit the property of their last-to-die parent, each owns one-third of each item of clothing, silverware, book, piece of furniture, etc. This, of course, can be extremely awkward if the three children are unable to agree among themselves regarding who receives full ownership of each asset. If they cannot agree, the item may be sold and proceeds divided proportionately. However, if the estate is being independently administered, the executor may make distributions in divided or undivided interests in proportionate or disproportionate shares, and value the property to adjust the

distribution for the differences in value of the assets. Estates Code § 405.0015.

The problems associated with heirs holding as tenants in common are exacerbated with real property. The 2017 Texas Legislature addressed two of these problems. First, the Legislature enacted the Uniform Partition of Heirs Property Act becoming the eighth state to do so. Property Code Ch. 23A. Here is how the Uniform Law Commission describes the act:

> [The act] helps preserve family wealth passed to the next generation in the form of real property. Affluent families can engage in sophisticated estate planning to ensure generational wealth, but those with smaller estates are more likely to use a simple will or to die intestate. For many lower- and middle-income families, the majority of the estate consists of real property. If the landowner dies intestate, the real estate passes to the landowner's heirs as tenants-in-common under state law. Tenants-in-common are vulnerable because any individual tenant can force a partition. Too often, real estate speculators acquire a small share of heirs' property in order to file a partition action and force a sale. Using this tactic, an investor can acquire the entire parcel for a price well below its fair market value and deplete a family's inherited wealth in the process. UPHPA provides a series of simple due process protections: notice, appraisal, right of first refusal, and if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds.

Second, the Legislature changed the common law by providing that under certain circumstances, a co-heir may adversely possess property owned by the other co-heirs. An uninterrupted ten year period of adverse possession is needed followed by another five years after affidavits of heirship and adverse possession are filed, notice published in the county where the property is located, and written notice to the last known address of all the co-heirs by certified mail. Title will then vest in the co-heir unless another co-heir files a controverting affidavit or brings suit to recover the co-tenant's share within five years of the date of the filing of the affidavits. Civil Practice & Remedies Code § 16.0265.

C. Survival

To be an heir, the individual must outlive the decedent. At common law, survival for only a mere instant was sufficient. This rule lead to many proof problems as family members tried to establish that one person outlived the other or vice versa. Some of these cases read like horror novels as the courts evaluate evidence of which person twitched, gurgled, or gasped longer. See *Glover v. Davis*, 366 S.W.2d 227 (Tex. 1963).

To remedy this problem, Estates Code § 121.052 imposes a survival period of 120 hours (5 days). If a person survives the decedent but dies prior to the expiration of the survival period, the property passes as if the person had actually predeceased the decedent.

D. Assignment or Release of Inheritance

1. Before Intestate's Death

Because a living person has no heirs, an heir apparent does not have an interest which rises to the level of being property. Instead, the hopeful heir's interest is a mere expectancy. The person whom the heir apparent hopes will die intestate may prevent the expectation from being fulfilled by taking a variety of steps such as writing a will, selling the property, or making a gift of the property. Accordingly, an heir apparent has nothing to transfer.

The heir apparent, however, may agree (1) to transfer the inheritance once received, or (2) not to claim a future inheritance. As long as the agreement meets all the requirements of a contract (e.g., offer, acceptance, and consideration), the court is likely to enforce the agreement if the heir apparent fails to perform upon the intestate's death. See *Mow v. Baker*, 24 S.W.2d 1 (Tex. Comm'n App.—holding approved 1930) and *Birk v. First Wichita Nat'l*

Bank of Wichita Falls, 352 S.W.2d 781 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.) (the court made the anomalous statement that "[a]n expectancy may be conveyed" but actually decided on contract grounds).

2. After Intestate's Death

Once an heir receives the property through intestate succession, the heir may assign his/her interest in the property to a third person under Estates Code § 122.201. Unlike with a disclaimer under § 122.003(b), the heir will be liable for transfer taxes and the property will become subject to the creditors of the heir.

E. Disclaimers

An heir may disclaim or renounce the person's interest in the intestate's estate. In the normal course of events, heirs do not disclaim. Most people like the idea of getting something for free. However, there are many good reasons why an heir might desire to forego the offered bounty. Four of the most common reasons are as follows: (1) the property may be undesirable or accompanied by an onerous burden (e.g., littered with leaky barrels of toxic chemical waste or subject to back taxes exceeding the value of the land); (2) the heir may believe that it is wrong to benefit from the death of another and refuse the property on moral or religious grounds; (3) an heir who is in debt may disclaim the property to prevent the property from being taken by the heir's creditors; and (4) the heir may disclaim to reduce the heir's transfer tax burden (a "qualified disclaimer" under I.R.C. § 2518).

Property Code Chapter 240 provides the formal requirements for an heir to disclaim. The heir must sign in a written document which describes the disclaimed property. Property Code § 240.009(a). The writing must be delivered to the personal representative of the estate but if none is serving, it must then be filed in the county where the intestate was domiciled at death or owned real property. Property Code § 240.102. The former requirement that the disclaimer be done within nine months of the intestate's death no longer applies unless the disclaimer is being done for federal tax purposes.

The heir or beneficiary may "pick and choose" which assets to disclaim but if the person accepts the property, the right to disclaim is waived. The disclaimer will be barred if the heir takes possession of the property, exercises dominion or control over the property, uses the property as collateral, or sells (or enters into a contract to sell) the property. Property Code § 240.151(b).

Once a valid disclaimer is made, the heir is treated as predeceasing the intestate. Property Code § 240.051(f). The disclaimed property then passes under intestacy as if the heir had died first. The disclaiming heir cannot specify the new owner of the disclaimed property. See *Welder v. Hitchcock*, 617 S.W.2d 294 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (holding that the disclaimed property passes as if the disclaiming person is dead vis-à-vis the disclaimed property, not the entire estate).

Once made, a disclaimer is irrevocable. Property Code § 240.009(c).

Disclaimers are an effective method for a debtor to prevent property to be inherited from falling into the hands of a creditor other than for child support arrearages. Property Code § 240.151(g). The disclaimer is not a fraudulent conveyance and thus it may not be set aside by the disclaimant's creditors. However, the United States Supreme Court has held that a disclaimer will not defeat a federal tax lien. *Drye v. United States*, 528 U.S. 49 (1999).

F. Advancements

An advancement is a special type of inter vivos gift. The advancer (donor) anticipates dying intestate and the advancee (donee) is an individual who is likely to be one of the advancer's heirs. Although the gift is irrevocable and unconditional, the advancer intends the advancement to be an early distribution from the advancer's estate. Thus, the advancee's share of the advancer's estate is reduced to compensate for the advancement.

When the advancer dies intestate, the advanced property is treated as if it were still in the advancer's probate estate when computing the size of the intestate shares. Thus, the advancee receives a smaller share in the estate because the

advancee already has part of the advancer's estate, that is, the advancement. This equalization process is referred to as *going into hotchpot*.

Estates Code § 201.151 provides that property given during an intestate's life to an heir is an advancement only if (1) the decedent acknowledges the advancement in a contemporaneous writing at the time of or prior to the transfer or (2) the heir acknowledges in writing, at any time, that the transfer of property is be treated as an advancement.

Here are some examples showing how advancements operate under Texas law.

1. Intestate had three children, Arthur, Brenda, and Charles. Intestate made a $100,000 advancement to Arthur. Intestate died with a distributable probate estate of $500,000. What is the proper distribution of Intestate's estate?

Arthur receives $100,000, Brenda receives $200,000, and Charles receives $200,000. Because the $100,000 gift to Arthur was an advancement, that amount is treated as if it were still in Intestate's estate. Thus, Intestate's estate is distributed as if it contained $600,000. Intestate had three children and thus each child is entitled to a per capita share of $200,000. Because Arthur has already received $100,000 by way of the advancement, he is entitled only to an additional $100,000 from Intestate's estate. Brenda and Charles each receive their share from Intestate's estate. The hotchpot process ensures that each child receives an equal share from Intestate accounting for both inter vivos and at-death transfers.

2. Intestate had three children, Arthur, Brenda, and Charles. Intestate made a $100,000 advancement to Arthur. Intestate died with a distributable probate estate of $50,000. What is the proper distribution of Intestate's estate?

Arthur receives none of Intestate's estate, Brenda receives $25,000 and Charles receives $25,000. Like other inter vivos gifts, advancements are irrevocable. Thus, Arthur is under no obligation to actually return the advanced amount to Intestate's estate. Arthur is not indebted for the advanced amount. Instead, Arthur simply does not share in Intestate's estate because he has already received property in excess of the share to which he would be entitled under a hotpotch computation. Thus, Intestate's entire estate is distributed to Brenda and Charles.

3. Intestate had three children, Arthur, Brenda, and Charles. Intestate advanced two assets to Arthur, a house worth $100,000 at the time of the advancement and a car worth $30,000 at the time of the advancement. Intestate died with a distributable probate estate of $500,000. At the time of Intestate's death, the house had appreciated to $300,000 and the car had depreciated to $1,000. What is the proper distribution of Intestate's estate?

Arthur receives $80,000, Brenda receives $210,000, and Charles receives $210,000. Advancements are valued as of the date of the advancement under Estates Code § 201.151. Thus, subsequent appreciation and depreciation of advanced property is ignored when going into hotchpot. The house valued at $100,000 and the car valued at $30,000 come into hotchpot. The value of the hotchpot, that is, advancements plus Intestate's estate, is $630,000. Each of the three children is entitled to $210,000. Because Arthur already received advancements valued at $130,000, he receives only $80,000 from the estate. Brenda and Charles each receive a full $210,000 share because neither of them had received an advancement.

4. Intestate had three children, Arthur, Brenda, and Charles. Intestate made a $100,000 advancement to Arthur. Arthur died survived by his two children, Sam and Susan. Subsequently, Intestate died with a distributable probate estate of $500,000. What is the proper distribution of Intestate's estate?

Under Estates Code § 201.152, the advancement is not considered because Arthur did not survive Intestate and thus hotchpot does not occur unless Intestate specified in writing that the advancement is to be brought into hotchpot even if Intestate predeceases Arthur. Accordingly, Brenda and Charles would each receive 1/3 of Intestate's probate estate (approximately $166,666) while Sam and Susan would each receive 1/6 (approximately $83,333). The policy behind this approach is that the advancee's heirs

may not have received the advanced property or its value from the advancee's estate.

The analogous concept to advancements in a will context is called *satisfaction* and is governed by Estates Code § 255.101.

G. Equitable Conversion

If the intestate was in the midst of a real estate transaction at the time of death, it may be significant to determine whether the intestate's interest is real or personal property, especially if the intestate was married and the property is separate. Texas courts hold that equitable conversion occurs. Thus, after a contract for the purchase and sale of real property is signed but before closing, the seller is treated as owning personal property (the right to the sales proceeds) and the buyer as owing real property (the right to specifically enforce the contract). See *Parson v. Wolfe*, 676 S.W.2d 689 (Tex. App.—Amarillo 1984, no writ).

H. Ancestral Property

The common law policy of keeping real property in the blood line of the original owner lead to the development of the principle of *ancestral property*. This doctrine applied if an individual inherited real property and then died intestate without surviving descendants or first line collateral relatives. Under this doctrine, real property inherited from the intestate's paternal side of the family would pass to the paternal collateral relatives and property inherited from the maternal side would pass to the maternal collateral relatives.

Estates Code §§ 201.102 and 201.103 provide that the doctrine of ancestral property does not apply in Texas by stating that the intestate is treated as the original purchaser of all the intestate's property.

I. Liability for Debts of Predeceased Intermediary

Heirs are entitled to their full inheritances without reduction for debts owed by a predeceased intermediary. It does not matter that the predeceased intermediary owed the debt to the intestate or to third parties. In other words, a debt owed to the intestate is not charged against the intestate share of any individual except the actual debtor. If the debtor fails to survive the intestate, the debt is not taken into account in computing the intestate share of the debtor's descendants. See *Powers v. Morrison*, 30 S.W. 851 (Tex. 1895).