

# Alternatives to Regular Probate

**Dr. Gerry W. Beyer**

Governor Preston E. Smith Regents Professor of Law  
Texas Tech University School of Law



TEXAS ASSOCIATION *of* COUNTIES

March 28, 2019

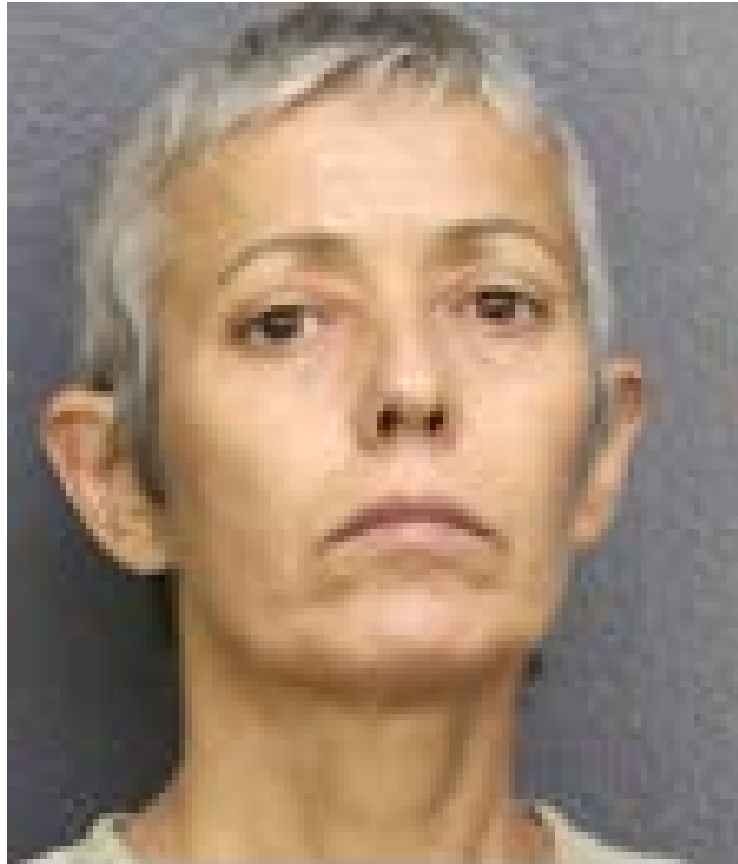
# Warren Bradway's Codicil

In the name of God, Amen  
This codicil drawn by me on 11 January  
2006 and transcribed in mine own hand  
I of sound and disposing mind and  
memory, of my own free will and volition  
devoid of any external influence that  
may be contrary to my wishes, confirm  
my Last Will & Testament bearing the date  
28 June 2001 —

Whosoever the name of Marie Albert  
Coleman appears, I direct that it  
shall be replaced with the name  
Kristen John Baylock —

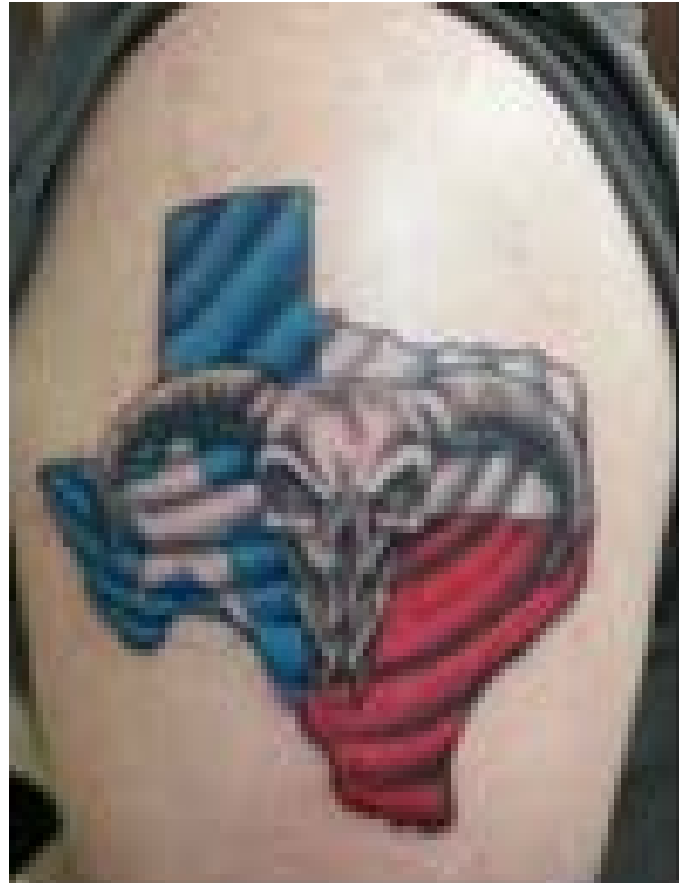
In so much that Marie Albert Cole-  
man owes to me a debt on the  
property at 1203 Pine Street, Philadelphia  
City and County, within the Commonwealth of  
Pennsylvania, I direct that it be in one  
half measure forgiven. Warren Bradway

# Tell Your Children?



**Gabriela Perero**

# Tattoos



# Estate Administration Reasons

## 1. Title Transfer

- From decedent to:
  - Heirs, if intestate
  - Beneficiaries, if testate.

## 2. Creditor Payment

- Death as the “final bankruptcy”

# Non-Probate Assets

- **Joint tenancies with survivorship rights**
  - Bank accounts
  - Real property
  - Automobiles
- **Pay-on-death designations**
  - Bank accounts
  - Retirement funds, pensions, annuities, etc.
  - Life insurance
- **Other arrangements**
  - Community property survivorship agreement
  - Inter vivos trusts
  - Transfer on death deeds

# 1. Probate Will as Muniment of Title

- Useful if will is needed only to prove title transfer.
- You will have a normal will prove up but not appoint an executor.

# 1. Probate Will as Muniment of Title

- **When used:**
  - **If probate within four years of death**
    - No unpaid creditors other than those secured by real property, or
    - For other reason you agree with the will proponent that no administration is needed.
  - **If probate after four years of death**
    - Proponent not in default in probating late.



# 1. Probate Will as Muniment of Title

- **Duty of Applicant**
  - **Unless waived, the applicant must report to the court within 180 days that he/she complied with the will provisions.**
  - **In almost all cases, the applicant will ask for this duty to be waived.**
  - **Unless you have some unusual situation, you will probably approve the waiver.**

# 1. Probate Will as Muniment of Title

- **Combine with Declaratory Judgment**
  - The applicant may combine the muniment of title application with a request for a declaratory judgment on some issue of will construction or interpretation.

## 2. Family Allowance Small Estate

- **Basic Idea**
  - **No reason to have an estate administration if no property would be left for creditors, heirs, or beneficiaries after paying the family allowance.**

## 2. Family Allowance Small Estate

- **Requirements**

- **1. Decedent is survived by at least one of the following:**
  - Spouse
  - Minor child
  - Adult incapacitated child

## 2. Family Allowance Small Estate

- **Requirements**
  - 2. Value of estate does not exceed the family allowance without counting:
    - Homestead
    - Exempt personal property

# 2. Family Allowance Small Estate

- **Requirements**
  - **3. Application which lists:**
    - Heirs
    - Assets
    - Liabilities

## 2. Family Allowance Small Estate

- **Effect**

- Court sets aside the family allowance for the appropriate claimants.
- Court orders that no administration needed as no assets for the creditors to reach.
- Within one year, an interested person may file to revoke the order if more property is found or if value was understated in the application.

### 3. Summary proceedings for certain insolvent estates

- Used when estate not large enough to pay Class 1 through 4 claims.
  - But, these classes do not reflect the same classes as when originally enacted in 1955.
  - Thus, rarely used.



## 4. Small Estate Affidavit

- **Efficient and cost-effective technique for a small intestate estate.**

# 4. Small Estate Affidavit

- **1. Decedent died intestate**
  - Cannot be used if the decedent died testate.

# 4. Small Estate Affidavit

- 2. No PR appointed or application pending
  - Thus, creditors can prevent this procedure from being used.

## 4. Small Estate Affidavit

- 3. At least 30 days have elapsed since date of the intestate's death

# 4. Small Estate Affidavit

- 4. Value of estate does not exceed \$75,000
  - Does not include:
    - Non-probate assets
    - Homestead
    - Exempt personal property

# 4. Small Estate Affidavit

- **5. Detailed affidavit**
  - **Non-exclusive list of contents:**
    - **Affirmance of the conditions to use this procedure**
    - **List of all estate assets indicating which are exempt**
    - **List of all estate liabilities**
    - **Names and addresses of all distributees**
    - **Family history to show that the listed distributees are actually the heirs**

# 4. Small Estate Affidavit

- 5. Detailed affidavit
  - Sworn to by:
    - All distributees (or guardian of minor or incapacitated heir), and
    - Two disinterested witnesses

# 4. Small Estate Affidavit

- **6. Court approves**
  - Notice not needed
  - Hearing not needed



# 4. Small Estate Affidavit

## ■ 7. Effect

### ■ Personal property

- Persons holding the intestate's personal property may deliver it to the heirs

### ■ Real property

- Homestead = affidavit effective to transfer
- Other real property = procedure ineffective to transfer title

# 5. Determination of Heirship

- **When used:**
  1. **If decedent died intestate and no administration necessary.**
  2. **As part of normal intestate administration.**

# 5. Determination of Heirship

- **Purpose**
  - **Determine the heirs and their shares by applying Texas intestacy laws.**

# 5. Determination of Heirship

- **Application**
  - **Statute sets forth the details of a detailed application which includes the family information necessary to ascertain the decedent's heirs.**
  - **Applicant must submit affidavit swearing to truth of facts stated in the application.**

# 5. Determination of Heirship

- **Notice**
  - Each heir at least **12 years old** by registered or certified mail.
  - Parent or guardian of each heir under **12**.
  - If heir or an heir's address unknown, publication in:
    - County where proceedings taking place, and
    - County where intestate lived at time of death.
  - Unless publication, posting in those counties.

# 5. Determination of Heirship

- **Protection of unknown heirs**
  - The court must appoint an attorney ad litem to represent the interests of unknown heirs.

# 5. Determination of Heirship

- Evidence
  - In court testimony
  - Affidavits and other documents
    - Should be filed for at least five years before court relies on them.

# 5. Determination of Heirship

- **Prerequisite**

- **A court cannot enter an order determining heirs unless the applicant files:**

- 1. a copy of the notice and proof of delivery sent to interested parties, and**
- 2. an affidavit of the applicant or a certificate signed by the applicant's attorney stating that notice was given, the name of each person who received the notice if not shown on the proof, and the name of each person who waived citation.**



# 5. Determination of Heirship

- **Effect**

- If court also finds no necessity for administration, heirs are now entitled to the decedent's property.

# 5. Determination of Heirship

- **Subsequent steps:**
  - Applicant will file certified copy of judgment in each county where the intestate owned real property.
  - Applicant may appeal, if necessary, as a determination of heirship is a final judgment.

# 5. Determination of Heirship

- **Omitted heirs**
  - **If not served with notice by mail or personally**
    - **Four years to seek bill of review**
    - **But, if actual fraud, no time limit**
  - **The omitted heirs are not protected from BFPs of estate property who purchase from the determined heirs.**

# 5. Determination of Heirship

- **Statute of Limitations**
  - None.

# 6. Affidavit of Heirship

- **A Texas non-judicial “custom”**
  - **Accept affidavits on public record as evidence of good title despite no court action.**
  - **Although weak procedure, title companies may accept.**
  - **Unlikely to work with personal property such as bank accounts.**
  - **Query – As of January 1, 2014, no statute of limitations for determination of heirship. Will this reduce a title company’s willingness to rely on this procedure?**

# 7. Withdrawing estate from administration

- Used by heir who wants to stop estate administration process and obtain the property.
- Heir must post bond at least double the value of estate is necessary to protect creditors.

# 8. No Administration of Community Property

- **No administration of community property is necessary if:**
  - **Deceased spouse died intestate, and**
  - **All community property will pass to the surviving spouse.**
    - **No descendants, or**
    - **All descendants of the deceased spouse are also the descendants of the surviving spouse.**

# 8. No Administration of Community Property

- **Warning: This procedure does NOT clear title to property.**
- **If surviving spouse needs to prove title (especially real property):**
  - Determination of heirship
  - Small estate affidavit (if only real property is homestead)
  - Regular administration



# 9. Unqualified Community Administration

- **“Unqualified” = surviving spouse is not court appointed**
- **When applicable:**
  - **No personal representative has qualified**
  - **Deceased spouse may be testate or intestate**

# 9. Unqualified Community Administration

- **Powers of surviving spouse**
  - Administer all community property
  - Sell community property to pay community debts
  - Collect community claims
- **BUT, no right to deal with deceased spouse's separate property.**

# 9. Unqualified Community Administration

- **When used?**
  - Not commonly used except for:
    - Collection of deceased spouse's final paycheck (including sick leave and vacation pay).
      - Deceased spouse's employer is protected even if payment wrongful.

# 10. Emergency Intervention Proceedings

- **Purposes**
  - Obtain money for funeral and burial expenses up to \$5,000.
  - Gain access to decedent's rental accommodations.

# 10. Emergency Intervention Proceedings

- Time
  - Three days after death but before 90 days after death.

# 10. Emergency Intervention Proceedings

- **Applicant**
  - Anyone who could qualify as a personal representative.

# 10. Emergency Intervention Proceedings

- **No pending administration application**

# 10. Emergency Intervention Proceedings

- If for funeral funds, money paid directly to funeral home.



# 10. Emergency Intervention Proceedings

- If for rental access, the court may order a detailed inventory of the property removed.
  - Applicant and owner/agent of rental accommodations must jointly prepare.

# 10. Emergency Intervention Proceedings

- Authority ends upon the first of
  - PR qualified, or
  - 90 days after order.

# 11. Family Settlement

- Favored by courts as better for family relations and lessens burden on court.
- Agree to:
  - Not probate the will (if there is one), and
  - How estate property is to be divided.

# 11. Family Settlement

- Normally, court approval is not needed.
- But, in some situations, court approval may be appropriate:
  - Will already probated and agreement makes a different disposition.
  - Minor, unknown, or unascertained heirs or beneficiaries.
  - Agreement modifies or terminates a testamentary trust without agreement of all trust beneficiaries.

# 11. Family Settlement

- **Filing**
  - The parties to a family settlement agreement should file it in the deed records if it impacts real property.
    - Thus, the agreement should be acknowledged to facilitate filing.

# Questions?

