Riddle & Butts, LLP

Estate Planning Handbook

A NOTE FROM THE TEAM

Introduction

Thank you for taking the time to familiarize yourself with the information in this handbook. The purpose of this handbook is to serve as a reference guide, highlighting specific issues and requirements necessary to administer an estate. We hope the information provided enhances your understanding of this process. Should you be appointed as Executor or Administrator of an estate, this handbook will assist you in serving in such capacity in a thoughtful and competent manner. If you have additional questions or concerns, your attorney and our staff are available to provide assistance.

About the Team

Michael C. Riddle began his practice of law as a gift and estate tax attorney for the Internal Revenue Service. He graduated from the University of Houston Law School in 1972 and in 1991 became Board Certified by the Texas Board of Legal Specialization in Estate Planning and Probate. He is the Managing Partner of Riddle & Butts, LLP and has been practicing law in Harris County and surrounding counties for over 40 years.

Christine Butts is a 1993 graduate of the University of Texas at Austin where she obtained her BBA in International Business. In 1996, she graduated from the University of Houston Law School. Christine is Board Certified in Probate and Estate Planning by the Texas Board of Legal Specialization. Christine served Harris County as Judge of Probate Court 4 from 2011 to 2018.

Kristi Gourley is a 1997 graduate of Texas A&M University where she obtained her BS in Biomedical Science. In 2003, she graduated from the Paul M. Hebert Law Center at LSU, where she was an editor for the Louisiana Law Review.

Kathryn Hansen is a 2015 graduate of the Texas Tech University School of Law and 2012 graduate of the University of Texas at San Antonio. In addition to being a licensed attorney, Kathryn is a Certified Public Accountant. Prior to joining Riddle & Butts in 2021, Kathryn worked in the tax department of a mid-market accounting firm in Houston where she specialized in tax planning and tax return preparation for individuals and business entities.

Kaitlyn Ready graduated from Texas A&M University in 2016 with a degree in business management. She continued her education at South Texas College of Law. Kaitlyn now handles both probate and estate planning matters.

LAYING THE GROUNDWORK

Meeting with Your Attorney

When you meet with your attorney, you will be asked about basic personal information. In addition, the attorney will ask you to discuss information about your family, assets, and estate planning goals. You should be prepared to offer the following information, as applicable to you:

- The names and birthdates of your children;
- Whether any children were born to you but adopted out of the family;
- Names of current and/or former or ex-spouses;
- Names of friends and/or family members who might be willing to serve in a fiduciary capacity on your behalf;
- The names of persons and/or charitable organizations you wish to receive part of your estate at your death;
- Detailed list of investment assets;
- Detailed list of real property;
- Detailed list of retirement accounts;
- Detailed list of life insurance policies and/or annuity contracts;
- List of interests in small businesses;
- Copies of any deferred compensation contracts;
- List of assets inherited in trust;
- Original or copy of existing Will and/or estate plan; and
- Copy of any separate property contract you may have with your spouse.

Familiarize Yourself with Vocabulary

Accounting. A document that sets out the property which came into the hands of the fiduciary, the disposition of such property, the debts or expenses that were paid, any debts or expenses remaining to be paid, and property remaining in the estate.

Agent. One who is authorized to act for or in the place of another. In developing an estate plan, you may be asked to appoint agents and alternate agents to make financial, health treatment, and placement decisions in the event of your incapacity. In addition, you may be asked to appoint an agent to make your final arrangements after your death.

Beneficiary. A person or entity that receives help or an advantage from something. If the beneficiary is named in a Will they may also be called a "devisee" or "distributee."

Executor. The personal representative of an estate appointed pursuant to the Will of a decedent. Often, an Executor in Texas serves independently and free of court supervision. Rarely, an Executor serves dependently and under court supervision. Dependent administrations are often recommended when an estate is insolvent.

Estate. The probate estate of a decedent consists of real and personal property owned by the decedent on the decedent's date of death and not passing to others via beneficiary designation, a pay on death provision, a joint tenant with right of survivorship agreement, or some other transfer related agreement.

Family Settlement Agreement. A specific type of settlement agreement, usually entered into when potential beneficiaries and other interested parties are considering contesting a Will's validity or the heirship of a decedent.

Fiduciary. Anyone who holds control or custody over the funds or property for the benefit of another person.

Fiduciary Duties. Fiduciaries owe those they serve duties of loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty of full disclosure.

Heir. A person who is entitled under the statutes of descent and distribution to a part of the estate of a decedent who dies intestate.

Heirship. Process by which the court determines who is entitled to the assets of a decedent's estate pursuant to the laws of descent and distribution when the decedent died intestate or left a Will but the Will failed to dispose of all of the decedent's property.

Interested Person. An heir, devisee, spouse, creditor, or any other person having a property right in or claim against an estate being administered.

Intestate. Used to describe a person who dies without leaving a valid Last Will and Testament.

Inventory. A list of estate assets coming into the hands of the Executor or Administrator.

Letters of Administration. A document issued by the County Clerk indicating that the person named is authorized to act as Administrator for a decedent's estate. Letters of Administration are issued when the decedent died intestate or failed to name an Executor in a Will who is willing and able to so serve.

Letters Testamentary. A document issued by the County Clerk indicating that the person named is authorized to act as Executor for a decedent's estate pursuant to a Will.

Trust. A trust is a legal arrangement whereby one person or entity manages a property interest for the benefit of another. Trusts may be revocable or irrevocable. When a trust is set out in a Will, it is a testamentary trust.

Trustor, Grantor, or Settlor. Person placing assets into a trust.

Trustee. A natural or legal person to whom property is legally committed to be administered for the benefit of a beneficiary.

Will. A legal document that, if admitted to probate, typically names beneficiaries and fiduciaries.

THE LAST WILL AND TESTAMENT

What is a Will?

A Will is a document which creates a plan for the transfer of assets to beneficiaries upon death. In addition, a Will should name persons to serve as Independent Executors and perhaps name Guardians for minor children and Trustees to manage assets for the benefit of beneficiaries. A simple will should answer the following questions:

- Who will serve as the guardian of minor children?
- Who will administer the will as Executor?
- Will the Executor serve independently of court supervision?
- To whom will the assets in the probate estate pass?
- How will the assets in the probate estate pass to the beneficiaries? In trust or outright?
- If a trust is created, who will serve as trustee?

Should a Trust be Created Under the Will?

Testamentary Trust for the Benefit of Children

It is often advisable to leave assets to beneficiaries inside of a trust. A trust created under a Will is called a Testamentary Trust. Transferring assets to beneficiaries in trust creates the following benefits for the beneficiaries:

- Enables the inheritance for minor children to be managed without court intervention;
- Protects assets from most creditors, lawsuits, and failed marriages;
- Allows the assets to be managed by an individual or institutions of your choice, thereby enhancing flexibility and minimizing cost; and
- May enable beneficiaries to receive benefit of inheritance without causing them to become disqualified from government assistance programs.

Irrevocable Trusts for the Surviving Spouse

Irrevocable trusts are often created for the benefit of the surviving spouse. When the irrevocable trust is created to escape inclusion in the surviving spouse's taxable estate, such trust is called a Bypass or Family Trust. When the irrevocable trust is created for other reasons, like to insure that the surviving spouse is cared for during her lifetime and upon her death the assets pass to the children of the first spouse to die, then such irrevocable trust is called a QTIP or Marital Trust.

What Assets are Governed by a Will?

Assets pass to beneficiaries in three primary ways: under a Will or pursuant to a Trust, via beneficiary designation (or pay on death provisions), and via joint tenancy with rights of survivorship. Life insurance, annuities, and retirement plans often pass via beneficiary designation. Checking and savings accounts may pass to a surviving spouse as a joint tenant with rights to survivorship. Because some assets may not be governed by your Will, it is important to coordinate beneficiary designations and rights of survivorship with your overall estate plan. Assets which are typically governed by a Will include real estate, brokerage accounts, bank accounts, business interests, and personal property.

Who Should Serve as Executor or Trustee?

Fiduciaries should possess the following qualities: 1) interested in the well-being of the beneficiaries; 2) consistently acts in a responsible manner; and 3) not afraid to seek professional advice. Typically, the surviving spouse serves as the initial fiduciary. Then, after the death of both spouses, children serve as fiduciaries. A corporate fiduciary is most appropriate if: 1) the beneficiaries do not get along with one another; 2) no individual meets the criteria discussed above; or 3) a beneficiary is not a United States citizen, had creditor problems, or is an individual with special needs.

ANCILLARY ESTATE PLANNING DOCUMENTS

Durable Power of Attorney

A power of attorney is a document which enables another person to serve as your agent to make financial decisions for you. Often the power of attorney will itemize specific powers being granted to the agent. The agent is usually a close family member or trusted friend and should not be an unrelated caregiver. There are three types of powers of attorney: nondurable, durable, and springing. The nondurable power of attorney is effective immediately and is terminated by the revocation, death, or incapacity of the person who executed the power of attorney, or principal. The durable power of attorney is effective immediately and remains in effect until the revocation or death of the principal. It is referred to as "durable" because it remains in effect if the principal becomes incapacitated. The springing power of attorney is not immediately effective, rather it becomes effective only in the event the principal becomes incapacitated.

Our office prepares the durable power of attorney routinely as an estate planning document, so that the person you nominate will have power to make financial decisions for you in the event you become incapacitated, obviating the need for a medical opinion with respect to your mental capacity. It is a good idea to name one agent and at least two alternates, if possible.

Medical Power of Attorney/Physician's Directive

The medical power of attorney is a legal document in which you name an agent to make health care decisions for you in the event you become incapacitated. This agent will be authorized to obtain medical records, discuss medical issues with your physicians, and make health treatment decisions on your behalf. Except to the extent you state otherwise, this document gives the person you name as your agent the authority to make any and all health care decisions for you in accordance with your wishes, including your religious and moral beliefs, when you are no longer capable of making them yourself. Because "health care" means any treatment, service, or procedures to maintain, diagnose, or treat your physical or mental condition, your agent has the power to make a broad range of health care decisions for you. Your agent may consent, refuse to consent, or withdraw consent to medical treatment and may make decisions about withdrawing or withholding life-sustaining treatment. The agent you select to make health treatment decisions should be a close family member or friend who is knowledgeable about, and may share, your system of values as those values relate to health care. It is wise to name alternate agents.

The physician's directive (or "living will") is designed to communicate your wishes to your physician as it relates to life sustaining treatments and procedures in the event you are incapacitated and have an injury or illness which is irreversible or terminal. It removes the power to make the decision to withdraw life sustaining treatments from your health care agent. You also may specify particular health treatments and procedures in the event you want those particular treatments or procedures discontinued under any circumstance.

HIPAA Authorization

The HIPAA Authorization enables the persons you designate to receive your medical information that would otherwise be protected by the Health Insurance Portability and Accountability Act.

Designation of Guardian

The Designation of Guardian in the Event of Incapacity enables you to name guardians for your person and estate and for the person and estate of your minor children in the event you become incapacitated. With a complete estate plan in place, the need for a guardianship is unlikely. However, designating guardians helps prevent guardianships instituted by persons who are not named in your estate plan.

THE REVOCABLE TRUST

What is a Revocable Trust?

A trust is a box that holds assets. A trust is created when one person (called the Trustor, Settlor, or Grantor) transfers to another person or entity (called the Trustee) a property interest to be held for the benefit of a beneficiary. If the trust is created during the Grantor's lifetime, rather than in his or her Will, it is called a living or inter-vivos trust. When the Grantor retains the right to change or dissolve the trust, it is called a revocable trust. Conversely, if the Grantor does not have the right to change or dissolve the trust, it is irrevocable. A revocable trust often becomes irrevocable when the Grantor dies.

What are the Advantages of the Revocable Trust?

Most of the advantages associated with the revocable trust involve the fact that the assets owned by the revocable trust pass to the beneficiaries without probate. If the assets are titled in the name of the revocable trust and the Grantor dies, a successor trustee simply steps in and administers the assets according to the instructions outlined in the trust agreement. In Texas, it is generally not difficult, time consuming, or expensive to probate a well drafted will. However, a revocable trust is often recommended for the person who:

- Has a degenerative illness which may lead to incapacity;
- Desires privacy in the settlement of his or her estate;
- Has real property outside the State of Texas;
- Has a complex estate plan involving business interests, a blended family, or significant estate tax exposure; or
- Anticipates the estate plan will be contested.

Some people particularly desire privacy in the settlement of their estate. They do not wish for their will and the assets governed by this will to be of public record. For example, if a person has a large estate, is leaving a bequest to a non-family member, or does not want an ex-spouse to have information regarding the administration of the estate, a revocable trust may avoid this information becoming of public record. When the centerpiece of a person's estate plan is a Will and the person dies, the Will is filed for probate and made of public record. In addition, the Executor files an Inventory of the assets of the Estate or an Affidavit in Lieu of Inventory.

How Will the Revocable Trust Help Me if I Own Property Located Out of State?

People who own real property outside the State of Texas may be able to avoid the ancillary probate of that property by placing the property into a revocable trust. Generally speaking, ancillary probate involves hiring another attorney in the jurisdiction where the real property is located. The procedure differs from state to state but usually involves filing a certified copy of the probate with a congressional certificate in the county, parish, or township where the real property is located. It may also require an oral hearing. The expense and time associated with ancillary probate varies widely from state to state.

Why are Revocable Trusts Effective in Complex Estate Planning Situations?

In general, blended families, nontraditional families, business owners, and moderately wealthy to wealthy individuals require more complex estate planning. In these situations, it is often advantageous to utilize the revocable trust to avoid unnecessary delay in the management of a person's estate. If the management and distribution of the estate is governed by a Will, it could take some time to have the Will admitted to probate, especially if the Will is challenged. Further, privacy is a critical concern for many business owners and moderately wealthy to wealthy clients. If a person anticipates a Will contest, he is better off creating and funding a revocable trust for two main reasons. First, the trust is not of public record and no person has the right to know of its contents except: the trustee, the beneficiary, the IRS, and other interested persons. Second, it is often more difficult to contest a trust as opposed to a Will, especially if the Grantor was Trustee of the trust.

What are the Possible Disadvantages of the Revocable Trust?

Perhaps the most important disadvantage of a revocable trust involves the fact it requires more time and effort from the at-

THE REVOCABLE TRUST

torney and the client to create the trust and fund the trust. In other words, after the attorney has drafted the trust and the client has signed it, the client and the attorney must work together to fund the trust. Funding is the process of placing assets in the name of the trust or dovetailing beneficiary designations with the trust. The funding of a revocable trust is often referred to as "pre-settling the estate." Often, the revocable trust is more expensive to create and fund and saves little in administration expenses after the death of the Grantor.

If I have a Revocable Trust, do I Need a Will?

Yes. A pour-over Will should accompany the revocable trust. A pour over Will enables assets which were not placed into the trust before your death, or assets received after your death, to funnel into and be administered pursuant to the terms of the revocable trust. If all your assets are owned by the revocable trust or pass to the revocable trust via a beneficiary designation or pay on death provision, then the pour-over will would not require probate. However, the pour-over Will is prepared just in case an asset escaped being placed into the trust before your death. The pour-over Will also distributes your personal property.

Once I Have a Revocable Trust, How do I Fund it?

The trust is a box and funding is the process of placing your assets into the box. When you sign your revocable trust, you will receive a funding packet that sets out a list of your assets and provides instructions regarding how to place each asset into the revocable trust. Our funding department will guide you through the funding process. Depending on the type of asset, procedures may be different for funding. For example, to place real estate into a trust, a deed must be prepared. Transferring a brokerage account or bank account into a revocable trust requires styling the account in the name of the trust. No change of ownership is necessary on life insurance, annuities, and retirement plans. Instead, the beneficiary designation should name the surviving spouse and/or revocable trust as the beneficiary, depending on a variety of factors. Be aware that the revocable trust is an alter-ego of you, it does not have a separate tax identification number, and does not require a separate income tax return so long as it remains revocable and a Grantor is Trustee.

Will the Revocable Trust Protect my Assets?

No. You may read about asset protection tools in an article entitled "Choice of Business Entity in Texas," which was published in the Houston Journal of Business and Taxation. This article is available on our website and may also be requested by you. While the Grantor is alive, the revocable trust is an alter ego of the Grantor and the assets styled in the name of the revocable trust are titled under the social security number of the Grantor. In other words, during the Grantor's lifetime, the revocable trust does not obtain a tax identification number separate and apart from the Grantor's social security number. In addition, during the Grantor's lifetime, the revocable trust is not required to file its own income tax returns; rather, the income earned by the assets owned by the revocable trust is reported on the Grantor's individual income tax return.

Will the Revocable Trust Enable my Family to More Easily Manage my Estate if I Become Incapacitated?

Probably. If you become incapacitated, the successor trustee of your revocable trust will manage the trust. You will remain the beneficiary of the trust. Since some institutions are reluctant to accept authority under a durable power of attorney, the revocable trust is often used to plan for individuals who will likely become incapacitated.

With the uptick in contested guardianships, the revocable trust is gaining popularity, as it is an estate planning tool that transcends incapacity and often enables families to avoid a costly and restrictive guardianship. If a person places assets into a revocable trust and serves as the trustee and beneficiary of such trust, then when that person subsequently becomes incapacitated, the successor trustee takes over and controls the assets governed by the revocable trust. Importantly, for a revocable trust to transcend the grantor's incapacity in such way, it must be properly funded.

IMPORTANT CONSIDERATIONS

If You Have Minor Children

Minor children should only inherit assets as a beneficiary of a trust. If a minor child inherits assets outright, a court supervised guardianship will be required or the court may encourage the creation of a special trust, called a Section 1301 Management Trust. The assets of the Section 1301 Management Trust are managed by a bank's trust department. The trustee fees and attorney fees associated with such trusts range between 1% and 2% of the value of the trust each year. When a child reaches the age of eighteen, the child may receive the trust proceeds outright. To avoid this result, you might consider creating a trust for the lifetime and benefit of minor children and name a trustee who is a trusted family member, a close friend, or a trust department. When a child reaches a certain age of your choosing, often thirty or thirty-five, the child may become trustee of his or her own trust.

Incorporating a trust for the benefit of your children into your estate plan enables the assets in the trust to be protected from the creditors and potential failed marriages of your children. In addition, a person or institution of your choosing serves as trustee to manage the assets in the trust and make distribution decisions. Finally, upon the death of a child, if they have a taxable estate, the trust created by you for their benefit escapes being included in such child's taxable estate and may pass to your grandchildren transfer tax free.

If You Have a Child with Special Needs

Planning for children who have special needs is important to preserve the child's access to government benefits including Medicaid and supplemental security income. Your will or revocable living trust should include a trust for the special needs child; and the trust should include language limiting the distributions made for the child's benefit to insure that distributions are not being made for services or treatments which would otherwise be provided by a governmental program.

If You Have a Blended Family

A blended family is a family with at least one child who is not the natural or adopted child of both parents. Under the Texas probate code, if a married parent dies intestate and leaves children who were not all born of the marriage of the deceased parent, those children of the deceased parent receive the deceased parent's one-half of the community estate, two-thirds of the deceased parent's separate personal property, and almost all of the deceased parent's separate real property. Most clients wish to opt out of the default plan provided by the State of Texas, as it can leave the surviving spouse in a financial bind. While parents in a blended family have the greatest need for estate planning, such planning is often postponed because decisions are often difficult to make. Your attorney will offer creative solutions which will enable you to balance competing interests and manage complex relationships.

If You Have a Retirement Plan

Often, a retirement plan, taking the form of an IRA or 401(k) plan, represents one of the largest assets in a person's taxable estate. Be aware that this asset passes to beneficiaries via a beneficiary designation on your death and will not be governed by your will or revocable trust unless you specifically name the revocable living trust or trust set out in your will as the beneficiary. There are important income tax advantages to naming a spouse as the primary beneficiary of a retirement plan. However, a trust should be named as the alternate beneficiary. If a trust is named as a beneficiary, care must be taken to insure that the trust is a "qualified trust'' so that the minimum required distributions from the retirement plan may be made over the life expectancy of the oldest beneficiary of such qualified trust. In some limited cases, it may be more beneficial to name individuals rather than a trust as the alternate beneficiary to the spouse. Some older plans require a

IMPORTANT CONSIDERATIONS

lump sum distribution to trusts but allow more favorable distributions to adult individuals. Never name minor children as the outright beneficiaries of a retirement plan. Please seek guidance from your attorney when preparing the beneficiary designations.

If You Have Life Insurance or Annuities

Like retirement plans, life insurance and annuities pass to beneficiaries via beneficiary designations upon your death. Consequently, if you want your will or revocable living trust to govern the distribution of such assets, the beneficiary designations will need to name the revocable living trust or trust in your will as the primary beneficiary or alternate beneficiary to your spouse. Never name minor children as the outright beneficiaries of life insurance. Please seek guidance from your attorney when preparing the beneficiary designations.

If You Have a Taxable Estate

The modern estate tax, or death tax, was enacted in 1916 and proponents of the estate tax tout the tax as an effective tool for preventing the concentration of wealth in the hands of a few powerful families. Others believe that the estate tax curbs economic growth by discouraging the accumulation of wealth.

Each citizen of the United States may give to another during their lifetime or at their death assets having a total value equal to the estate tax exemption equivalent. In addition, some gifts are considered "de minimis" in value and fall under a category of gifts that need not be reported to the IRS. Such gifts must total no more than around $15,000 per transferee each year and are considered annual exclusion gifts. Gifts are reported on a 709 Gift Tax Return. Assets belonging to a decedent on his date of death are reported on a 706 Estate Tax Return. A 706 Estate Tax Return is required to be filed when a decedent's estate is a taxable estate. Generally speaking, a taxable estate is an estate where the decedent's lifetime gifts, excluding annual exclusion gifts, along with the value of the decedent's gross estate exceeds the estate tax exemption equivalent available to the decedent's estate in the year of the decedent's death. Below is a chart depicting the estate tax exemption equivalent along with the top estate tax rate applicable for any given year.

Year	Estate Tax Exemption Equivalent	Top Estate Tax Rate
1997	600,000	55%
2002	1,000,000	50%
2010		0%
2011	5,000,000	35%
2018	1,118,000	40%
2019-2025	11,400,000	40%
2026	5,000,000	40%

If you are in a Committed Relationship

In Texas, a common law marriage exists when two people live together, hold themselves out as married, and agree to be married. If two people live together in a committed relationship yet such relationship is not recognized officially as a marriage, ambiguity in the nature of the relationship can obscure the characterization and ownership of property, the rights of each person with respect to making important health treatment decisions, and the standing of each person to advocate on behalf of the other. When a couple does not wish to marry, they may formalize the terms of their relationship using a co-habitation agreement. In addition, when a couple wishes to marry, they may clarify the ownership of and rights to property using a separate property agreement or agreement in contemplation of marriage.

HEIRSHIPS

An Introduction to Heirship

A person never dies without an estate plan. If a person fails to develop their own estate plan and dies intestate, the State of Texas has established an estate plan for them. Heirship determines who is entitled to a distribution of estate assets upon the death of an intestate decedent. Heirship proceedings enable the court to declare the heirs of a decedent who dies without leaving a Will or dies leaving a Will which fails to dispose of all of his property. The heirship also allocates the share of community property, separate real property, and separate personal property to which each heir is entitled. Though an heirship can be a stand-alone proceeding to pass title, it is most often accompanied by an administration of the estate. Generally speaking, heirship proceedings and the administration of an intestate estate can be much more time consuming and expensive than the administration of an estate pursuant to the terms of a Will.

Application to Determine Heirship

The first step in an heirship is to file an Application for Determination of Heirship. Those who may begin heirship proceedings must be an interested person and include:

- The personal representative of the decedent's estate;
- A person claiming to be a creditor or the owner of a portion of the decedent's estate;
- A person representing a person claiming ownership of a portion of the decedent's estate as guardian or next friend;
- The guardian of an estate for a decedent who was a ward;
- A party seeking the appointment of an independent administrator; or
- The Trustee of a trust holding assets for the benefit of a decedent.

An Application to Determine Heirship must include the decedent's name, along with the date and place of decedent's death. In addition, the Application must state the names and addresses of all heirs, as well as each heir's relationship to the decedent and their interest in the estate. The Application must also delineate whether the decedent died testate, and if so, the disposition of the estate. Finally, the Application will include a general description of all property belonging to the estate or held in a trust, if applicable. Included with the Application must be a verification, signed by the applicant and notarized, stating that all information in the Application is true and correct and nothing has been omitted.

Attorney Ad Litem

With the Application for Determination of Heirship, the applicant should file a Motion for the Appointment of Attorney Ad Litem. The court requires this Motion to appoint an attorney to represent the interests of any heirs whose names and/or locations may be unknown. The court may also utilize such attorney to represent the interests of any incapacitated heirs of an estate.

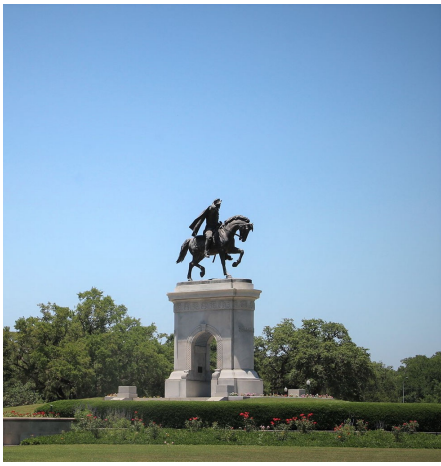
Service of Citation and Publication

After filing the Application, all known heirs must be served with citation through the clerk's office by certified mail. Each heir must be served individually if they are 12 years of age or older. If an heir is younger than 12 years of age, the applicant may serve a parent or guardian of the child. If any heirs choose to waive service of citation, they may do so by filing a waiver with the clerk's office and service will not be required.

Service by publication is required by law in an heirship so that any unknown heirs may be made aware of the proceedings. The applicant will publish a notice in a local newspaper or other publication in the county in which the proceedings are being held, and also the county in which the decedent last resided, if different.

Affidavit of Service and Citation

After each heir has been served or has filed a Waiver of Service of Citation, the applicant will file an Affidavit of Service



of Citation with the clerk. Such Affidavit will state that the citation was served, the name of each person who was served, and the name of each person who has waived service.

The Affidavit will also include copies of all citations that were served and proof of delivery of service. This Affidavit is very important because the court cannot enter a Judgment Declaring Heirship until the Affidavit is filed.

The Attorney Ad Litem

The court shall appoint an Attorney Ad Litem in a proceeding to declare heirship to represent the interests of heirs whose names or locations are unknown. The court may expand the appointment of the Attorney Ad Litem to include representation of an incapacitated heir on a finding that the appointment is necessary to protect the interests of the heir. Proceedings to declare heirships most commonly result when a decedent dies intestate, but heirships may be also be used when a will fails to dispose of all property of the decedent or when a Trustee of a trust must determine the heirs of a deceased beneficiary. Though the attorney ad litem in an heirship represents unknown heirs and seemingly reports only to the court and his own conscience, he must represent such clients with tenacity and good judgment.

The Hearing

After the above-listed documents have been accepted by the court, a hearing will be set for the court to determine heirship. For expediency, the court will often combine the heirship hearing with the hearing on the administration of the estate.

For the hearing, the Attorney Ad Litem will contact at least two disinterested witnesses, whose contact information your attorney provides to the Attorney Ad Litem. The witnesses must have personal knowledge of the heirs and family history of the decedent. The applicant's attorney and the Attorney Ad Litem will question the witnesses at the hearing. After the testimony is complete, and provided the judge has the evidence to support a determination of heirship, the judge will enter a Judgment Declaring Heirship and discharge the Attorney Ad Litem. The applicant should be prepared to pay the Attorney Ad Litem his fees on the date of the hearing. Typical fees range between $500 and $1000.

Intestate Distribution in Texas—Special Rules

Intestate distribution plans are set out graphically in pages 12 and 13 herein. Set out below are special rules to keep in mind when determining the distribution plan of an intestate decedent.

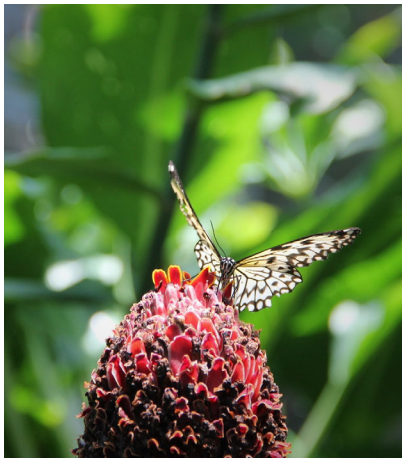
Distribution When Child Predeceases Parent

In Texas, if some of the children predecease the intestate decedent and at least one child survives the intestate decedent, then each descendant of a child who predeceases the intestate decedent is entitled to a distribution of the intestate decedent's estate. Each such descendant shares in only that portion of the property to which the parent through whom the descendant inherits would be entitled if that parent had survived the decedent. If all of an intestate decedent's children predecease him, then the grandchildren of such decedent take equal shares.

Who is a Child under Texas Law?

In Texas, for purposes of inheritance, a child is the child of a biological father if: 1) the child is born under circumstances which create a presumption of paternity; 2) the child is adjudicated to be the child of the father by court decree; 3) the child was adopted by the child's father; or 4) the father executed an acknowledgment of paternity. A child described above may inherit from and through his or her paternal kindred. Even if a child does not meet the criteria described above, he or she may petition the probate court for a determination of inheritance rights from a decedent.

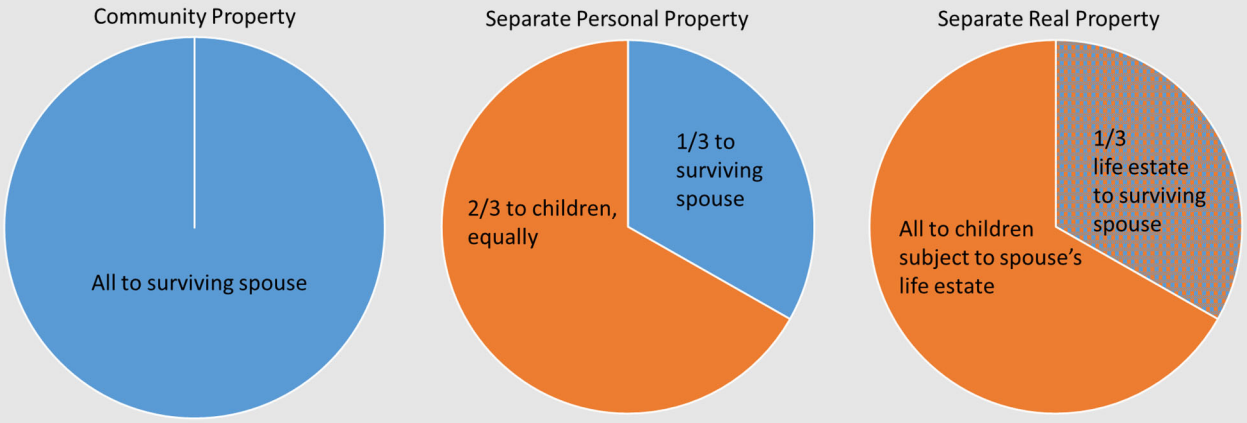
In addition, Texas has long recognized the doctrine of adoption by estoppel. Modern Texas courts have held that a child's knowing reliance on an agreement to adopt is unnecessary as the child's belief in his or her status as a "child" is enough to support a claim of adoption by estoppel.



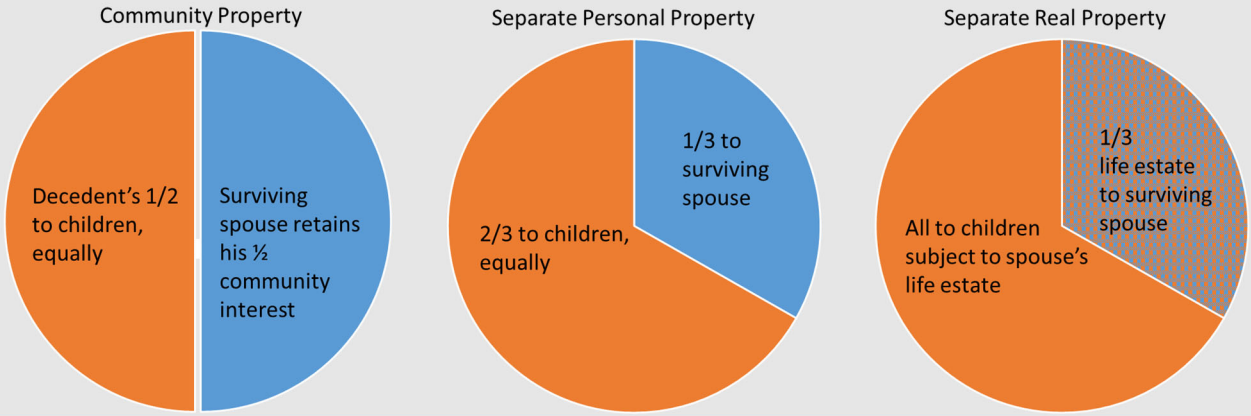
INTESTATE DISTRIBUTION

Descent and Distribution for Texas Domiciliary Dying Without Leaving a Will

Married Decedent with all Children Born or Adopted by Decedent and Decedent's Spouse

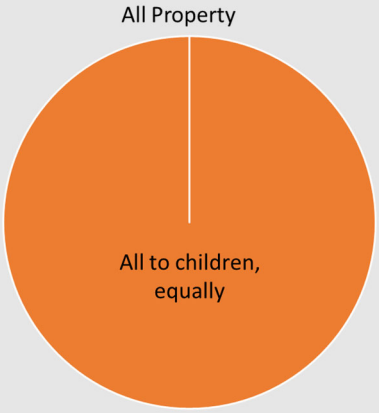


Married Decedent with at Least One Child Born or Adopted by Decedent and Person Other Than Decedent's Spouse



Married Decedent without Surviving Descendants, Parents, Siblings, or Descendants of Siblings

Unmarried Decedent with Surviving Descendants

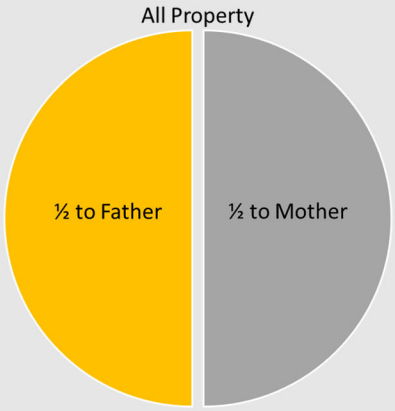


INTESTATE DISTRIBUTION

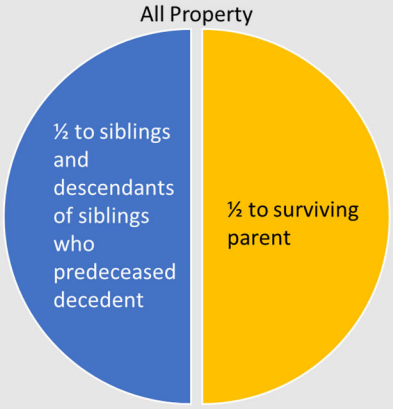
Descent and Distribution for Texas Domiciliary Dying Without Leaving a Will

Unmarried Decedent without Descendants

Both Parents Surviving



One Parent Surviving



Only Siblings Surviving

Married Decedent without Descendants

Separate Real Property

Both Parents Surviving

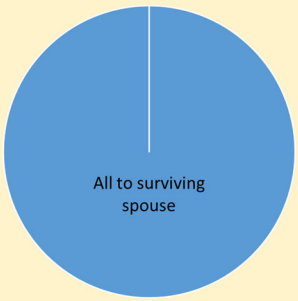
One Parent Surviving and No Siblings

One Parent Surviving

No Surviving Parent

All Other Property

No Surviving Parent and No Siblings



The descendants of a child or sibling who predeceases the decedent share in the portion that would have passed to such predeceased child or sibling had the child or sibling survived the decedent. In addition, in the event a whole blood and a half blood sibling are heirs of a decedent, each half blood sibling receives a portion equal to one-half of the share reserved for each whole blood sibling.

SERVING AS A FIDUCIARY

What is a Fiduciary?

When preparing your estate plan, you will be asked to consider persons to serve in many different fiduciary capacities. A fiduciary is a person or institution that has a confidential, legal, or ethical relationship with a person or a group. As a result of such relationship, the fiduciary must act in the best interests of the person or group to whom he owes a fiduciary duty. When a person or institution assumes the role of Executor, Administrator, Trustee, Guardian, or agent under a power of attorney, they are entrusted with the care of money or property and owe a host of duties to the beneficiaries on whose behalf they serve.

What are Fiduciary Duties?

A fiduciary duty is an obligation to act in the best interests of another party. A fiduciary is held to high standards of loyalty, care, honesty, and full disclosure.

Duty of Loyalty

It is the duty of the fiduciary to administer the estate solely in the best interests of the beneficiaries. The fiduciary must minimize or avoid conflicts of interest and hold the interests of the beneficiaries above his own.

Duty not to Delegate

The fiduciary is under an obligation to personally administer the estate and is under a duty not to delegate to others acts that the fiduciary should personally perform, like engaging attorneys and other professionals, opening a bank account, collecting assets, overseeing the management of investments, and approving or rejecting claims.

Duty to Keep and Render Accounts

A fiduciary is under a duty to the beneficiaries to keep full and accurate accounts; and a beneficiary has the right to demand accountings as set out in the Estates Code or under the decedent's Will.

Duty to Furnish Information

A fiduciary is under a common law duty to the beneficiaries at reasonable times to give complete and accurate information regarding the estate.

Duty to Exercise Reasonable Care and Skill

A fiduciary is under a duty in administering an estate to exercise the same care and skill as a man of ordinary prudence would use in dealing with his own property.

Duty to Take and Retain Control of Estate Property

A fiduciary must use the same care and skill that a person of ordinary prudence would use to preserve estate property.

Duty to Enforce Claims

A fiduciary is under a duty to take reasonable actions to collect claims that are due to the estate.

Duty to Defend

The fiduciary is under a duty to do what is reasonable, under the circumstances, to defend actions by third parties against the estate.

Duty to Avoid Co-Mingling of Funds

The fiduciary has a duty to keep estate property separate from other property, and to properly designate it as estate property. Not only is it the fiduciary's duty to keep the estate property separate from the fiduciary's own property, but also to keep that property separate from other estates or trusts the fiduciary may administer.

Duty with Respect to Investments

Because a personal representative's primary responsibility is to collect estate assets, pay creditors, and distribute the estate, the personal representative will not typically actively manage investments. The personal representative cannot ignore the investments, however, as he or she does have the duty to preserve estate property. If the assets of the estate require active management in such case, the personal representative should oversee the management required in a prudent manner.

SERVING AS A FIDUCIARY

Duty to Treat Beneficiaries Impartially

When there are multiple beneficiaries of an estate, it is the duty of the fiduciary to deal impartially among the beneficiaries. A fiduciary may face tax elections and other situations that will require careful attention to impartiality.

Duty with Respect to Co-Fiduciaries

Unless the Will provides otherwise, all fiduciaries are under a duty to participate in the estate administration. Therefore, a fiduciary cannot properly delegate the acts required of the fiduciary to co-fiduciaries. It is also the duty of a fiduciary to use reasonable care to prevent other fiduciaries from committing a breach of trust. Pursuant to Texas law, any Executor or Administrator can act alone to bind the estate, except that all Executors must execute any conveyance of real estate. Nonetheless, Co-Executors and Co-Administrators should act in concert whenever possible.

When Should an Accounting be Filed?

In dependent administrations, Annual Accountings must be filed; and when the administration is to be closed, a Final Accounting must be filed with the court. In addition, in an independent administration, any person interested in an estate may demand an accounting from the personal representative after the expiration of 15 months from the issuance of Letters Testamentary or Letters of Independent Administration. Finally, once an estate has been fully administered, taxes have been paid, and the distributees of the estate are in receipt of estate assets, a personal representative serving independently may seek a judicial discharge via a declaratory judgment and pay from estate assets legal fees, expenses, and other costs incurred in relation to such declaratory judgment. Often, the court will require a full accounting of the estate to be filed before granting a judicial discharge.

Remedies for Breach of Fiduciary Duties

When breach of trust arises, the beneficiaries may pursue measures to remedy the breach. Such remedies may include removal without notice, removal with notice, and requiring the fiduciary to be bonded. When a serious breach occurs and the interests of the beneficiaries are damaged, the successor fiduciary or the beneficiaries may seek to be made whole by suing on the fiduciary's bond, if the fiduciary is bonded, or by seeking recovery from the fiduciary directly.

Under What Circumstances Can an Executor or Administrator be Removed?

An Executor or Administrator may be removed by the probate court when:

- The Executor or Administrator cannot be served with notice because their whereabouts are unknown, they are eluding service, or they are a non-resident without a designated resident agent;
- It appears to the court that sufficient grounds exist to believe the Executor or Administrator has or is about to misapply or embezzle all or part of estate property; or
- The Executor or Administrator:
  - fails to qualify in the time required by law;
  - fails to file an Inventory or Affidavit in Lieu of Inventory within 90 days of qualification, unless extended by court order;
  - fails to file an Accounting if required by law;
  - fails to file an Affidavit of Notice within 90 days of the Order Admitting Will to Probate stating that the required notice to the beneficiaries has been made;
  - is proven guilty of gross misconduct or gross mismanagement in the performance of his duties;
  - becomes incapacitated or is sentenced to a penitentiary; or
  - becomes incapable of properly performing his duties due to a material conflict of interest.

Special thanks to Laurel Smith, Abigail Butts, and staff members from Harris County Probate Court Four for your hard work and research which made this publication possible.

INFORMATION AND CONTACTS

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Houston, Texas 77002

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Fax: 832-927-1400

Probate Court No. 2
Honorable Michael Newman
Office: 832-927-1402
Fax: 832-927-1432

Probate Court No. 3
Honorable Jason Cox
Office: 832-927-1403
Fax: 832-927-0010

Probate Court No. 4
Honorable James Horwitz
Office: 832-927-1404
Fax: 832-927-1499

Harris County Clerk's Office
Probate Department
P.O. Box 1525
Houston, Texas 77251-1525
(713) 274-8585
http://www.cclerk.hctx.net

Physical Address
Harris County Civil Courthouse
201 Caroline, 8th Fl./Probate Dept.
Houston, Texas 77002

Judicial Branch Certification Commission
205 W. 14th, Ste. 600
Austin, TX 78701
(512) 475-4368
Oversees the certification, registration, and licensing of guardians, court reporters, court reporter firms, process servers, and licensed court interpreters.

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(866) 362-2851 (Video Phone)

Information on regional offices available at www.dfps.state.tx.us/

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IMPORTANT INFORMATION TO REMEMBER

NAME AND ADDRESS OF ATTORNEY: _____

NAME AND ADDRESS OF CPA: _____

NAME AND ADDRESS OF FINANCIAL ADVISOR: _____

NAME AND ADDRESS OF INSURANCE ADVISOR: _____

PREPLANNED BURIAL/CREMATION CONTACT: _____

NAME AND ADDRESS OF FAMILY PHYSICIAN: _____

OTHER: _____