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**TEXAS HOMESTEAD AND PROBATE LAW**

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**INSTITUTE FOR ENERGY LAW  
Texas Mineral Title Course  
May 2-3, 2013  
Houston, Texas**

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## TEXAS HOMESTEAD LAW

The importance of the law of homestead cannot be overstated in the state of Texas when it comes to conducting a title examination or in determining whether an oil and gas lease is valid. Practitioners sometimes mistakenly assume that since a landowner may own his or her property as separate property that the joinder of the other spouse is not needed in the applicable instrument (e.g. oil and gas lease). As shown below, this is simply not true.

### **I. Introduction**

This paper is intended to provide the reader with a general understanding of Texas homestead law and is not intended to cover all of this topic's nuances.<sup>1</sup> This paper will focus on the purpose of the homestead, the possessors of a homestead, the effect of marriage, reservation of a homestead, mineral interests in a homestead, homestead termination, and unique homestead issues that can arise in the oil and gas context. This paper will also cover some aspects of probate law including testate succession, intestate succession, and other related issues.<sup>2</sup> This paper is intended to give the reader a broad overview of these areas as well as some of the issues that a title examiner may consider in the oil and gas context.

### **II. The Homestead Exemption**

The Texas Constitution permits a person to establish a "homestead" whereby certain real property is exempted from forced sale by general creditors. Texas Law essentially recognizes two types homestead exemptions, urban and rural. The claimant must have a possessory right in the property. If all the claimant has is a future interest without any present possessory interest, the property may not be claimed as a homestead.<sup>3</sup>

Historically, the purpose of the homestead exemption is to preserve the family, provide the debtor with a home and means to support his or her family and prevent the family from becoming a public burden.<sup>4</sup>

No particular form or legal document is required to establish homestead rights. Generally, a homestead can be created by (i) overt acts of usage; (ii) with an intent to claim the real property as a permanent residence.<sup>5</sup>

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<sup>1</sup> Steven C. Haley's paper entitled "Texas Homestead Law," presented to the State Bar of Texas, August 2005, [hereinafter HALEY] provides a comprehensive, well-written discussion of all aspects of homestead rights in Texas. The author has relied heavily on this paper.

<sup>2</sup> Substantial portions of the Probate Section of this paper were written by Rachael H. Hopson with the Kilburn Law Firm. The author acknowledges Ms. Hopson's significant contribution.

<sup>3</sup> *Laster v. First Huntsville Properties*, 826 S.W.2d 125, 130 (Tex. 1991).

<sup>4</sup> ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 26.2 (1993 & Gerry W. Beyer, Supp. 2002). [hereinafter LEOPOLD].

<sup>5</sup> *Sanchez v. Telles*, 960 S.W.2d 762, 770 (Tex.App.—El Paso 1997, writ denied).

In order to claim a homestead, the party must have the right of possession in the property.<sup>6</sup> There is no requirement that the property be occupied by the party claiming the homestead right.<sup>7</sup>

#### **A. The Texas Constitution**

The homestead exemption originates from the Texas Constitution. Article 16, Section 51 of the Texas Constitution<sup>8</sup> provides:

The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided, that the homestead in a city, town or village shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business, of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired; provided further that a release or refinance of an existing lien against a homestead as to a part of the homestead does not create an additional burden on the part of the homestead property that is unreleased or subject to the refinance, and a new lien is not invalid only for that reason.

The limits of the homestead exemption are expressed in acres of land. Under the language quoted above, urban homesteads are limited to 10 acres and rural homesteads are limited to 200 acres. The Property Code, however, provides that a single adult is limited to 100 acres although a family may have a rural homestead of up to 200 acres.<sup>9</sup>

#### **B. Rural Homestead**

The rural homestead is limited to 200 acres that are not in a city, town, or village used for the purposes of a home together with improvements.<sup>10</sup> It is important to note that a person may only claim a single homestead, and thus cannot claim both a rural and an urban homestead.<sup>11</sup> In

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<sup>6</sup> *Laster v. First Huntsville Properties*, 826 S.W.2d 125, 130 (Tex. 1991).

<sup>7</sup> *Clark v. Salinas*, 626 S.W.2d 118, 120 (Tex.Civ.App.—Corpus Christi, 1981), *aff'd*, 628 S.W.2d 51 (Tex. 1982).

<sup>8</sup> TEX. CONST. art. XVI, § 51; *see also* TEX. PROP. CODE § 41.001 (homestead exempt from seizure for claims of creditors); TEX. PROP. CODE § 41.002 (definition of homestead).

<sup>9</sup> PROP. CODE § 41.002(b).

<sup>10</sup> TEX. CONST. art. XVI § 50, 51.

<sup>11</sup> *In re Grisham*, 230 B.R. 529, 531 (Bankr. N.D. Tex. 1998).



order to establish a rural homestead, a person must both reside on the property, and use all the remaining property to support his family.<sup>12</sup>

### **C. Urban Homestead**

The urban homestead exemption entitles a family or single adult to an exemption for one or more contiguous lots amounting to not more than 10 acres in a city, town, or village and used for the purposes of a home or both as an urban home and a place to exercise a business or calling of the claimant, together with improvements.<sup>13</sup>

In particular, the Property Code states:

If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.<sup>14</sup>

The Property Code defines a homestead to be urban if, at the time the designation is made, the property is:

- (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
- (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:
  - (a) electric;
  - (b) natural gas;
  - (c) sewer;
  - (d) storm sewer; and
  - (E) water.<sup>15</sup>

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<sup>12</sup> See *NCNB Texas Nat'l Bank v. Carpenter*, 849 S.W.2d 875, 879 (Tex. App.—Fort Worth 1993, no writ).

<sup>13</sup> TEX. CONST. art XVI, § 51, as amended in 1999; TEX. PROP. CODE § 41.002(a).

<sup>14</sup> TEX. PROP. CODE § 41.002(a).

<sup>15</sup> TEX. PROP. CODE § 41.002(c).

### **III. Claims Enforceable Against the Homestead**

Lien claims against the homestead are void<sup>16</sup> and the homestead may not be subjected to forced sale for the payment of debts except for:

1. purchase money liens (including owelty liens);
2. liens (mechanics and materialman liens) for improvements;
3. liens for ad valorem or federal taxes;
4. home equity liens;
5. reverse mortgages;
6. liens predating the establishment of the homestead; and
7. conversion or refinance of a lien secured by a manufactured home attached to the homestead.

### **IV. The Possessor of the Homestead**

#### **A. The “Family Homestead”**

##### **1. Definition of “Family”**

Based on the jurisprudence, “family” is a term of art in Texas.<sup>17</sup> The Texas Constitution does not define “family.”<sup>18</sup> Likewise, the definition of homestead contained in the Property Code does not define “family.” Texas courts have recognized that “family” is a status not a contract. Texas courts have established that a family consists of:

- a) a group of people having the social status of a family living subject to one domestic government;
- b) the head of the family must be legally or morally obligated to support at least one other family member; and
- c) there must be a corresponding dependence by the other family member for this support.<sup>19</sup>

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<sup>16</sup> *Laster v. First Huntsville Properties*, 826 S.W.2d 125, 129 (Tex. 1991).

<sup>17</sup> *Border v. McDaniel*, 70 F.3d 841, 844 (5th Cir. 1995); *Matter of Hill*, 972 F.2d 116, 120 (5th Cir. 1992).

<sup>18</sup> *Id.* at 119.

<sup>19</sup> *Duran v. Henderson*, 71 S.W.3d 833, 841 (Tex. App.—Texarkana 2002, pet. denied); *NCNB Texas Nat’l Bank v. Carpenter*, 849 S.W.2d 875, 879 (Tex. App. —Fort Worth 1993, no writ); *Matter of Hill*, 972 F.2d 116, 119 (5th Cir. 1992); *PaineWebber, Inc. v. Murray*, 260 B.R. 815, 823 (E.D. Tex. 2001); *In re Preston*, 233 B.R. 375, 377 (Bankr. E.D. Tex. 1999). See also HALEY.

## 2. Social Status of Family

Based on Texas case law, a family homestead can be established by the following social relationships:

- (1) Husband and wife<sup>20</sup>
- (2) Single grandparent, grandparent's adult married child, and minor grandchild (when child separated and living apart from spouse)
- (3) Adult child and parent
- (4) Brother and sister
- (5) Divorced parent and minor child (even if parent does not have custody)
- (6) Grandparents and grandchildren<sup>21</sup>
- (7) A widower with no dependent children.<sup>22</sup>

## 3. Duty to Support

Courts have also stated that in order to establish a domestic unit as a family, the head of the family must be legally or morally obligated to support at least one other family member.<sup>23</sup>

## 4. State of Dependence

In order to support a finding of a family, one family member must be dependent upon another. For a dependent minor or elderly infirm person, the type of support may be either emotional or financial.<sup>24</sup> However, the need for support must be financial for a dependent

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<sup>20</sup> *PaineWebber, Inc. v. Murray*, 260 B.R. 815, 823 (E.D. Tex. 2001) (husband and wife the traditional type of family for homestead purposes).

<sup>21</sup> See *HALEY* and cases cited therein; *Laster v. First Huntsville Properties*, 826 S.W.2d 125, 131 n.4 (Tex. 1991); *Duran v. Henderson*, 71 S.W.3d 833, 841 (Tex. App.—Texarkana 2002, pet. denied); *Patterson v. First Nat'l Bank of Lake Jackson*, 921 S.W.2d 240, 246 (Tex. App.—Houston [1st Dist.] 1995, no writ); *NCNB Texas Nat'l Bank v. Carpenter*, 849 S.W.2d 875, 879–80 (Tex. App.—Fort Worth 1993, no writ); *Matter of Hill*, 972 F.2d 116, 119–20 (5th Cir. 1992).

<sup>22</sup> *Border v. McDaniel*, 70 F.3d 841, 844 (5th Cir. 1995).

<sup>23</sup> *NCNB Texas Nat'l Bank v. Carpenter*, 849 S.W.2d 875, 879 (Tex. App.—Fort Worth 1993, no writ); *Matter of Hill*, 972 F.2d 116, 121 (5th Cir. 1992); *PaineWebber, Inc. v. Murray*, 260 B.R. 815, 823 (E.D. Tex. 2001).

<sup>24</sup> *Matter of Hill*, 972 F.2d 116, 121 (5th Cir. 1992); *PaineWebber, Inc. v. Murray*, 260 B.R. 815, 827 (E.D. Tex. 2001).

adult.<sup>25</sup> The test of financial dependency is whether, but for the head of the family's support, the dependent's financial position would be altered.<sup>26</sup> Financial dependence need not be absolute.<sup>27</sup>

## 5. "Family" Status Affected by Death/Divorce/Marriage

Only one homestead can be claimed by a family.<sup>28</sup> Members of a family cannot have a separate homestead apart from the family homestead.<sup>29</sup> For instance, a wife cannot have one homestead and the husband another.<sup>30</sup>

### B. The "Single Adult" Homestead

A single adult homestead was established in 1973 by the Texas Constitution.<sup>31</sup> The single adult homestead is limited to 10 acres for an urban homestead or 100 acres for a rural homestead.<sup>32</sup> When claiming the adult homestead the claimant must be single at the time. If the adult is separated but not divorced at the time, he or she will not qualify for a single adult homestead.<sup>33</sup> For example, if a husband and wife separate and the husband acquires and occupies property with another woman, the single adult homestead cannot be claimed because the husband is legally married and the family homestead cannot be claimed on the new property because it is not the family home.<sup>34</sup>

Once an adult is divorced (and has children) he or she may maintain a family homestead, rather than a single adult homestead, if the requisites of support and dependence, are present. For example, Texas courts have recognized that a divorced father of three sons may maintain a family homestead if he provides support for (or perhaps merely has an obligation to support) his children as the head of household and the children in turn depend on their father for support.<sup>35</sup> Furthermore, if both father and mother provide support for their children in a joint custody scenario, both may claim a family homestead.<sup>36</sup> In addition, as shown below, a widowed adult has continuing rights in the family homestead through the survivor's homestead right.

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<sup>25</sup> *Matter of Hill*, 972 F.2d 116, 121–122 (5th Cir. 1992); *PaineWebber, Inc. v. Murray*, 260 B.R. 815, 827 (E.D. Tex. 2001).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Matter of Clafflin*, 71 F.2d 1088, 1090 (5th Cir. 1985); *PaineWebber, Inc. v. Murray*, 260 B.R. 815, 825 (E.D. Tex. 2001); *In re Dawson*, 266 B.R. 355, 358 (Bankr. N.D. Tex. 2001); *In re Brown*, 191 B.R. 99, 101 (Bankr. N.D. Tex. 1995).

<sup>29</sup> *Id.*

<sup>30</sup> *In re Dawson*, 266 B.R. 355, 358 (Bankr. N.D. Tex. 2001)

<sup>31</sup> TEX. CONST. art. XVI, § 50.

<sup>32</sup> PROP. CODE § 42.001(a)–(b) (but note that TEX. CONST. art. XVI, § 51 provides for 200 acres for all rural homesteads).

<sup>33</sup> See *Tremaine v. Showalter*, 613 S.W.2d 35 (Tex. Civ. App.—Corpus Christi 1981, no writ).

<sup>34</sup> LEOPOLD at § 24.13.

<sup>35</sup> *Woods v. Alvarado State Bank*, 19 S.W. 35 (Tex. 1929).

<sup>36</sup> *Reynaldo v. Bank of San Antonio*, 630 S.W.2d 638, 639–40 (Tex. 1982).

### C. Surviving Spouse

The Probate Code provides that the homestead property shall “descend and vest in like manner as other real property of the deceased” upon the death of either the husband or wife (or both).<sup>37</sup> However, the Probate Code provides the surviving spouse is entitled to retain a survivor’s homestead right for life or for so long as the survivor elects to use the homestead.<sup>38</sup> So long as the surviving spouse chooses to use and occupy the homestead, this right protects the homestead against forced sale and partition.<sup>39</sup>

The laws of testamentary disposition are subject to the survivor’s homestead right.<sup>40</sup> Therefore, the survivor’s homestead right may not be defeated by either spouse through the devise of the homestead in either party’s will.

Likewise, a second wife and the children of such a second marriage have a right to a homestead interest in the estate of the husband and father on his death.<sup>41</sup> In the event the land constituting the homestead has not been partitioned, the wife of the second marriage has a right to occupy the entire tract along with the children of the first marriage.<sup>42</sup>

### D. Surviving Minor Children

The homestead property will pass according to descent and distribution or under the deceased parent’s will upon the death of both parents. However, the surviving minor children are entitled to a constitutional survivor’s homestead.<sup>43</sup> In asserting the surviving minor children’s homestead entitlement, there is no requirement that the minor children resided with the deceased parent(s) prior to the parent’s death.<sup>44</sup> The homestead right of surviving minor children is protected against forced sale as well as partition among heirs and beneficiaries under a will.<sup>45</sup>

Furthermore, parents cannot, through a testamentary devise of the homestead property, defeat the homestead rights of their minor children. However, the parents can convey or encumber the homestead property while they are alive.<sup>46</sup>

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<sup>37</sup> TEX. PROB. CODE §283.

<sup>38</sup> *Id.*

<sup>39</sup> TEX. PROB. CODE §284.

<sup>40</sup> *White v. Sparks*, 118 S.W.2d 649 (Tex. Civ. App.—Dallas 1938, writ dismissed).

<sup>41</sup> *Clements v. Maury*, 50 Tex.Civ.App. 158, 110 S.W. 185 (1908, writ refused). See *Burk Royalty Co. v. Riley*, 475 S.W.2d 566, 568 (Tex. 1972). (Court held wife was not entitled to homestead exemption where wife remarried following divorce, in absence of evidence that property was homestead of new family.)

<sup>42</sup> *Cox v. Oliver*, 43 Tex.Civ.App. 110, 95 S.W. 596 (1906, no writ). (Court held where the homestead, on the death of a first wife descended to the extent of 1/2 in her children, a surviving second wife of the husband, on his death, had a right of homestead in the remaining 1/2 so long as she might elect to use and occupy it as such.)

<sup>43</sup> TEX. CONST. art. XVI, § 52.

<sup>44</sup> *National Union First Ins. Co. v. Olson*, 920 S.W.2d 458, 462 (Tex. App.—Austin 1996, no writ).

<sup>45</sup> TEX. PROB. CODE § 284.

<sup>46</sup> *Hall v. Fields*, 17 S.W. 82 (Tex. 1891).

### **E. Unmarried Adult Children Remaining With the Family**

The homestead may be set aside and delivered only to the surviving spouse or minor children. Prior to 2005, sections 271 and 272 of the Probate Code, the homestead could arguably be set aside for unmarried children remaining with the family of the decedent.

## **V. Homestead Rights in the Oil & Gas Context**

### **A. Mineral Property**

When a homestead claimant owns the surface of land, the homestead exemption may extend to the unsevered minerals under that land even if the homestead claimant has executed an oil and gas lease of the mineral estate.<sup>47</sup> The owner's occupation of the surface of the property is sufficient to continue to impress the leased mineral estate with the homestead exemption.<sup>48</sup> However, a debtor may not claim a homestead exemption underlying land he does not own for a severed mineral interest<sup>49</sup> even though the income from the severed mineral estate may be used as support for the family.<sup>50</sup>

### **B. Open Mine Doctrine**

The general rule is that a life tenant is entitled to nothing but interest on mineral royalties and bonuses. However, the open mine doctrine is an exception.<sup>51</sup> Under the open mine doctrine, a homestead claimant is entitled to receive oil and gas royalties from the homestead. This doctrine only applies where the homestead property was producing oil or gas when the claimant's right on the property came into existence.<sup>52</sup>

## **VI. Constitutional and Historical Basis for Mineral Rights Being Included in Homestead**

It appears that the first time a court considered whether oil and gas rights were part of a homestead right was in *Southern Oil Co. v. Colquitt*.<sup>53</sup> The sole question in the case was whether

the husband could make a contract conveying all the oil, gas, coal, and other minerals under the homestead of himself and his wife, with the right to the purchaser at all times to enter upon the homestead tract for the purpose of drilling for oil, gas, coal, and

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<sup>47</sup> *In re Poer*, 76 B.R. 98, 99 (Bankr. N.D. Tex. 1987); *In re Eskew*, 233 B.R. 708, 710–11 (Bankr. W.D. Tex. 1998) citing *Evans v. Miller*, 67 F.2d 840 (5th Cir. 1933).

<sup>48</sup> *In re Eskew*, 233 B.R. 708, 710–11 (Bankr. W.D. Tex. 1998) citing *Evans v. Miller*, 67 F.2d 840 (5th Cir. 1933).

<sup>49</sup> *Id.* at 100.

<sup>50</sup> *Id.*

<sup>51</sup> *Riley v. Riley*, 972 S.W.2d 149, 155 (Tex. App.—Texarkana 1998, no pet.) (widow claimed homestead in deceased husband's separate property that was producing royalties at time of death. Court held widow's homestead covered royalties.)

<sup>52</sup> *Id.*

<sup>53</sup> 69 S.W. 169 (Tex. Civ. App.—1902, writ refused). (Before June 1927, writ refused meant the same as n.r.e.)

other minerals, and to conduct all other operations, and lay all pipes necessary for the production and transportation of all the oil produced and saved from said premises, reserving to himself one-tenth of the oil so produced and saved, without his wife's having joined in such conveyance in the manner and form required by the statute for the sale of the homestead?"

The court said:

It would seem that the drilling of oil wells on said homestead, and the laying of pipes necessary for the production and transportation of oil, would necessarily interfere with and impair the value and use of the land as a homestead. [A contract clause] indicates that the association would have the right to construct machinery for the boring and digging of wells, and the right to erect derricks, build tanks, and place boilers, engines, and machinery for the operation of the same. Such a lease and contract, in our opinion, would substantially interfere with the enjoyment by the wife of the homestead. It, in fact, would destroy the homestead use of the property, or to at least a portion of the same. The contract does not limit the amount of land the company may take for the above purpose. If the contract be considered a lease, we are of the opinion that it is void. We are, however, of the opinion that the contract, although denominated an "oil lease," is in fact a conveyance of a portion of the homestead. It is held that oil in place under the soil is a mineral, and that minerals in place are land. An oil lease investing the lessee with the right to remove all the oil in place, in consideration of his giving the lessor a certain per cent thereof, is, in legal effect, a sale of a portion of the land. [citations omitted]

This case was approved by the Supreme Court in *Texas Co. v. Daugherty*,<sup>54</sup> a case addressing whether oil leases were subject to taxation as property, where the Court relied on *Colquitt* for the proposition that an oil and gas lease was an interest in property and said the writ could have been refused in *Colquitt* "only under the view that the interest created by the instrument was an interest in the realty itself, requiring for its validity the joinder of the wife because of the homestead character of the realty."

In *McEntire v. Thomason*,<sup>55</sup> the court said:

It seems to be no longer an open question with us that a lease of the character of the one under consideration is a conveyance of an interest in lands. [citing *Texas Co. v. Daugherty, supra*]. And it is statutory that the homestead of the family cannot be conveyed by

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<sup>54</sup> 176 S.W. 717, 722 (1915).

<sup>55</sup> 210 S.W. 562 (Tex. Civ. App.—Fort Worth), *aff'd on other grounds*, 233 S.W. 616 (Tex. 1919).

the owner, if a married man, without the consent of the wife, such consent to be evidenced by her separate acknowledgment, taken in the manner [provided by statute]. And it was expressly decided in the case of *Southern Oil Co. v. Colquitt* (citation omitted), that a husband alone could not give a lease authorizing the lessee to bore for and extract oil and gas from the homestead and erect machinery and lay pipes thereon, etc.

*See also Stephenson v. Mallett*,<sup>56</sup> (court had assumed oil and gas lease was part of the homestead right, “because we have no doubt that the instrument constitutes an absolute conveyance of an interest in the homestead itself, and under the law as announced in *Southern Oil Co. v. Colquitt*, such conveyance is absolutely void by reason of the invalid acknowledgement of the wife.”) This court also pointed out that the Supreme Court cited *Colquitt* favorably in *Texas Co. v. Daugherty*.

So, arguably, with that little thought and analysis, it became the law in Texas that oil and gas was part of the homestead right and that oil and gas leases of homestead property required the joinder of both spouses.

By 1933 and 1935, respectively, the Fifth Circuit Court of Appeals and the Texas Supreme Court were stating this as the law without citation.<sup>57</sup>

In *Evans v. Mills*, the husband and wife executed a valid mineral lease. Subsequently, the husband alone executed a second lease, subject to the first lease. The Fifth Circuit held that the second lease was void, rejecting the arguments that the first lease had effected a severance, had constituted an abandonment of the homestead as to the minerals, had converted the mineral interest into a royalty, which was personalty and not subject to the homestead right, and, finally, that the husband’s lease was not inconsistent with the homestead right, because it did not substantially interfere with the homestead right. The court’s analysis was based entirely on Texas’ view of mineral interests as realty. This result was expressly approved by the Texas Supreme Court in *Thompson v. Thompson*.<sup>58</sup>

In *Grissom v. Anderson*, two brothers owned tracts of land as their separate property, and occupied the land with their wives as their homesteads. Together with 6 other joint owners, they executed a mineral lease. The wives knew all about it, and were willing to sign it if necessary. The lease was valid and binding on all parties except the brothers and their wives. The Court stated without citing to authority, “Without the signatures of the wives of Taylor and Frank Anderson, the mineral lease to Welch was inoperative, so long as the land constituted their homestead.” But the court found that subsequent leases signed by the wives ratified the Welch lease; therefore, the Supreme Court did not actually invalidate the lease on the homestead issue.

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<sup>56</sup> 240 SW. 633 (Tex. Civ. App.—Beaumont 1922, writ refused).

<sup>57</sup> *Evans v. Mills*, 67 F.2d 840 (5<sup>th</sup> Cir. 1934); *Grissom v. Anderson*, 79 S.W.2d 619 (Tex. 1935).

<sup>58</sup> 236 S.W.2d 779, 685 (Tex. 1951).



For the first time, in 1956, Judge Garwood expressed his thoughts on the nature of the homestead right, in a case considering whether the open mine doctrine applies to mere leases, but his view did not prevail and his analysis appears in the dissent.<sup>59</sup> There, the husband and wife executed an oil and gas lease on their homestead which was the husband's separate property, and oil was produced after his death for the first time. The court noted that under Texas law, a homestead right is in the nature of a life estate. Therefore, the wife's homestead right included the royalties (as a life tenant would have under the open mine doctrine), rather than simply the interest on the royalties (as a life tenant would have if the mine hadn't been open). The only issue really was whether the execution of the lease or the first production opened the mine, and the court held that the execution of the lease did.

In dissent Judge Garwood said that whatever rule might apply to life tenants, the Court should not extend that rule to homestead rights in this case, just because the Court had in the past said that a homestead was similar to a life tenancy.

Whether we have been right or wrong in heretofore holding that, for the general purposes of the open mine doctrine, there is no difference between the homestead occupancy right and an ordinary life estate in the same premises, the rather extreme consequences of that policy would seem to be a good reason for not extending the doctrine of the open mine in any situation. . . .

The authors of the homestead institution probably had in mind largely a place to live and, incidentally thereto, the agricultural or pastoral profits which the occupant would naturally make where the homestead happened to be rural. The small urban homestead carries no special feature of its own which would correspond to the rural homestead crop privilege and thus, being yet a homestead, leaves the inference that security of shelter rather than income was the dominant homestead purpose. The same idea finds still stronger support in the rule that the entire homestead right, including all income privileges, disappears into thin air upon mere abandonment of the land as a place of abode. The occupant may with impunity abandon exploitation of the land but may not abandon occupancy without losing all homestead rights.

Especially where the homestead is the separate property of the deceased spouse, the latter during life probably thinks of it (as in *White v. Blackman* cited by the Court) largely as a place of mere occupancy for the other spouse and regards the producing oil wells on it as something apart which may be disposed of by his or her will. These wells are in many instances his or her only claim to wealth. . . . If the surviving spouse has a life expectancy of twenty-five or thirty years, the result is often the same as if she or he were

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<sup>59</sup> *Youngman v. Shular*, 288 S.W.2d 495 (Tex. 1956) (Judge Calvert).

a forced heir of the fee, because the minerals may well be by far the most important element of the fee, and the homestead occupant in effect takes all of the minerals. . . .

No doubt the authority that could best and most realistically deal with the whole subject, arranging a possibly more equitable and less formalistic relationship between life tenant and remainder and redefining the interest of the homestead occupant, would be the legislature. . . .

Interestingly, the law was no different for water leases. In *Houston & T.C. Ry. Co. v. Cluck*,<sup>60</sup> the court held that the husband alone could not contract with a railway company empowering it to use water from a spring located on his homestead and to enter on the homestead to erect the necessary pumping works. There was evidence that the wife did not give her consent to enter upon the premises and use the water in the spring, and such entry and use was against her will. There was evidence that the water from the spring could be used by the plaintiffs for domestic purposes and for irrigating. The use of the spring and the land surrounding it and the improvements erected thereon by the railroad was a use and appropriation of a part of the homestead without the consent of the wife. The spring and the land adjoining it is a valuable part of the homestead, and there is no limitation on the railroad's right to use it. The couple won the trespass to try title suit, along with damages and an injunction.

Likewise, the law does seem to be different for timber leases.<sup>61</sup> In *Downey v. Dowell*,<sup>62</sup> the court held that, though standing timber is generally regarded as part of the realty, the owner by contract can constructively cause a severance, and for purposes of sale convert it into personalty. A bill of sale from the husband to the defendants was not void even though his wife did not join in the conveyance:

It has also been held that the husband alone may convey an easement in the homestead, provided it does not materially interfere with the use and enjoyment of the homestead.... There is nothing in the evidence in this case that requires the finding that the use of the land as a homestead was interfered with or its value impaired by the sale of the timber to the defendant.

Several other cases demonstrate how far the homestead right can be extended. In *In re Poer*,<sup>63</sup> the court held that the royalty to which the debtor would be entitled upon leasing minerals was real property under Texas law and thus subject to the debtor's claim of homestead exemption. In *Riley v. Riley*,<sup>64</sup> the court held that the homestead claimant may exclude part of a

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<sup>60</sup> 72 S.W. 83 (Tex. Civ. App.1903, writ refused).

<sup>61</sup> *Downey v. Dowell*, 207 S.W. 585 (Tex. Civ. App.—Texarkana 1918, writ dismissed).

<sup>62</sup> 207 S.W. 585 (Tex. Civ. App.—Texarkana 1918, writ dismissed).

<sup>63</sup> 76 B.R. 98 (Bankr. N.D.Tex. 1987).

<sup>64</sup> 972 S.W.2d 149 (Tex. App.—Texarkana 1998, no pet.).

tract actually occupied to obtain more acreage in another, mineral-rich tract, as long as claimant can show the second tract is used for the support of the family.

## **VII. Homestead Rights In The Separate Property Owned By The Other Spouse**

Most people are usually surprised to learn that a spouse cannot give an oil and gas lease in his separate property that happened to be his or her homestead, without the joinder of the other spouse. It is commonly misunderstood since many equate the homestead right as a possessory right to the surface. However, the establishment of homestead rights over the separate property of the other spouse are firmly rooted in the Texas Constitution. The Texas Constitution provides:

“An owner or claimant of the property claimed as homestead may not sell or abandon the homestead without the consent of each owner and the spouse of each owner, given in such manner as may be prescribed by law.”<sup>65</sup>

As shown below, the Family Code, the Property Code and the Probate Code consistently support the fact that the homestead can attach to the separate property of the other spouse. For instance, the Family Code further provides:

Whether the homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber the homestead without the joinder of the other spouse except as provided in this chapter or by other rules of law.<sup>66</sup>

Likewise, the Property Code provides:

A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.<sup>67</sup>

If a homestead claimant is married, a homestead cannot be abandoned without the consent of the claimant’s spouse.<sup>68</sup>

Section 270 of the Probate Code makes clear that the homestead is not liable for the payment of the debts of the estate except for purchase money, etc. Section 282 provides that the homestead rights of the surviving spouse are the same whether the homestead is separate property of the deceased or community property, and section 284 provides that the homestead shall not be partitioned among the heirs during the lifetime of the surviving spouse, for so long as the survivor elects to occupy the same as a homestead.

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<sup>65</sup> TEX. CONST. art. XVI, § 50.

<sup>66</sup> TEX. FAM. CODE § 5.001.

<sup>67</sup> TEX. PROP. CODE § 41.001.

<sup>68</sup> TEX. PROP. CODE § 41.004 (added 1985).

### VIII. Special Issues Involving Prior Attempted Conveyance of the Homestead

The Texas Constitution allows the legislature to specify the manner in which the spouse of the owner must consent to the sale or abandonment of the homestead:

An owner or claimant of the property claimed as homestead may not sell or abandon the homestead without the consent of each owner and the spouse of each owner, given in such manner as may be prescribed by law.<sup>69</sup>

It is possible that in reviewing title that the title examiner may need to determine whether a prior conveyance was valid under then-existing law. For instance, Article 1300 (repealed effective January 1, 1968) provided as follows (emphasis added):

*The homestead of the family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto, and by her separate acknowledgment thereof taken and certified to before the proper officer, and in the mode pointed out in articles 6605 and 6608.*

Article 6605 (repealed effective January 1, 1968) provided as follows:

No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken, unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment on an examination privily and apart from her husband; nor shall he certify to the same, unless she thereupon acknowledges to such officer that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it.

Article 6608 (repealed effective January 1, 1968) provided as follows:

The certificate of acknowledgment of a married woman must be substantially in the following form:

“The State of \_\_\_\_\_,

“County of \_\_\_\_\_.

“Before me, \_\_\_\_\_ (here insert the name and character of officer) on this day personally appeared \_\_\_\_\_, wife of \_\_\_\_\_, known to me (or proved to me on the oath of \_\_\_\_\_) to be the person whose name is subscribed to the

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<sup>69</sup> TEX. CONST. art. XVI, § 50.

foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said \_\_\_\_\_, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

(Seal) “Given under my hand and seal of office this \_\_\_ day of \_\_\_\_\_, A.D., \_\_\_\_\_.”

Effective in August, 1963, the predecessor provision to Family Code § 5.001, Article 4618 (emphasis added), provided as follows:

**The homestead, whether the separate property of the husband or of the wife, or the community property of both, shall not be disposed of except *by the joint conveyance of both the husband and the wife.***

Effective January 1, 1968, Article 4618 (emphasis added) was amended to read as follows:

Section 1. The homestead, whether the separate property of either spouse or community property, shall not be sold, conveyed or encumbered *without the joinder of the spouses*, except as provided herein or by other rules of law.

The current statutes relating to the conveyance of a homestead make references to the “joinder of the other spouse” and that abandonment cannot occur without the consent of the claimant’s spouse. For instance, the Family Code provides:

Whether the homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber the homestead *without the joinder of the other spouse* except as provided in this chapter or by other rules of law.<sup>70</sup>

Likewise, the Property Code now provides:

If a homestead claimant is married, a homestead cannot be abandoned without the consent of the claimant’s spouse. (added 1985).<sup>71</sup>

<sup>70</sup> TEX. FAM. CODE § 5.001 (emphasis added);

<sup>71</sup> TEX. PROP. CODE § 41.004.

In *Allen v. Monk*,<sup>72</sup> the Supreme Court set out the prior statutes discussed above and acknowledged that the statutory changes eliminating the requirement of the wife's separate acknowledgment of a sale of the homestead meant that the Legislature had eliminated the requirement of a "joint conveyance" and simply required that both spouses join in any disposition of the homestead. Therefore, a wife could be compelled to execute a deed if she had executed a contract of sale agreeing to sell the homestead.

Article 1300 specifically required that the wife consent to the conveyance as evidenced *by the wife joining in the conveyance, and signing her name thereto*. The current statutes do not require that she "join in the conveyance" and "sign her name thereto." Additionally, the requirement that a homestead can be abandoned only with the consent of the spouse does not require that such consent be in writing. Nevertheless, in reviewing the chain of title, the title examiner may need to determine whether an instrument executed prior to 1968 complied with then-existing law.

## **IX. Termination Of The Homestead By Abandonment**

A claimant may terminate a homestead by abandoning it. To prove abandonment, one must show that the party attempting to claim the homestead discontinued use of the homestead and intended to permanently abandon the homestead.<sup>73</sup>

*Crews v. General Crude Oil Co.*,<sup>74</sup> involved an oil and gas lease and purported abandonment. In *Crews*, the lessors brought a trespass to try title to a mineral lease executed by a husband and wife, but not acknowledged by the wife as required by the law at the time. The husband and wife brought suit 22 months after production from the well began. In this particular case the lessee built a fence around the well. The court held there was an abandonment by the lessors of that part of the homestead enclosed by the fence around the well, to the extent of the interests purportedly conveyed by the lease.

In *Norman v. First Bank and Trust, Bryan*,<sup>75</sup> the court held that "husband could where acting in good faith abandon the homestead even though the wife would not consent to such abandonment." The court relied on *Hudgins v. Thompson*,<sup>76</sup> which held "while [the husband] acts in good faith and not against the will of the wife, having alone in view the good of the family, of which by nature and by law he is the recognized head, his power to abandon a

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<sup>72</sup> 505 S.W.2d 523 (Tex. 1974).

<sup>73</sup> *Churchill v. Mayo*, 224 S.W.3d 340 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

<sup>74</sup> 287 S.W.2d 243 (Tex. Civ. App.—Beaumont 1955, no writ).

<sup>75</sup> 557 S.W.2d 797, 802 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1977, writ ref'd n.r.e.).

<sup>76</sup> 211 S.W. 586 (Tex. 1919).

homestead ought not to be questioned...” Most would agree that a contemporary court would be unlikely to similarly identify the husband as head of the family “by nature and by law.”<sup>77</sup>

Courts have recognized that abandonment is a question of fact, and the court should determine whether the debtor released possession and control over the property, or some portion thereof.<sup>78</sup> Operation of a non-agricultural business on a rural homestead does not necessarily sacrifice the homestead character of the property, but the court also could not determine as a matter of law that operation of a mobile home and RV park on the 26-acre tract did not abandon it for homestead purposes. It is a fact issue.

Abandonment of a homestead requires both the cessation or discontinuance of use of the property as a homestead, coupled with the intent to permanently abandon the homestead. In *Estate of Montague v. National Loan Investors, L.P.*,<sup>79</sup> a couple executed a designation of homestead designating another ranch as their homestead, and a disclaimer disclaiming the mortgaged ranch as their homestead. They successfully stopped the lender from foreclosing on the mortgaged ranch because they were in such actual possession and use of the mortgaged property as a home that the lender was charged with notice of the fact of the homestead.

In *Primitive Baptist Church at Fellowship v. Fla-Tex Corporation*,<sup>80</sup> immediately after the husband executed a deed, without the wife’s joinder, that included a portion of the homestead, the grantee went into possession, constructed a building on it, and went on to use it for many years. “The facts clearly reveal that the Rameys abandoned as a homestead the part so conveyed to plaintiff, and the husband’s deed of conveyance became effective from and after such abandonment.”

## **X. Homestead Reservations**

Texas courts have recognized that a party may validly reserve a homestead right.<sup>81</sup> As a result, a deed which conveys property into a trust but reserves the homestead rights in the grantor preserves the homestead rights in the grantor. This is because the homestead right is in the nature of a life estate of the property. Consequently, the title examiner should require that a ratification be obtained from the grantor reserving the homestead.

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<sup>77</sup> See also *Peterman v. Harborth*, 300 S.W.33 (Tex. Comm’n App. 1927, judgment adopted) (subject to requirements of good faith on the part of the husband, abandonment of a portion of a tract of land constituting the family homestead without the consent of the wife is effective).

<sup>78</sup> *In re Perry*, 345 F.3d 303 (5<sup>th</sup> Cir. 2003).

<sup>79</sup> 70 S.W.3d 242 (Tex. App.—San Antonio 2001, pet. denied).

<sup>80</sup> 158 S.W.2d 549 (Tex. Civ. App.—Fort Worth 1942, writ ref’d want of merit).

<sup>81</sup> *Emerson v. Pate*, 165 S.W. 469 (Tex. Crim. App. 1914, no writ).

## TEXAS PROBATE LAW

### **I. Introduction**

“[T]here is never a time when title is not vested in someone.”<sup>82</sup>

Title vests immediately in the heirs or devisees of a decedent, subject to the payment of debts of the testator or intestate; but upon issuance of letters testamentary or of administration, the executor or administrator shall have the right to possession of the estate as it existed at the death of the decedent, and he shall recover possession of and hold such estate in trust to be disposed of in accordance with the law.<sup>83</sup>

### **II. Intestate**

When a decedent dies intestate (without a will), his estate is distributed according to the Descent and Distribution scheme governed by Sections 38 and 45 of the Texas Probate Code. The manner in which the decedent’s real and personal property pass is dependent upon (i) the character of the property, being community or separate in nature; (ii) whether the decedent died prior to or after the September 1, 1993 legislative amendment; and (iii) the decedent’s family status on the date of death.

#### **A. Community Property**

The Family Code provides: “Community property consists of the property, *other than separate property*, acquired by either spouse during marriage”<sup>84</sup> Generally, all assets of the spouses on hand during the marriage and upon its termination are presumed to be community property thereby placing the burden of proof on the party (a spouse or that spouse’s personal representative) asserting separate character to show by “clear and convincing evidence” that a particular asset is in fact separate.<sup>85</sup>

The Texas Title Standards provides: “Except as otherwise provided in this Chapter, an examiner must presume that real property acquired during marriage is community property, whether acquired in the name of one or both spouses.”<sup>86</sup>

Where title is joint, both can manage. When title is in the name of only one spouse, then that spouse alone can manage, lease or sell, except for homestead.<sup>87</sup> If the mineral estate has not been severed from the surface estate and if the surface estate is a homestead, then both spouses must execute an oil and gas lease or it is inoperative as to the nonjoining spouse.<sup>88</sup>

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<sup>82</sup> *Ferguson v. Ferguson*, 111 S.W.3d 589, 595–96 (Tex. App.—Fort Worth 2003, pet denied).

<sup>83</sup> TEX. PROB. CODE § 37.

<sup>84</sup> TEX. FAM. CODE § 3.002.

<sup>85</sup> TEX. FAM. CODE § 3.003.

<sup>86</sup> TEXAS TITLE STANDARD. 14.10.

<sup>87</sup> TEX. FAM. CODE §§ 5.22 and 5.24.

<sup>88</sup> TEX. FAM. CODE, §§ 5.81 and 5.82.



## **B. Separate Property**

Separate property is (i) the property owned or claimed by the spouse before marriage; (ii) the property acquired by the spouse during marriage by gift, devise, or descent; and (iii) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.<sup>89</sup> Except that Income from either spouse's separate property belongs to the community.

## **C. Community Property – Married Decedent**

### **(1) Death Prior to September 1, 1993**

- Surviving spouse and no descendants (i.e. children or grandchildren) – decedent's one-half (1/2) community estate to the surviving spouse
- Surviving spouse and surviving descendants – decedent's one-half (1/2) of the community estate to the descendants (regardless if descendants are also the descendants of the surviving spouse)

### **(2) Death On or After September 1, 1993**

- Surviving spouse and no descendants – decedent's one-half (1/2) community estate to surviving spouse
- Surviving spouse and surviving descendants where all decedent's descendants are also descendants of surviving spouse – decedent's one-half (1/2) community estate to surviving spouse
- Surviving spouse and surviving descendants where all descendants are not also descendants of surviving spouse – decedent's one-half (1/2) community estate to descendants.<sup>90</sup>

## **D. Separate Property –**

### **(1) Decedent Married with Children**

- Real Property: surviving descendants take equally, subject to surviving spouse's life estate interest in one-third (1/3) of decedent's real property.

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<sup>89</sup> TEX. FAM. CODE § 3.001.

<sup>90</sup> TEX. PROB. CODE § 45.

- Personal Property: surviving descendants take two-thirds (2/3) equally, surviving spouse takes one-third (1/3).

**(2) Decedent Single or Widowed with No Children**

- Both Parents Survive: one-half (1/2) to mother of decedent and one-half (1/2) to father of decedent
- One Parent and Siblings Survive: one-half (1/2) to surviving parent of decedent and one-half (1/2) to surviving siblings

**(3) Decedent Single or Widowed with Children**

- All of decedent's real and personal property to children, equally

**(4) Decedent Married with No Children**

(i) Real Property

- Both Parents of decedent survive: one-fourth (1/4) to mother of decedent; one-fourth (1/4) to father of decedent; and one-half (1/2) to surviving spouse
- One Parent of decedent survives: one-fourth (1/4) to surviving parent; one-fourth (1/4) to decedent's siblings or their descendants; and one-half (1/2) to surviving spouse
- No Siblings or their Descendants: one-half (1/2) to surviving parent and one-half (1/2) to surviving spouse
- No Surviving Parent: one-half (1/2) to surviving siblings or their descendants and one-half (1/2) to surviving spouse
- No Surviving Parent or Siblings (or their descendants): all to surviving spouse

(ii) Personal Property

- All to surviving spouse

### **E. Adopted Children**

An adopted child and her issue inherit from and through her adopted parents in the same manner as a natural child. The adoptive parents and their kin inherit from or through the adopted child the same as though she were a natural child.<sup>91</sup>

The natural parents of an adopted child and their kin may not inherit from or through the child, but the child may inherit from and through her natural parent or parents.<sup>92</sup> In a court order terminating the parent-child relationship, the child retains the right to inherit from and through the natural parent unless the court provides otherwise.<sup>93</sup> As such, the child retains the right to inherit from the other children of the natural parent.<sup>94</sup>

### **F. Half-Blood Take Half as Much as Whole Bloods**

Collateral kin of the half-blood (i.e. with only one common parent) inherit only half as much as relatives of the whole blood.<sup>95</sup>

### **G. Anti-Lapse Statute**

Texas has adopted the common law lapse doctrine. A gift to a devisee who predeceases the testator, lapses and is passed through the residuary estate. If the will does not contain a residuary estate, then the gift passes by descent and distribution.

However, if a devisee who is a descendant of the testator or a descendant of a testator's parent is deceased at the time of the execution of the will, fails to survive the testator, or is treated as if the devisee predeceased the testator by Section 47 [Requirement of Survival for 120 Hours] of the Texas Probate Code or otherwise, the descendants of the devisee who survived the testator take the devised property in place of the devisee.<sup>96</sup>

- (i) Prior to September 1, 1999: applies only to bequests made to testator's descendants (i.e. children or grandchildren of testator).
- (ii) On and after September 1, 1999: applies to bequests made to testator's descendants or a descendant of the testator's parent (i.e. siblings of testator).
- (iii) Language in will - "to my surviving children" – Anti-lapse statute does not apply.
- (iv) Language in will – "if he/she survives me" – Anti-lapse statute does not apply

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<sup>91</sup> TEX. PROB. CODE § 40.

<sup>92</sup> TEX. PROB. CODE § 40.

<sup>93</sup> TEX. FAM. CODE § 161.206.

<sup>94</sup> *Id.*; *B.C.S. vs. D.A.E.*, 818 S.W.2d 929, 930 (Tex. App. – Beaumont 1991, writ denied).

<sup>95</sup> TEX. PROB. CODE § 41(B).

<sup>96</sup> TEX. PROB. CODE § 68.

### III. Wills

“Will” includes codicil; it also includes a testamentary instrument which merely: (1) appoints an executor or guardian; (2) directs how property may not be disposed of; or (3) revokes another will.<sup>97</sup>

“An instrument is not a will unless it is executed with testamentary intent.” For a will to be admitted to probate, it must be established that the testator intended to create a revocable disposition of his property to take effect after his death and intended to express his testamentary wishes in the particular instrument offered for probate.<sup>98</sup>

To legally execute a will, the testator must have attained the age of eighteen years, or be lawfully married, or a member of the armed forces of the United States or of the auxiliaries thereof or of the maritime service at the time the will is made.<sup>99</sup>

Texas Probate Code Section 57 provides that a person of sound mind may execute a will. The term “sound mind” means having “testamentary capacity”.<sup>100</sup> The testator must know (1) that he is making a will, (2) the effect of his will, (3) generally the nature of his property, (4) how he intends to dispose of it and (5) the connection between items 1 through 5. Testamentary capacity is often defined as a lucid moment and only need exist on the date the will is executed.<sup>101</sup>

It must be clear that the writing offered for probate is a “will.” Letters directing the preparation of a will or codicil may not be probated as the person’s will.<sup>102</sup>

#### A. Holographic Wills

A valid Holographic will must be entirely in the handwriting of the testator and signed by the testator.<sup>103</sup> The signature may be located anywhere on the will.<sup>104</sup> No date is required on a holographic will.<sup>105</sup>

If other words, not in testator’s handwriting, appear on the will, Texas courts apply the “surlusage” rule. The will is admitted to probate if the words not in the testator’s handwriting

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<sup>97</sup> TEX. PROB. CODE § 3(ff).

<sup>98</sup> *Hinson v. Hinson*, 280 S.W.2d 731, 733 (Tex. 1955).

<sup>99</sup> TEX. PROB. CODE § 57.

<sup>100</sup> *Chambers v. Chambers*, 542 S.W.2d 903 (Tex. Civ. App. – Dallas 1976, no writ).

<sup>101</sup> *Croucher v. Croucher*, 660 S.W.2d 55 (Tex. 1983).

<sup>102</sup> *Price v. Huntsman*, 430 S.W.2d 831, 833 (Tex. Civ. App. – Waco 1968, writ ref’d n.r.e.) (“writings were not themselves intended to be her will or codicil, but were instructions or directions to her attorney to prepare a new will or codicil”)

<sup>103</sup> TEX. PROB. CODE § 59.

<sup>104</sup> *Burton v. Bell*, 380 S.W.2d 561, 568 (Tex. 1964).

<sup>105</sup> *Gunn v. Phillips*, 410 S.W.2d 202, 207 (Tex. Civ. App. – Houston 1966, writ ref’d n.r.e.).

“are not necessary to complete the instrument in holographic form, and do not affect its meaning.”<sup>106</sup>

## **B. Attested Wills**

A valid attested will must be signed by the testator (or by another person at testator’s direction and in his presence) and attested to by two credible witnesses over the age of 14, each who must sign in the testator’s presence. A disinterested witness is a credible witness.<sup>107</sup>

According to Texas Probate Code Section 61, if a beneficiary is also a subscribing witness, the will is not void, but the bequest to the beneficiary/witness is void, unless the will can be “otherwise established” by the testimony of a disinterested witness. However, if the beneficiary/witness would have been an heir if the testator died intestate, he shall be entitled to the lesser of (a) the bequest in the will and (b) the intestate share. Additionally, the bequest to the beneficiary/witness is not voided if the beneficiary/witnesses’ testimony is corroborated by one or more disinterested and credible persons. Good practice is to have disinterested witnesses sign the will.

Any mark made by the testator can satisfy the signature requirement.<sup>108</sup> The signature of the Testator may appear anywhere on the will.<sup>109</sup>

Texas courts favor the “conscious presence” test, meaning that the witnesses are deemed to have signed in the testator’s presence if the testator actually saw the witness sign or was “in such a position that testator could, had he been so disposed, readily have seen same by some slight physical exertion on his part.”<sup>110</sup>

## **C. Self-Proving Affidavit**

A self-proving affidavit constitutes prima facie evidence of the validity of the will’s execution and eliminates the need for live testimony by witnesses in court.<sup>111</sup> As of September 1, 1991, Section 50 of the Texas Probate Code provides that “[a] signature on a self-proving affidavit is considered a signature to the will if necessary to prove that the will was signed by the testator or witness, or both, but in that case, the will may not be considered a self-proved will.”

## **D. Codicil**

A codicil is a later testamentary instrument that alters, modifies, or amends a previously executed will. A codicil must be executed with the same testamentary formalities as a will.

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<sup>106</sup> *Maul v. Williams*, 69 S.W.2d 1107, 1109–1110 (Tex. Comm’n App. 1934, holding approved).

<sup>107</sup> *See Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992).

<sup>108</sup> *Orozco v. Orozco*, 917 S.W.2d 70 (Tex. App.—San Antonio 1996, writ denied) (X of a person who was too weak to sign her name).

<sup>109</sup> *Lawson v. Dawson’s Estate*, 53 S.W. 64 (Tex. Civ. App. 1899, writ ref’d).

<sup>110</sup> *Nichols v. Rowan*, 422 S.W.2d 21 (Tex. Civ. App.—San Antonio 1967, writ ref’d n.r.e).

<sup>111</sup> TEX. PROB. CODE § 59(b).

## **E. Revocation of a Will**

A will can only be revoked by (i) a subsequent writing (i.e. will, codicil, etc.); or (ii) a physical act by the testator. For a codicil to revoke a will, it must use clear and unambiguous language. A codicil may revoke a will in whole or in part if the express language in the codicil making a different and contrary disposition of identical properties is clear and unambiguous.<sup>112</sup>

Partial revocations of attested wills by handwritten changes or strike-outs are not permitted. However, interlineations and partial revocations of holographic wills are given effect, provided it can be shown that the changes were made in the testator's handwriting.<sup>113</sup>

## **F. No Revival Rule**

Once revoked, a will cannot be revived, unless (1) the will is re-executed by the necessary formalities; or (2) the will is republished by a subsequent codicil. With respect to codicils, the revocation of a codicil to a will only revokes the codicil, and the will is read as though the codicil had never been written.<sup>114</sup>

## **G. Basic Will Provisions**

### **1. Exordium Clause**

Introductory paragraph in will that includes the testator's full name and any other names he is known by; states place of residence, declares instrument to be Last Will and Testament, and revokes all prior wills.

### **2. Identification**

Includes all full legal names of testator, spouse, children, stepchildren, and grandchildren. It is important to include after born or after adopted children to avoid the pretermitted child statute under Section 67 of the Texas Probate Code, which allows such pretermitted child to inherit under the intestate laws if such child is not mentioned in the will, provided for in the will, or otherwise provided for by the testator.

(i) Forced Heirship: Texas does not have a forced heirship statute. The testator may disinherit a child in the will.

(ii) Pretermitted Child: Texas Pretermitted child statute gives protection only to *children* born or adopted after the will's execution, and only if such children are *not provided for or mentioned* in the parent's will.

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<sup>112</sup> *Laborde v. First State Bank & Trust Co. of Rio Grande City*, 101 S.W.2d 389 (Tex. App. – San Antonio 1936).

<sup>113</sup> *Stanley v. Henderson*, 162 S.W.2d 95 (Tex. 1942).

<sup>114</sup> *Dean v. Garcia*, 795 S.W.2d 763 (Tex. App. – Austin 1989, writ denied).

(a) *Testator had no other children when the will was executed:* the pretermitted child would take his intestate share of the estate as if the testator died unmarried with no other children, owning only that portion not bequeathed to the other parent.

(b) *Testator had other children when the will was executed:* the pretermitted child's share is limited to the gifts made to the other children, and the pretermitted child would take an equal share in the gifts to all the children.

(c) *Testator made no gifts to other children living at the time the will was executed:* the pretermitted child would take his intestate share of the estate as if the testator died unmarried with no other children, owning only that portion not bequeathed to the other parent.

(d) *Nonprobate Transfers:* By the 1993 amendment, the pretermitted child statute does not apply if the testator made nonprobate transfers to the child that took place after the testator's death (i.e. life insurance proceeds, joint bank accounts, etc.).

(e) *Effect of Codicil:* If child is born after the original will was executed, but before a codicil was executed, the child will not be entitled to protection under the statute because the codicil republishes the will.<sup>115</sup>

(iii) Pretermitted spouse: Texas does not have a Pretermitted spouse statute.

(iv) Effect of Divorce on Will Provisions: If testator's marriage is dissolved after making a will, whether by divorce, annulment, or declaration that marriage is void, all provisions in the will shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator, failed to survive the testator, unless the will expressly provides otherwise.

### 3. Specific Bequests

Identifies the nature of the gift and identifies the beneficiaries and contingent beneficiaries. Identification of realty devised by will need not necessarily be as specific as

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<sup>115</sup> *Laborde v. First State Bank & Trust Co.*, 101 S.W.2d 389, 393 (Tex. Civ. App. – San Antonio 1936, writ ref'd).

required to satisfy the Statute of Frauds.<sup>116</sup> A reference to “my home” or “my land” may be sufficient.<sup>117</sup>

#### 4. Residuary Clause

The rest and remainder of the estate, including any specific gifts that lapse, after the payment of debts and administration expenses of the estate. If the will does not contain a residuary clause, may have a partial intestacy.

#### 5. Survival Period

Unless the will provides otherwise, no beneficiary named in the will shall take unless such beneficiary survives the testator by 120 hours. If such beneficiary fails to survive the testator by 120 hours, the beneficiary is treated as if he predeceased the testator.<sup>118</sup>

#### 6. Fiduciary Appointments

Persons named by testator in his will to serve as executor and trustee.

(i) Executor/Executrix: Gathers estate assets, pays estate debts, and administers the estate according to the terms of the will. The executor holds the estate property “in trust” for the beneficiaries and is subject to criminal liability for mismanagement of estate property. The executor shall take care of the estate of the decedent as a prudent man would take care of his own property.<sup>119</sup>

The power to select an executor is not absolute. A person who is designated in a will but who is disqualified cannot serve.<sup>120</sup> Texas Probate Code Section 78 states that no person is qualified to serve as an executor or administrator who is:

- (a) an incapacitated person;
  - (b) a convicted felon, unless such person has been duly pardoned, or his civil rights restored, in accordance with law;
  - (c) a non-resident of Texas who has not appointed a resident agent to accept service;
  - (d) a corporation not authorized to act as a fiduciary in Texas;
- or

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<sup>116</sup> *Baines v Ray* 251 S.W.2d 565, 567 (Tex. Civ. App – Galveston 1952, writ ref’d n.r.e.).

<sup>117</sup> *See Hedick v. Lone Star Steel Co.*, 277 S.W. 2d 925, 930–31 (Tex. Civ. App. – Texarkana 1955, writ ref’d n.r.e.).

<sup>118</sup> TEX. PROB. CODE § 47.

<sup>119</sup> TEX. PROB. CODE § 230.

<sup>120</sup> *In re Estate of Crenshaw*, 982 S.W.2d 568 (Tex. App. – Amarillo 1998, no pet.).



- (e) a person whom the court finds unsuitable

(ii) Trustee: holds legal title to the trust property for the benefit of the beneficiaries, who hold equitable title. The trustee administers the property to the beneficiaries according to the terms of the trust. Unless limited by the trust, the trustee's powers are governed by the Texas Property Code. Like the executor, the trustee holds the estate property "in trust" for the beneficiaries and is subject to criminal liability for mismanagement of estate property. The trustee shall take care of the trust property in accordance with the prudent investor rule as set forth in the Texas Property Code.<sup>121</sup>

## 7. Fiduciary Powers and Duties

Executors and Trustees are held to a high fiduciary standard. As a fiduciary, the executor has a duty to protect the beneficiary's interest by fair dealing in good faith with fidelity and integrity<sup>122</sup>.

## 8. Disclaimers

Any beneficiary named in a will (or an intestate heir) may disclaim, in whole or in part, such property devised to such beneficiary.<sup>123</sup> Disclaimers, once filed, are irrevocable, and unless the will provides otherwise, the disclaimer will have the effect as if the disclaiming beneficiary predeceased the testator. The disclaimer must be filed within 9 months after the testator's death. Disclaimers are used primarily for tax purposes and to defeat the beneficiary's creditor claims.

Pursuant to the 1993 Amendment to the Texas Probate Code Section 37A, if a life tenant disclaims, remainders following the life estate are accelerated.<sup>124</sup>

## IV. Trusts

A trust is a fiduciary relationship in which a trustee holds *legal title* to specific property under a fiduciary duty to manage, invest, safeguard, and administer the trust assets and income for the benefit of designated beneficiaries, who hold *equitable title*.

The trustor of a trust (also called grantor, or settler) is the person who creates a trust or contributes property ("res" or "corpus") to a trustee of a trust. If more than one person contributes property to a trustee of a trust, each person is a trustor of the portion of the property in the trust attributable to that person's contribution to the trust.<sup>125</sup>

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<sup>121</sup> TEX. PROP. CODE § 117.003.

<sup>122</sup> *McLendon v. McLendon*, 862 S.W.2d 662, 670 (Tex. App. – Dallas 1993, writ denied).

<sup>123</sup> TEX. PROB. CODE § 37A.

<sup>124</sup> TEX. PROB. CODE § 37A, cmt.

<sup>125</sup> TEX. PROP. CODE § 111.004(14).

A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the trustor or the trustor's authorized agent.<sup>126</sup>

A person has the same capacity to create a trust that he has to transfer property free of trust.<sup>127</sup> Thus, all that is required is a person with legal capacity (i.e., must be age 18, of sound mind, and with the capacity to convey title) who intends to create a trust, and who makes an appropriate transfer of assets to the trustee.

Trusts are not a legal entity that can hold property. Property transferred into a trust must be conveyed to the trustee of the trust for the benefit of the beneficiaries.

There must be a delivery of the assets to the trustee with an intention to create a trust in order to create a valid living trust under which someone other than the trustor is to serve as trustee. The delivery requirement does not apply to a self-declaration of a trust where the trustor declares himself trustee for the benefit of another person, or for the benefit of himself and another person. However, if the intent to create a trust appears reasonably clear from the terms of the will, construed in light of the surrounding circumstances, a trust by implication may arise even though the testator failed to convey legal title to the trustee.<sup>128</sup>

The trustor of a trust may be the trustee of the trust.<sup>129</sup> Also, a beneficiary can be trustee. The fact that the person named as trustee is also a beneficiary does not disqualify the person from acting as trustee if he is otherwise qualified.<sup>130</sup> However, if the sole trustee of a trust is also the sole beneficiary, there is no trust. The legal and equitable titles merge, and the person holds title free of any trust.<sup>131</sup> This is because there is "no separation of the legal and beneficial interests, and there are no duties to assume or to provide."<sup>132</sup> If the trust includes a vested remainder interest, no merger occurs.<sup>133</sup>

No one can be compelled to serve as trustee. A person named as trustee who chooses not to accept the appointment incurs no liability with respect to the trust.<sup>134</sup> The reason for this rule is that no one can be forced to take on the duties, responsibilities, and potential liabilities of a fiduciary. The signature of the person named as trustee on the writing evidencing the trust or on a separate written acceptance is conclusive evidence that the person accepted the trust. A person named as trustee who exercises power or performs duties under the trust is presumed to have accepted the trust.<sup>135</sup> However, a person designated as trustee may, without accepting the

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<sup>126</sup> TEX. PROP. CODE § 112.004.

<sup>127</sup> TEX. PROP. CODE § 112.007.

<sup>128</sup> *Perfect Un. Lodge No. 10 v. InterFirst Bank-San Antonio*, 748 S.W.2d 218, 220 (Tex. 1988).

<sup>129</sup> TEX. PROP. CODE § 112.008(c).

<sup>130</sup> § 112.008(b).

<sup>131</sup> TEX. PROP. CODE § 112.034.

<sup>132</sup> *Moody v. Pitts*, 708 S.W.2d 930, 934 (Tex. App.—Corpus Christi 1986, no writ).

<sup>133</sup> *Id.*

<sup>134</sup> TEX. PROP. CODE § 112.009(B).

<sup>135</sup> TEX. PROP. CODE § 112.009(a).

trusteeship, inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose. A named trustee will not be presumed to have accepted the trust if he merely acts to preserve the trust property, provided he sends notice of the rejection to the trustor (if living) or all beneficiaries currently entitled to distributions.<sup>136</sup>

A trust does not fail for lack of a trustee. If the trust instrument does not name a trustee, or if the named trustee dies or resigns and the trust makes no provision for designation of a successor trustee, the court will appoint someone to serve as trustee. However, a valid trust must have a beneficiary.<sup>137</sup>

The powers and duties of the trustee should be expressed in the trust instrument. Prior to April 19, 1943, the effective date of the Texas Trust Act, a trustee only had those powers granted by or reasonably implied from the trust instrument.<sup>138</sup> Under the current Texas Trust Code, unless limited by the express terms of the trust, the trustee's powers are governed by Texas Property Code §§ 113.003-113.27, including the power to convey, lease, encumber trust property, and any additional powers authorized by the Code that are necessary and appropriate to carry out the purposes of the trust.<sup>139</sup>

Because a trust document may limit the powers of the trustee, the Title Examiner must review trust instruments to confirm the identity and powers of the trustee and whether the trust was in effect at the time of a trust transaction.<sup>140</sup>

If property is conveyed to a person identified as "trustee," but the conveyance does not identify the trust or disclose the names of the beneficiaries, an examiner may presume the authority of the trustee to convey, transfer or encumber the title to the property.<sup>141</sup> This situation is frequently referred to as a "blind trust," and permits the trustee to execute an oil and gas lease. However, if the instrument creating the trust, or some other recorded instrument, identifies a trust instrument or the name of a beneficiary of said trust, then inquiry should be made and a copy of said trust instrument obtained to verify that the trust instruments does not limit the power of the trustee, and to determine that the trust has not terminated. If authority of the trustee is questioned or there is a possibility that the trust terminated, then the oil and gas lease should be ratified by the beneficiaries.

#### **A. Living Trusts (i.e. Intervivos Trusts)**

Living trusts are trusts created during the lifetime of the trustor. Living trusts are revocable unless expressly made irrevocable. In Texas, a trustor can revoke, modify, or amend a

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<sup>136</sup> TEX. PROP. CODE § 112.009(a)(1).

<sup>137</sup> *Morrison v. Parish*, 384 S.W.2d 764, 766 (Tex. App.—Texarkana, 1964, writ dismissed).

<sup>138</sup> TEXAS TITLE STANDARD 9.10, cmt.

<sup>139</sup> TEX. PROP. CODE § 113.002.

<sup>140</sup> TEXAS TITLE STANDARD. 9.10.

<sup>141</sup> TEX. PROP. CODE § 101.001; TEXAS TITLE STANDARD 9.20.

trust unless the instrument provides that the trust is irrevocable and not subject to amendment.<sup>142</sup> However, the trustor cannot enlarge the trustee's duties without the trustee's express consent. All amendments must be in writing and according to any specific procedure provided by the trust agreement. A revocable trust becomes irrevocable upon the death of the trustor.

Irrevocable trusts are unable to be revoked or amended by the trustor. Irrevocable trusts are primarily used for estate tax planning purposes (i.e. life insurance trust) or for Medicaid qualifying purposes (i.e. Miller trust). Unlike revocable trusts, the trustor cannot be both the trustee and beneficiary of the irrevocable trust, and has no control over the assets once placed in an irrevocable trust.

Generally, with Living Trusts, the trustor creates a trust, naming himself as the initial trustee and the initial beneficiary. Thus, the trustor holds legal title to trust property as trustee for his own use and benefit as beneficiary. When the trustor dies, becomes incapacitated, or resigns as trustee, another person named in the trust document becomes trustee and manages the property for the benefit of the trustor, if living, or for the beneficiaries named by the trustor, if the trustor is dead.

Living trusts are used to avoid probate, maintain privacy regarding assets, hold property owned in a state where probate is burdensome, concerns over will contests, and assistance with management due to impending disability concerns.

Only those assets which are transferred into or which are acquired by a revocable living trust are governed by the trust at the death of the trustor. To transfer assets to the trust, the name of the owner must be changed to reflect ownership by the trust or the trustee of the trust. In the case of real property, a deed from the owner is used to convey the property to the trustee of the trust. The real property deed should be recorded in the county in which the real estate is located. If the real property is subject to a mortgage, it should be determined whether the transfer of real property to a trust requires consent from the lender to avoid the effects of a "due on transfer" clause. With respect to a personal residence, if the property is transferred to a "qualifying trust" (basically a revocable living trust), which otherwise would qualify as the homestead had it not been transferred into the trust, assignment to the trust should not affect the homestead exemption for property tax purposes.<sup>143</sup> Accordingly, the homestead does not lose the creditor protection it would normally have merely because the homestead property is being held in trust form. Once real property is owned by the trust, all transactions pertaining to that property must be taken by the trustee, acting in his capacity as trustee, rather than in his individual capacity.

Any property owned by the trustor not transferred into the living trust at death must pass through probate. Therefore, a "pour-over" will is generally drafted at the same time as the living

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<sup>142</sup> TEX. PROP. CODE § 112.051.

<sup>143</sup> TEX. PROP. CODE § 41.0021.

trust which dictates that any assets not transferred to the trust at death will be transferred to the trust as part of the probate administration process.

## **B. Testamentary Trusts**

A testamentary trust is a trust created in a will that is to take effect upon the testator's death. The terms of the trust are detailed in the actual will. A testamentary trust has the same components of a living will in that it identifies the trustee, any successor trustees, and beneficiaries, as well as sets out the powers and duties of the trustee and terms of the trust. However, whereas a living will can be revocable or irrevocable, a testamentary trust is always irrevocable since the testator is deceased.

As indicated above, testamentary trusts are generally used when devising property to minors, incapacitated persons, financially irresponsible individuals, or for tax planning purposes. Creating trusts in a will is desirable in that the testator has more control over the terms of the bequests in the disposition of his will. A will might contain several different types of trusts. For example, a will may contain (i) a bypass trust, (ii) a management trust, (iii) a descendants' trust; and (iv) a contingent trust.

## **C. Some Relevant Provisions in Trusts and Wills that contain Testamentary Trusts**

### **1. Spendthrift Protection**

Section 112.035 of the Texas Property Code indicates that a trustor may provide in a trust instrument that a beneficiary's interest in the trust may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee. This provision should protect the beneficiary from creditor claims prior to receipt of the property. In the case of testamentary trusts, unless the will includes a spendthrift provision, beneficiaries will be entitled to assign their beneficial interests in the trust. Therefore, this provision is generally in the trust instrument, or in the case of a testamentary trust, in the will.

No particular form of words is required for the creation of a spendthrift trust; however, the trustee must have the active duty to preserve trust funds and a trustee who has no duty except to make payments as they become due is a trustee of a "passive" or "dry" trust which cannot constitute a valid spendthrift trust.

It should be noted that in the case of a living trust where the trustor is also a beneficiary of the trust, the spendthrift provision does not protect the trustor from claims by his own creditors.<sup>144</sup> A settlor may create a trust in favor of some third party and prohibit assignment by such party of the beneficial interest in the trust, but the rule is otherwise in cases where a settlor

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<sup>144</sup> TEX. PROP. CODE § 112.035(d).

creates a trust and makes himself the beneficiary thereof.<sup>145</sup> A settlor cannot create a spendthrift trust for his own benefit and have the trust insulated from the rights of his creditors.<sup>146</sup>

**Spendthrift Trust Example:** Prior to the actual receipt of property by any beneficiary, no property (income or principal) distributable under my will or under any trust created by my will shall be subject to anticipation or assignment by any beneficiary, or to attachment by or to the interference or control of any creditor or assignee of any beneficiary, or be taken or reached by any legal or equitable process in satisfaction of any debt or liability of any beneficiary. Any attempted transfer or encumbrance of any interest in such property by any beneficiary hereunder prior to distribution shall be absolutely and wholly void.

## 2. Rule Against Perpetuities Savings Clause

Except as to charitable trusts, an interest is not good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the trust, plus a period of gestation.<sup>147</sup> Texas Property Code Section 5.043 permits a reformation or construction of trust instruments to the extent necessary to satisfy the rule against perpetuities.

The rule against perpetuities savings clause is generally included in the trust instrument of a living trust, and in the case of a testamentary trust, in the will in order to avoid a judicial reformation proceeding. The savings clause should state that no trust will continue beyond 21 years after the death of the last to die of the specified beneficiaries or otherwise specified individuals living at the date of the testator's death. The clause should indicate how such assets will pass in the event of a termination under the perpetuities provision.

**Rule Against Perpetuities Savings Clause Example:** Notwithstanding anything to the contrary contained in my will, no trusts created hereby, or by exercise of a power of appointment hereunder, shall continue for more than the limiting period permitted by the applicable rule against perpetuities, applied with my descendants who are living at the time of my death as the measuring lives. Any property still held in trust at the expiration of that period shall immediately be distributed to the Beneficiary of the trust.

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<sup>145</sup> *Glass v. Carpenter*, 330 S.W.2d 530 (Tex. App.—San Antonio, 1959, rehearing denied.)

<sup>146</sup> *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372 (Tex.App.—San Antonio 1992).

<sup>147</sup> TEX. PROP. CODE § 112.036.

### 3. Powers of Appointment

A power of appointment is a power of disposition given to a person (the “donee” or “powerholder”) over property not his own, by someone (the “donor”) who directs the mode in which the power shall be exercised by a particular instrument. A power of appointment is not a property interest, but is a mere right or power.<sup>148</sup> The persons in whose favor the power may be exercised are the “objects of a power”, and become “appointees” once the power has been exercised. Powers of appointment are particularly useful in regard to trusts with successive interests, in that the powerholder will have better information as to the ultimate disposition of the property. For example, mom sets up a trust for her son, an adult with no children. Pursuant to the trust terms, son is to receive the income for life, with the principal distributed equally among his (unborn) children. Because mom doesn’t know if son will have children, how many, or their individual needs, mom could instead give son (or someone else) a power of appointment to determine who should take the trust principal and in what shares.

A distinction is drawn between a power of appointment that can be exercised in favor of the donee, the donee’s creditors, the donee’s estate, or the creditors of the donee’s estate, which is a general power of appointment, and a power that can be exercised in favor of a limited class that does not include the donee, the donee’s creditor’s, the donee’s estate, or the creditors of the donee’s estate, which is called a special power of appointment.<sup>149</sup>

A general power of appointment would authorize appointment to any person or entity. This power would be used in a situation where the creator would like for the beneficiary to have as much flexibility as possible in appointing the assets. Where the powerholder has only a *special* power of appointment, the power is not beneficial to the powerholder and cannot be reached by his creditors.<sup>150</sup>

A special power of appointment is useful if the donor is concerned with taxes being included in the donee’s estate. This is because, unlike a special power of appointment, if a donee dies holding a general power of appointment, the property subject to that power will be included in the donee’s estate for tax purposes.<sup>151</sup>

Additionally, the donor can dictate whether the power of appointment is an (i) *intervivos* power, meaning it is exercisable by a deed during the donee’s lifetime, or (ii) a *testamentary* power, which is only exercisable by a will at death.

**Special Power of Appointment Example:** My spouse acting in his/her individual capacity shall have the special power to appoint (outright, in trust or otherwise) all or any part of the trust income

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<sup>148</sup> *Krausse v. Barton*, 430 S.W.2d 44 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1968, writ ref’d n.r.e.).

<sup>149</sup> *G.A.C. Half Found. v. Calvert*, 281 S.W.2d 178 (Tex. Civ. App.—San Antonio 1955, writ ref’d n.r.e.).

<sup>150</sup> *In re Shurley*, 171 B.R. 769, 786–87 (Bankr. W.D. Tex. 1994).

<sup>151</sup> I.R.C. § 2041.

and principal to any one or more of my descendants. Such special power shall be exercisable by acknowledged instrument delivered to my trustee during my spouse's lifetime or by specific reference in his/her will. My spouse shall not have the power under this section to appoint trust property to my spouse, his/her creditors, his/her estate, or the creditors of my spouse's estate.

Whether a power has been exercised by the powerholder depends upon the powerholder's intention.<sup>152</sup> There are three methods by which the intent to exercise a power of appointment can be manifested: (1) by reference to the power; (2) by reference to the property which is the subject of the power; or (3) by a provision which would not be operative or could not be given effect except by an exercise of the power.<sup>153</sup> The common understanding in Texas has been that a typical residual gift in the will of a powerholder is insufficient to exercise a power of appointment.

Chapter 181 of the Texas Property Code allows for broad flexibility in releasing a power of appointment. Unless the creating instrument provides otherwise, a powerholder may: (a) completely release a power of appointment; (b) release a power of appointment as to specific property subject to the power; (c) release the power as to a person in whose favor a power may be exercised; or (d) limit in any respect the extent to which the power may be exercised.<sup>154</sup>

A release of a power pursuant to this statute must be in writing, acknowledged and delivered as follows: (a) to the person or in the manner specified in the instrument creating the power; (b) to an adult, other than the powerholder, who may take any of the property in default of an exercise of the power or in whose favor the power could be exercised; (c) to a trustee or co-trustee of the property subject to the power; or (d) to an appropriate county clerk for recording. Although a guardian of an estate most likely cannot exercise a power of appointment of the ward, a guardian may release a ward's power of appointment.<sup>155</sup>

#### **D. Life Estates**

The life tenant has the right to use, enjoyment and possession of the property with the remainderman obtaining possession upon the death of the life tenant. Under the Doctrine of Waste, a life tenant must preserve the corpus for the remainderman.<sup>156</sup> Neither the life tenant nor the remainderman can execute an effective oil and gas lease without the joinder of the other.<sup>157</sup> In the absence of a written agreement, the doctrine of waste requires that the bonus and royalties

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<sup>152</sup> *Republic Nat'l Bank v. Fredericks*, 283 S.W.2d 39, 46–47 (Tex. 1955).

<sup>153</sup> *Id.* at 47.

<sup>154</sup> TEX. PROP. CODE § 181.051.

<sup>155</sup> TEX. PROP. CODE § 181.053.

<sup>156</sup> *Moore v Vines*, 474 S.W.2d 437 (Tex. 1971).

<sup>157</sup> *Davis v. Bond*, 158 SW 2d 297 (Tex. 1942). See *Lowrance v. Whitfield*, 752 S.W.2d 129, 134 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (citing *Kemp v. Hughes*, 557 S.W.2d 139, 142 (Tex. Civ. App.—Eastland 1977, no writ)).



be escrowed for the benefit of the remainderman, with interest on royalties being paid to the life tenant during the term of the life tenancy.<sup>158</sup> The life tenant is entitled to the delay rental. This is because bonus and royalty are considered corpus while the delay rental is considered income or rent.<sup>159</sup>

An exception to the above is the “Open Mine Doctrine.” This doctrine states that, if a lease was in effect or if a well was producing, at the time the life estate was created, the life tenant can use the land for that purpose and is thus entitled to receive all bonus and royalty himself.<sup>160</sup> The theory is that the person creating the life estate must have intended that the life tenant benefit from the activities being conducted at the time the life estate was created.<sup>161</sup>

## V. Overview of the Probate Process in Texas

### A. Formal Probate

Probate is the process of legally establishing the validity of a will before a judicial authority, and the legal process by which the estate is administered. When a person dies leaving a will all of his estate devised by the will vests immediately in the devisees named in the will, if the will is admitted to probate. To probate a will, it must be established in court that the will meets the requirements of execution and that the will was not canceled or revoked. Except as discussed below, an application to probate a will must be done within four (4) years of the testator’s death.

When a person dies intestate, all of his estate vests immediately in his heirs at law.<sup>162</sup> A judicial determination of heirship may be conducted whereby the Court makes a formal declaration as to the identity of the decedent’s heirs, and their respective shares and interest in the real and personal property of the decedent.<sup>163</sup> The benefit of the judicial determination of heirship is that a court has made a formal Judgment finding the identity of the decedent’s heirs. Thus, while such judgment may later be modified, set aside, or nullified, it shall nevertheless be conclusive in any suit between an heir omitted from the judgment and a bona fide purchaser for value who has purchased real or personal property after entry of judgment without actual notice of the claim of the omitted heir.<sup>164</sup> Similarly, any person who has delivered funds or property of the decedent to the persons declared to be heirs in the judgment, or has engaged in any other transaction with them, in good faith, after such entry of such judgment, shall not be liable therefor to any person.<sup>165</sup>

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<sup>158</sup> *Clyde v. Hamilton*, 414 S.W.2d 434 (Tex. 1967).

<sup>159</sup> *Id.*; 26 O&GR 220.

<sup>160</sup> *Id.* at 11–12 (citing *Youngman v. Shular*, 155 Tex. 437, 288 S.W. 2d 495 (1956)).

<sup>161</sup> *Id.*

<sup>162</sup> TEX. PROB. CODE § 37.

<sup>163</sup> TEX. PROB. CODE § 54.

<sup>164</sup> TEX. PROB. CODE § 55.

<sup>165</sup> *Id.*

## **B. Executor v Administrator**

As discussed above, an executor is the personal representative named in the decedent's will. If the will failed to name an executor or the named executor died, or otherwise fails to qualify, the court will appoint an administrator (Administrator with will annexed). Likewise, in an intestate proceeding, where there is no will, the court will appoint an administrator. Except in matters regarding the sale of real property, discussed below, the term executors and administrators are interchangeable, as they have the same powers and duties.

Although duly appointed by the court, the executor or administrator is still not qualified to act until he has taken the oath, and posted bond, if necessary. Once the oath has been taken, and any bond posted, the court will issue letters testamentary or letters of administration. Letters testamentary (or letters of administration) are papers issued by the probate court stating that a person has the authority to act on behalf of a deceased person's estate.

In addition to the Application to probate the will (if any) and the court order, Title Examiners must determine whether the executor or administrator is qualified to act. Therefore, the materials examined should also include (i) Application for Letters Testamentary or Letters of Administration; (ii) the will (if any); (iii) the bond (if required); (iv) the oath; and (v) recent letters. Because the executor or administrator still must qualify after appointment by taking the oath and posting bond (unless waived), reviewing a copy of current letters is the best way to determine if the executor or administrator was qualified to act. Because all acts of the executor or administrator must be approved by court in a dependent administration, this is more of an issue in an independent administration.

## **C. Administration**

### **1. Dependent Administration**

If an administration is dependent, the executor or administrator gets his power solely from the court and is subject to court supervision. Dependent administration is more costly and burdensome because a court order is needed for almost every act performed, but may be desirable when there are creditor problems, feuding beneficiaries, or difficult assets.

An executor or administrator in a dependent administration may only convey real property of a decedent upon application and order of the court. Therefore, in addition to examining the probate documents mentioned above, we need to examine (i) the application for sale of real estate, (ii) order of sale, (iii) additional bond (if required), (iv) report of sale; and (v) the decree confirming said sale.<sup>166</sup>

When a dependent executor or administrator executes an Oil, Gas and Mineral Lease, we need to see the application to lease and the order thereon.<sup>167</sup>

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<sup>166</sup> TEX. PROB. CODE §§ 331, 341, 346, 353, 354, AND 355.

<sup>167</sup> TEX. PROB. CODE § 367.

## **2. Independent Administration**

Texas is unique in that in certain situations it allows for an independent administration free of court supervision. After an independent executor or administrator is approved and an inventory of estate assets is filed with the court, the executor or administrator can administer the estate without any further court involvement or supervision. Thus, independent administration avoids the costs and delays associated with a court-supervised estate administration in which the executor or administrator must seek court approval before doing any of these acts. In order to have an independent administration, the testator must name the executor in his will as “independent.” If the will doesn’t name the executor “independent”, but all the beneficiaries under the will agree, the court will grant an independent administration. Likewise, in an intestate proceeding, the administrator can act independently if all the heirs agree to an independent administration.

### **D. Sale of Real Property and Mineral Transactions**

When an executor or administrator, legally qualified as such, has performed any acts as such executor or administrator in conformity with his authority and the law, such acts shall continue to be valid to all intents and purposes, so far as regards the rights of innocent purchasers of any of the property of the estate from such executor or administrator, for a valuable consideration, in good faith, and without notice of any illegality in the title to the same, notwithstanding such acts or the authority under which they were performed may afterward be set aside, annulled, and declared invalid.<sup>168</sup>

#### **1. Personal Representative’s Authority to Sell Real Property**

The independent executor named in the will has authority to sell real property if (1) the will expressly grants the executor the power to sell real property;<sup>169</sup> or, (2) if the sale is for the purpose of paying debts of the estate.<sup>170</sup> The independent executor will be deemed to have the power to sell real property if the will gives the executor all the rights, powers, and privileges that are given to trustees under the Texas Property Code. This is because Section 113.010 of the Texas Property Code gives trustees the power to sell real property.

When an independent administrator is appointed in a testate proceeding (with will Annexed), the independent administrator may not rely on the power to sell real property expressed in the will.<sup>171</sup> However, the independent administrator may sell real property if the purpose of the sale is for the payments of estate debts.<sup>172</sup>

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<sup>168</sup> TEX. PROB. CODE § 188.

<sup>169</sup> TEX. PROB. CODE § 332.

<sup>170</sup> TEX. PROB. CODE § 145C.

<sup>171</sup> S. B. 1198; *See Frisby v. Withers*, 61 Tex. 134, 138 (1884).

<sup>172</sup> TEX. PROB. CODE § 145C.

Title Examiners can rely on a statement of facts concerning the existence of debts of the estate and can presume that real property was sold in order to satisfy such debts. It should be noted that a purchaser from an independent executor or administrator has the burden of proving debts did exist or other conditions that would have authorized the court to order the sale.<sup>173</sup> If the purchaser cannot do so, he is not a bona fide purchaser and the sale is void.<sup>174</sup> However, the purchaser is not bound to see that consideration is in fact used to pay the debt; it is sufficient that he showed a state of facts that gave the executor power to sell.<sup>175</sup> Effective September 1, 2011, an affidavit provided by the independent executor or independent administrator, executed and sworn to under oath and recorded in the deed records of the county where the property is located, that the sale is necessary to pay debts of the estate or is deemed in the best interest of the estate, is conclusive evidence as to the authority of the independent executor or independent administrator.<sup>176</sup>

Pursuant to the Legislative Amendment, effective September 1, 2011, if all the beneficiaries under the will or heirs in an intestate proceeding consent prior to the appointment, the court may include the power to sell real property in the court order appointing the independent executor or administrator.<sup>177</sup>

In regard to co-executors, generally, the acts of one co-executor acting alone is valid, except with respect to conveyances of real estate, in which all co-executors must sign.<sup>178</sup>

## **2. Independent Executor's and Independent Administrator's Authority to Execute Oil and Gas Leases**

A will must specifically grant independent executors the authority to enter into mineral transactions. Without said express authority, a court cannot grant application thereto.<sup>179</sup> If the will contains the following or similar language then the independent executor has the power to enter into mineral transactions: "The executor shall have all of the rights, powers and privileges that are given to trustees under the Texas Trust Code."<sup>180</sup>

If the will names an independent executor, unless the will states otherwise, the independent executor can execute an oil and gas lease and other instruments without court approval and without ratification by the heirs for the purpose of settlement of the estate as long as the estate still has unpaid debts and the estate has not been closed.<sup>181</sup> The *Lowrance* case

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<sup>173</sup> *Haring v. Shelton*, 103 Tex. 10; 122 S.W. 13 (Tex 1909).

<sup>174</sup> *Id. Freeman v. Tinsley*, 40 S.W. 835 (Tex. App. 1897, writ ref'd).

<sup>175</sup> *Buckner Orphans Home v. Maben*, 252 S.W.2d 726 (Tex. Civ. App. – Eastland 1952, no writ).

<sup>176</sup> TEX. PROB. CODE § 145C.

<sup>177</sup> TEX. PROB. CODE § 145A.

<sup>178</sup> TEX. PROB. CODE § 240.

<sup>179</sup> *See Marshall v. Hobert Estate*, 315 S.W.2d 604 (Tex. Civ. App.—Eastland 1958, writ ref'd).

<sup>180</sup> TEX. PROB. CODE § 113.012.

<sup>181</sup> *Roy v. Whitaker*, 92 Tex. 346 (Tex. 1899); *Lowrance v. Whitfield*, 752 S.W.2d 129 (Tex. App.—Houston [1st Dist.] 1988, writ denied; rehearing of writ error overruled).

acknowledges that an independent executor has the authority that an administrator or executor under court order would have in the settlement of an estate. Likewise, under Texas Probate Code Section 145C, both independent executors and independent administrators have the authority to enter into real property transactions if the transaction is for the purpose of paying debts of the estate.

Unless it is clear as to the personal representative's authority to convey, all heirs or beneficiaries must join in any conveyance of real property.

### **3. Closing the Estate**

An independent administration is closed by court order or, more commonly, by affidavit.<sup>182</sup> While, a dependent administration must be closed, estates in an independent administration or frequently kept open for an indefinite period. This allows the independent executor or administrator the flexibility to act on behalf of the estate if necessary in the future.

## **VI. Alternative Probate and Non-Probate Procedures**

### **A. Community Administration**

#### **1. Powers of Surviving Spouse when no Administration is Pending: Unqualified Community Administration**

When no one has qualified as executor or administrator of the estate of a deceased spouse, the surviving spouse, as the surviving partner of the marital partnership has power to sell, mortgage lease, or otherwise dispose of *community property* for the purpose of paying *community debts*.<sup>183</sup>

Since an oil and gas lease in Texas is a conveyance of minerals a community survivor can execute an oil and gas lease for the purpose of paying of community debts.<sup>184</sup>

#### **2. Qualified Community Administration – Repealed**

Prior to repeal in 2007, sections 161–167 and 169–176 of the Texas Probate Code authorized a procedure known as “qualified community administration” where the decedent’s one-half (1/2) community interest passed to someone other than the surviving spouse. The surviving spouse may qualify as community administrator if (1) the deceased spouse failed to name an executor in his will; (2) the executor named in the will is unwilling or unable to qualify; or (3) the deceased spouse died intestate. Where a surviving spouse of a decedent qualified by posting bond and filing an inventory, appraisalment, list of claims, the court may authorize the surviving spouse as community administrator to control, manage, and dispose of the community

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<sup>182</sup> TEX. PROB. CODE § 151.

<sup>183</sup> TEX. PROB. CODE § 160.

<sup>184</sup> *Griffin v. Stanolind Oil & Gas Co.*, 133 Tex. 45, 125 S.W. 2d 545 (1939).

property, as provided in this Code. Title examiners may rely upon a deed of community property from the administrator without further court order.

## **B. Muniment of Title**

Section 89A–89C of the Texas Probate Code authorizes the probate of a will as a muniment of title. In a muniment of title proceeding, no executor or administrator is appointed since no administration is opened. The will and order admitting the will to probate are filed in the county deed records and constitute a chain to real property, showing ownership of the property.

A muniment of title proceeding is useful when there are no unpaid debts of the estate, except for those debts secured by liens on real estate, the deceased did not apply for Medicaid, and there is no need for administration. After the will has been probated as a muniment of title, the beneficiaries of the estate become the owners of the property. Generally, a will cannot be probated after four years has lapsed from the date of the testator’s death except as a muniment of title.

## **C. Small Estate Affidavit**

Section 137 of the Texas Probate Code governs probate by Small Estate Affidavit. The Small Estate Affidavit is a probate method of transferring a decedent’s property under certain limited circumstances: (1) the decedent must have died intestate; (2) estate assets must not exceed \$50,000, not including the homestead and exempt property; (3) the affidavit must list and clearly describe all of the decedent’s property, and stating which property is community and separate; (4) the estate must be solvent; (5) the affidavit must clearly state the decedent’s marital and family history in sufficient detail so that it is clear who inherits the decedent’s property and the shares of those heirs; (6) each heir must sign and swear to the affidavit before a notary; (7) two disinterested witnesses must sign and swear to the affidavit before a notary; and (8) the affidavit must be filed in the county where the decedent resided at the time of death. A Small Estate Affidavit cannot be filed until after thirty (30) from the decedent’s death.

It is important to note that the Small Estate Affidavit cannot be used to transfer title to real property unless the property was the decedent’s homestead. A bona fide purchaser for value can rely on the recorded affidavit.<sup>185</sup> An omitted heir may recover from an heir who receives consideration from a purchaser in a transfer for value of title to a homestead passing under the affidavit.<sup>186</sup>

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<sup>185</sup> TEX. PROB. CODE § 137(c).

<sup>186</sup> *Id.*

#### **D. Affidavit of Heirship**

An Affidavit of Heirship is an alternative to probate when the decedent died leaving only real estate.<sup>187</sup> An Affidavit of Heirship is executed by a knowledgeable party, preferably a disinterested person, which states the decedent's family history, genealogy, marital status, date of death, whether the decedent died testate or intestate, and identifies all of the heirs of the decedent.<sup>188</sup> If the Affidavit of Heirship states that the decedent died testate, the will should be attached. If the heirs and devisees are different, we must see an agreement not to probate executed by all of the heirs and beneficiaries named in the will. The agreement must provide the alternate plan of distribution or state that the parties will allow the estate to pass through intestacy.<sup>189</sup> If the agreement does not provide for an alternate plan of distribution or state that the parties will allow the estate to pass through intestacy, any conveyance of real property must be executed by all those entitled to take the property under the laws of intestacy and all of the beneficiaries listed in the will. Any conveyance of the decedent's property made subsequent to and based upon such Affidavit must be executed by all those entitled to inherit the property through intestate succession.

Affidavits of Heirship are considered prima facie evidence of the facts stated therein once recorded for more than five (5) years.<sup>190</sup> However, in the event of litigation, said Affidavit is subject to rebuttal. Therefore, it is advisable that the affiant is a person not related to the decedent and does not inherit from the decedent.<sup>191</sup> If the affiant is an interested heir, it is advisable to obtain a supporting affidavit from a disinterested person.<sup>192</sup>

#### **E. Recording Foreign Will in Official Public Deed Records**

If an ancillary administration of the foreign will is not necessary, then exemplified copies of the foreign will and the order admitting same to probate can be recorded in the Deed Records of the county where the decedent owned real property in Texas.<sup>193</sup> Exemplified copies are attested to by the clerk of the court, including the seal of the court, and the certificate with the original signature of the judge. Such recording has the same force and effect as a deed of conveyance as to all property in the state covered by the foreign will.<sup>194</sup> The record of any such foreign will or testamentary instrument, and of its probate, duly attested and proved and filed for recording in the deed records of the county where the real property is located, shall be notice of title to all persons.

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<sup>187</sup> TEX. PROB. CODE § 52.

<sup>188</sup> TEXAS TITLE STANDARD 11.70.

<sup>189</sup> See *Estate of Halbert*, 172 S.W.3d 194 (Tex. App.—Texarkana 2005, pet. denied.).

<sup>190</sup> TEX. PROB. CODE § 52(a).

<sup>191</sup> TEXAS TITLE STANDARD 11.70.

<sup>192</sup> *Id.*

<sup>193</sup> TEX. PROB. CODE § 96.

<sup>194</sup> TEX. PROB. CODE § 98.