

# YOU CAN'T TAKE IT WITH YOU: ANALYZING ESTATE-RELATED TITLE ISSUES IN TEXAS

---

Scott L. Turner, Esq.  
Welborn Sullivan Meck & Tooley, P.C.  
1125 17<sup>th</sup> Street, Suite 2200  
Denver, Colorado 80202  
(303) 830-2500  
[sturner@wsmtlaw.com](mailto:sturner@wsmtlaw.com)

Mallory J. Hasbrook, Esq.  
Welborn Sullivan Meck & Tooley, P.C.  
1125 17<sup>th</sup> Street, Suite 2200  
Denver, Colorado 80202  
(303) 830-2500  
[mhasbrook@wsmtlaw.com](mailto:mhasbrook@wsmtlaw.com)

As a title examiner, you frequently have to deal with death . . .



Unwittingly, Irwin has a brush with Death.

# Definitions

- Testate – Died with a valid Will
  - A Will is not valid to pass title until it is admitted into probate by a court
    - Tex. Estates Code Ann. § 256.001
- Intestate – Died without a Will (or with an invalid Will)
  - Will invalid if Decedent lacked mental capacity or undue influence
  - “Per Capita with Representation” – Tex. Estates Code Ann. §§ 201.003, 201.101
    - If all heirs are the same degree of relationship, “per capita” in equal shares.
    - If not, equal representation by generation.
    - Example: 2 children and 2 grandchildren (both from a deceased child) survive. Each child receives 1/3, and the each grandchild receives 1/6.

# Definitions – Cont'd

- Executor – Person named in Will
  - Powers – provided by terms of Will (in Texas or pre-UPC)
- Administrator – Statutory priority
  - No Will, or person(s) named in Will unable to serve
    - In Texas, Administrator with Will Annexed
  - Powers – provided by statute
- Personal Representative (UPC States) – refers to both Executors and Administrators
  - Broad statutory powers unless limited by a Will

# UPC and non-UPC States

- Non-UPC States:

- Texas (Estates Code enacted September 1, 1993)
- Wyoming

- UPC States:

- Colorado (July 1, 1974)
- North Dakota (July 1, 1975)
- Utah (July 1, 1977)
- Nebraska (January 1, 1977)
- Montana (July 1, 1975)

# Methods of Estate Administration

- Unsupervised/Supervised – four-year limit
- Probate as “Muniment of Title”
- Heirship Proceedings
- Alternatives
  - Affidavit of Heirship
  - Transfer on death deeds

# Unsupervised Probate

- File petition with the Court of the County in which the decedent lived
  - Probate Will (if testate)
  - Appoint Executor (if testate) or Administrator (if intestate or with Will Annexed)
    - UPC States - Appoint PR (nominated by Will or person with statutory authority)
- Issue Letters Testamentary (testate) or Letters of Administration (intestate)

# Unsupervised Probate cont'd

- Collect assets and pay creditors
- Distribute the remaining assets to the beneficiaries/heirs
- Close Estate
  - Texas – estates typically are not closed
  - UPC States – file statement Closing Estate



# Probate as “Muniment of Title”

- Fastest, most affordable way to probate a will in Texas
- Not dependent upon size, nature, extent, or value of probate estate, or subject to four-year limit
- Must have valid Will and no apparent need for formal administration
- Order Admitting the Will as Muniment of Title signed by judge effects transfer of title

# Heirship Proceedings

- Decedent owned property in Texas, but their estate has not been administered, or an administration failed to properly distribute all property (Tex. Estates Code § 202.001, *et seq.*)
- Not dependent upon size, nature, extent, or value of probate estate
- May be brought at any time after death – not subject to four-year limit (Tex. Estates Code § 202.0025)
- Judgment determining heirship effects transfer of title

# Affidavits of Heirship

- Decedent owned property in Texas, but died intestate, or died testate but the will has not been probated (Tex. Estates Code § 203.001, *et seq.*)
  - Executed by two disinterested persons who knew the decedent but are not heirs
  - Serves as prima facie evidence of the facts stated in the affidavit if recorded for at least 5 years
- In the absence of information to the contrary, an examiner may rely upon an affidavit of heirship with respect to the family history and the identity of heirs of a decedent.
  - Tex. Title Std. 11.7

# Marketable Title

- Record title free from reasonable doubt, such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it, but need not be free from every possible suspicion.
  - Tex. Title Std. 2.10

# Marketable Title – Cont'd.

- Testate:
  1. Confirm Will authorizes Executor to convey real property.
  2. If so, record certified copies of Will, Order admitting Will and appointing Executor into probate and Letters Testamentary

Intestate or Will does not give authority to convey real property:

1. Review Order appointing Executor or Administrator (beneficiaries can agree to give this authority)
2. If authority granted by the Court, record certified copies of Will (if testate), Order admitting Will and/or appointment of Executor or Administrator and Letters of Appointment
  - If no authority granted, need joinder of all beneficiaries

# Marketable Title – Cont'd.

- Texas is a “notice” recording state
  - H grants a deed on February 1 to A, who does not file for record.
  - H thereafter grants a deed to B, a bona fide purchaser, on February 5. B files for record
    - Who prevails?
      - B, regardless of whether A or B records.
- Colorado is a “race notice” recording state
  - Who prevails under the same scenario above?
    - A or B, depending on who records first!
      - B must not have had notice (constructive or actual)

# Community Property

- Texas, California, Washington, Arizona, Nevada and New Mexico
- Ownership between spouses
- Title is irrelevant to determination ownership – look at when property was acquired
- Texas presumptions:
  - Community property – acquired during marriage
    - Tex. Title Std. 14.10
  - Separate property – acquired by gift, devise or descent
    - Tex. Title Std. 14.20
  - Separate property – acquired from the other spouse
    - Tex. Title Std. 14.30
- Non-community property states may recognize community property rights created in a community property state (ex., Texas resident moves to Colorado)

# Community Property – Cont'd

- Example – Community Property State:
  - While living in Texas, Harry acquires Blackacre while married to Wilma
  - Only Harry's name appears on the title
  - Harry dies leaving his estate to the Harry Family Trust
  - Presume community property because acquired during marriage
  - Harry Family Trust owns 50% of Blackacre
  - Wilma owns the other 50% of Blackacre
- Example – Non-Community Property State:
  - Same as above except Harry and Wilma lived in Colorado
  - Harry Family Trust owns 100% of Blackacre
  - Wilma protected through the elective share





# Intestacy in Texas

- Determining who inherits property of the decedent without a will or after the 4-year statute of limitations
- Step 1:
  - Determine if there is a will and if the will has been probated within 4 years of death (subject to all exceptions).
- Step 2:
  - Determine the type of property
  - Community or Separate?
- Step 3:
  - Determine if the death was prior to September 1, 1993, when the Texas Estates Code was adopted.

# Intestacy in Texas – Cont'd

- Married person with only children from current marriage dies before September 1, 1993

## Community Property

1/2 to surviving spouse

1/2 divided equally b/t children

-Tex. Probate Code § 45

## Separate Property

1/3 life estate to surviving spouse

8/8 in fee simple divided b/t children

-Tex. Probate Code § 38(b)(1)

# Intestacy in Texas – Cont'd

- Married person with only children from current marriage dies after September 1, 1993

## Community Property

All to surviving spouse

-Tex. Estates Code § 201.003(b)(2)

## Separate Property

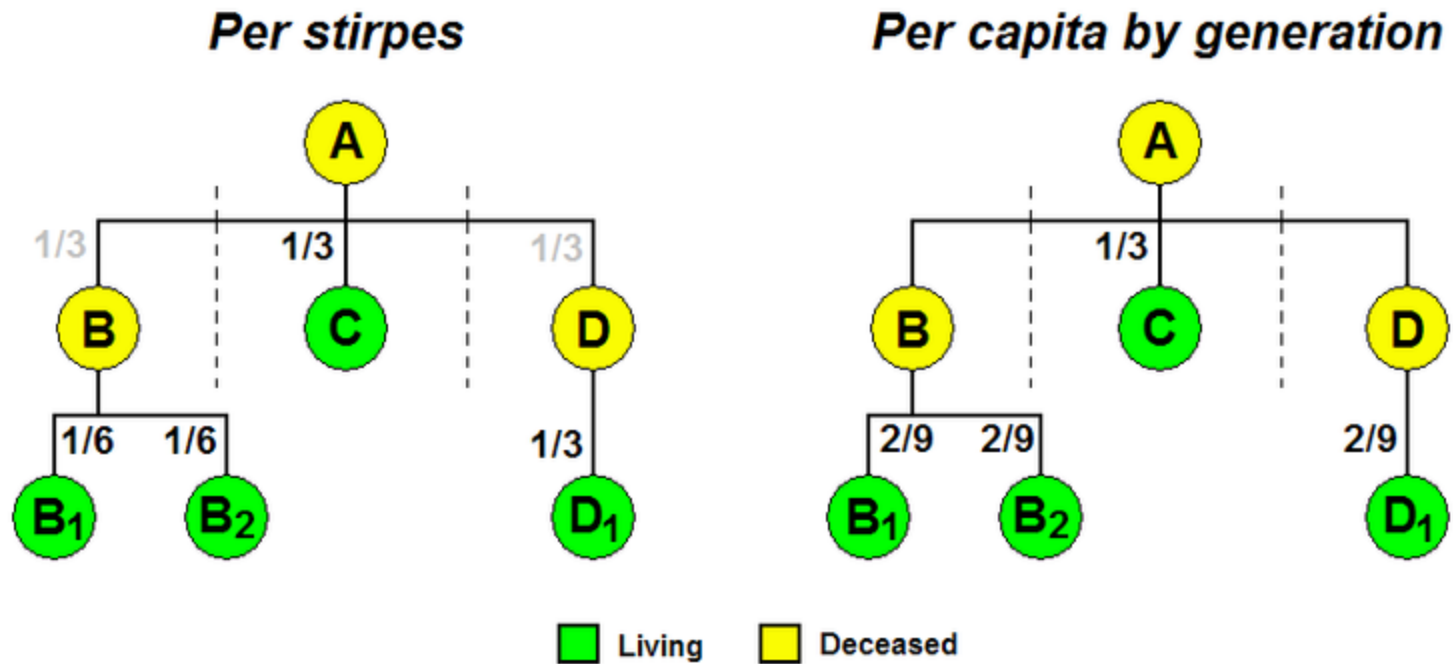
1/3 life estate to surviving spouse

8/8 in fee simple divided b/t children

-Tex. Estates Code § 201.002(b)

- Statutory descent: per capita with representation/by generation

# Intestacy in Texas – Cont'd



# Intestacy in Texas – Cont'd

- Married person with only children from outside current marriage dies after September 1, 1993

## Community Property

1/2 to surviving spouse

1/2 divided equally b/t children

-Tex. Estates Code § 201.003(c)

## Separate Property

1/3 life estate to surviving spouse

8/8 in fee simple divided b/t children

-Tex. Estates Code § 201.002(b)

- If there are children both from and outside the current marriage, the children from the current marriage would not take community property.
- If there are no children, spouse will take all community property and 1/2 of separate property, with the other 1/2 divided between surviving parents. If there are no surviving parents, then the other 1/2 is divided between surviving siblings.

## Problem No. 1

The real property records include a PR deed but no Letters of Appointment.

Is this sufficient to pass title?

# Problem No. 1 – Cont'd

- No; additional documentation is needed.
  - Testate:
    - Confirm Will authorizes Executor to convey real property.
    - If so, record certified copies of Will, Order admitting Will and appointing Executor into probate and Letters Testamentary.
  - Intestate or Will does not give authority:
    - Review Order appointing Executor or Administrator (beneficiaries can agree to give this authority).
    - If authority granted by the Court, record certified copies of Will (if testate), Order admitting Will and/or appointment Executor or Administrator and Letters of Administration.
    - If no authority granted, need joinder of all beneficiaries.



# A little more about Letters Testamentary or of Administration

- Confirm the following from the face of the Letters:
  - Issued by the relevant Texas court;
  - Grantor in deed is same person appointed in Letters;
  - Date the Letters were issued is before the deed was signed;
  - No restrictions; and
  - Certification.

## Problem No. 2

The real property records include a PR deed and Letters issued by another State's court ("Foreign Letters").

Is this sufficient to pass title?

## Problem No. 2 – Cont'd

- No; can open ancillary probate or, more commonly, record in real property records:
  - Testate: “Exemplified” or “Three-way certified” copies of Will and Order admitting Will into probate
  - Intestate: Affidavit of Heirship (discussed later)

# A Little About Ancillary Probate

- Assume Dan died in Travis County, Texas owning MI in Weld County, Colorado
- Original Probate in County/State where Dan lived at the time of death – Travis County, Texas
- PR appointed by a Texas court has power over:
  - Dan's personal property wherever located; and
  - Dan's real property in Texas
- PR does not have authority over real property located in other states.

## Problem No. 3

# Record Title Owner is Deceased

- What if no probate of record title owner's estate?
- Oil companies cannot institute probate for a mineral owner.
- Oil companies can:
  - quiet title action;
  - conduct investigation to determine devisees/heirs (Affidavit of Heirship);
    - lease presumed devisees/heirs based upon the Affidavit and
    - suspend proceeds as incentive to induce presumed devisees/heirs to probate owner's estate.
- Texas – Heirship proceedings
- UPC States – Determination of Heirs or Devisees by special proceeding if claiming an interest – Court order

# Problem No. 4

## Termination of a Joint Tenancy or Life Estate

- Need to record:
  - Certified copy of death certificate and
  - Affidavit by a disinterested person that includes:
    - the legal description of the real property;
    - a statement that the decedent owned an interest in such real property at the time of death; and
    - a statement that the affiant owns no record interest in such real property.

# Problem No. 5

## An Estate Cannot Hold Title to Real Property

- A deed that conveys real property to the “estate of” a decedent (as opposed to conveying to the “personal representative of the estate”) is generally ineffective.
- An estate is not a legal entity.
- Cure: Require a corrective deed in which the grantor conveys the real property to the personal representative of the estate.
- Ideally: ‘to Jane Doe, personal representative of the Estate of Bob Smith, deceased’

# Conveyance to a Trust

- Texas – usually do not require an amended conveyance; will examine copy of trust to confirm trustee's identity and authority.
- UPC States – trusts are capable of holding title to real property
- Utah – For recording purposes, the conveyance must include (i) name and address of at least one trustee, (ii) name and date of the trust. § 75-7-816.
- Wyoming – legally impossible for a trust with no trustee named to hold title. Conveyance must include name of trustee and the name and date of the trust. § 34-2-122.



# Trustee's Authority - Texas

- No protection for third parties unless “Certification of Trust” is of record (allowed as of 2007)
- Must examine Trust itself to verify:
  - Identity of Trust;
  - Powers of Trustee; and
  - Trust was in effect at time of conveyance.
- Limitation periods:
  - 20-year ancient documents rule
  - Texas Civil Practice & Remedies Code Sec. 16.033(a)(7):
    - If conveyance recorded before September 1, 2007, action to challenge trustee's authority limited to 4 years from date recorded.
    - If recorded after Sept. 1, 2007, action limited to 2 years from date recorded.

## Problem No. 6

Is the affidavit of heirship sufficient to pass record title?

# Problem No. 6 – Cont'd

- Texas – Yes and often used to establish defensible title
  - Ideally, a Court Order determining heirs
  - Title Std. 11.70, can rely on affidavit of heirship with respect to family history and identity of heirs
  - Should obtain affidavits of heirship from two disinterested persons

# Affidavits of Heirship – Required Info.

- Name of decedent and residence at time of death
- Date of death
- Complete marital history
- Whether the decedent died testate or intestate
  - If testate, attach copy of Will
- Names, addresses and dates of death for Decedent's heirs and devisees, including living children, descendants of deceased children, parents, etc.
- Legal description of property in question
- Statement that all debts are paid

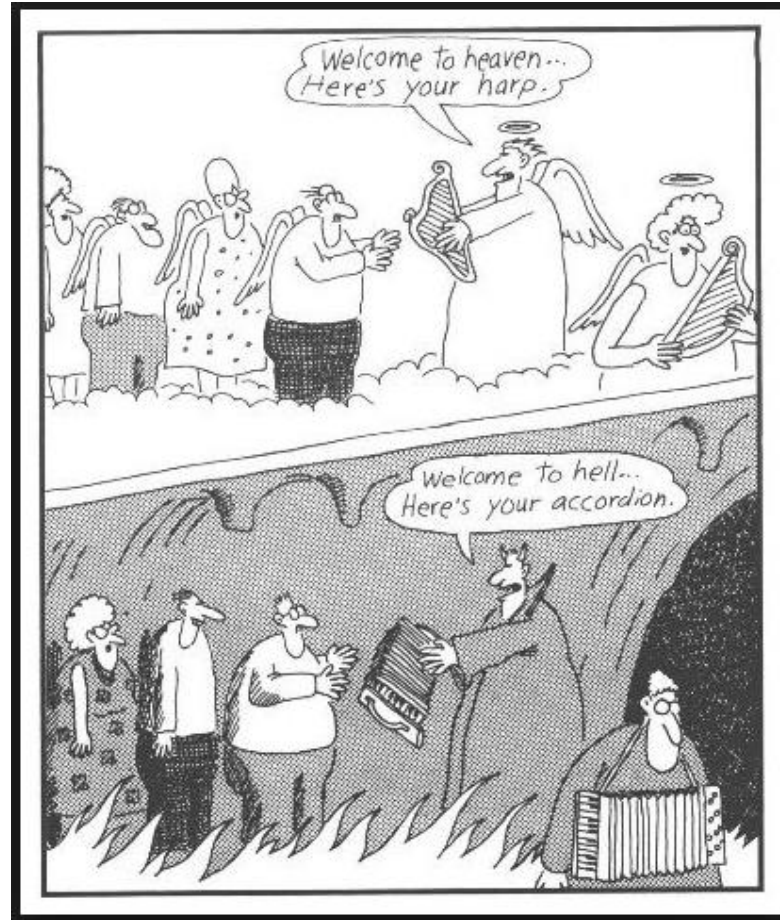
# Affidavits of Heirship – Reminders

- Time machine – determine heirs based upon the survivors and intestacy statute in effect at the time of death.
- Heirs who survived the decedent inherit even if they die before distribution of decedent's estate.

# Problem No. 7

## Who should lease minerals?

- If the real property has not been distributed and remains an asset of the estate, the Personal Representative has authority to issue lease (unless restricted by Letters or Court Order)
- Once property is distributed to beneficiaries, take subject to lease
  - Good idea to have beneficiaries ratify lease
- Bottom line: If the estate still holds title to the property, then the beneficiary only has the right to lease what the beneficiary actually receives from the estate.



# Questions?

- Scott L. Turner, Esq.
  - Welborn Sullivan Meck & Tooley, P.C.
  - 1125 17<sup>th</sup> Street, Suite 2200
  - Denver, Colorado 80202
  - (303) 830-2500
  - [sturner@wsmtlaw.com](mailto:sturner@wsmtlaw.com)
- Mallory J. Hasbrook, Esq.
  - Welborn Sullivan Meck & Tooley, P.C.
  - 1125 17<sup>th</sup> Street, Suite 2200
  - Denver, Colorado 80202
  - (303) 830-2500
  - [mhasbrook@wsmtlaw.com](mailto:mhasbrook@wsmtlaw.com)