

**PRESENTED AT**

20<sup>th</sup> Annual  
Estate Planning, Guardianship  
And Elder law Conference

August 9-10, 2018  
Moody Gardens  
Galveston, Texas

**HEIRSHIP DETERMINATION**

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# **DIVISION OF PROPERTY UPON INTESTACY IN TEXAS**

## **I. COMMUNITY PROPERTY (§201.0032, Texas Estates Code)**

1. **With Surviving Spouse, and Children** (or their descendants):
  - A) where Surviving Spouse and Decedent are parents of all Children  
Surviving Spouse -----All
  - B) where Surviving Spouse and Decedent are **NOT** the parents of all Children:  
Surviving Spouse retains Surviving Spouse's  $\frac{1}{2}$ , takes **NONE** of Decedent's  $\frac{1}{2}$   
Children or their descendants ----- take **ALL** of Decedent's  $\frac{1}{2}$
2. **With Surviving Spouse only:** Surviving Spouse -----All
3. **With Children or their descendants only** Children or their descendants -----All

## **II. SEPARATE PROPERTY**

1. **With Surviving Spouse (§201.002, Texas Estates Code)**
  - A) **With** Children or their descendants
    - 1) Pers Prop: a) Surviving Spouse -----  $\frac{1}{3}$   
b) Children and their descendants -----  $\frac{2}{3}$
    - 2) Real Prop: a) Surviving Spouse has life interest in -----  $\frac{1}{3}$   
(with remainder to Children and their descendants)  
b) Children and their descendants have fee in -----  $\frac{2}{3}$   
& remainder in -----  $\frac{1}{3}$
  - B) **Without** Children or their descendants
    - 1) Pers Prop: Surviving Spouse -----All
    - 2) Real Prop: a) Surviving Spouse has fee in -----  $\frac{1}{2}$   
b) 1) Both Parents Survive: Father -----  $\frac{1}{4}$   
& Mother -----  $\frac{1}{4}$   
or 2) One Parent surviving -----  $\frac{1}{4}$   
& Siblings and their descendants -----  $\frac{1}{4}$   
or 3) One Parent surviving alone -----  $\frac{1}{2}$   
or 4) Siblings and their descendants alone -----  $\frac{1}{2}$   
or 5) Surviving Spouse alone -----All
2. **Without Surviving Spouse (§201.001, Texas Estates Code)**
  - A) **With** Children or their descendants: Children & their descendants -----All
  - B) **Without** Children or their descendants:
    - 1) Both Parents survive: Father -----  $\frac{1}{2}$   
& Mother -----  $\frac{1}{2}$   
or 2) One Parent surviving -----  $\frac{1}{2}$   
& Siblings and their descendants -----  $\frac{1}{2}$   
or 3) One Parent surviving alone -----All  
or 4) Siblings and their descendants alone -----All  
or 5) a) Paternal Kin: 1) Both Grandparents: Grandfather -----  $\frac{1}{4}$   
& Grandmother -----  $\frac{1}{4}$   
or 2) One Grandparent surviving -----  $\frac{1}{4}$   
& descendants of deceased Grandparent -----  $\frac{1}{4}$   
or 3) One Grandparent surviving alone -----  $\frac{1}{2}$   
or 4) descendants of deceased Grandparent alone -----  $\frac{1}{2}$   
& b) Maternal Kin: ----- other half in same order

# HEIRSHIP DETERMINATION

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# HEIRSHIP DETERMINATION

## I. INTRODUCTION

The law of intestacy, or intestate succession, is among the oldest concepts in recorded history, as the necessity for having fixed rules determining shares of property of the deceased were of paramount importance in primitive cultures.

One of the earliest recorded intestacy proceedings is found in the Old Testament Book of Numbers, Chapter 27, where Moses obtained a ruling from a Higher Authority on whether the daughters of one of the descendants of the twelve tribes of Israel could inherit their father's share where he had no sons, but only daughters. Numbers 27:8.

## II. INTESTACY

**A. Basics** - Intestacy is the default condition for the passage of property upon death when:

1. the decedent dies without a will Tex. Est. Code § 101.001(a)(3);
2. the decedent dies with a will that fails to completely dispose of all of the decedent's property. (*Carr v. Rogers*, 383 S.W.2d 383, 1964 Tex. LEXIS 709, 8 Tex. Sup. J. 47 (Tex. 1964); *Haile v. Holtzclaw*, 414 S.W.2d 916, 1967 Tex. LEXIS 291, 10 Tex. Sup. J. 333 (Tex. 1967); *Swearingen v. Giles*, 565 S.W.2d 574, 1978 Tex. App. LEXIS 3181 (Tex. Civ. App. Eastland 1978);
3. the decedent's will is not offered for, or cannot be admitted to, probate. *Ochoa v. Miller*, 59 Tex. 460, 1883 Tex. LEXIS 198 (Tex. 1883); *Jones v. LaFargue*, 758 S.W.2d 320, 1988 Tex. App. LEXIS 2025 (Tex. App. Houston 14th Dist. 1988); or
4. the decedent had an ownership or beneficial interest in will, trust or other instrument and the personal representative or trustee seeks to determine the proper payees or owners of the interest. Tex. Est. Code §§ 202.002(2), (3).

### B. Fixed Nature of Distribution

"While a testator has an almost unrestricted power to dispose of his or her property by will, short of violating the homestead right of the surviving spouse, *Dominguez v. Duran* 540 S.W.2d 567 (Civ. App. Houston 1<sup>st</sup> Dist. 1976, ref. n.r.e.) a failure to effectively dispose of one's property by will results in the passage of that property according to the laws of intestacy, or as it is sometimes called 'descent and distribution.' Such property passes in the manner fixed by statute, even if it results in a disposition entirely at odds with any other stated intentions of the decedent." *Najvar v. Vasek* 564 S.W. 2d 202 (Civ.

App. Corpus Christi 1978, ref. n.r.e.).

### C. Which Law Controls?

The law of the state in which the estate's real property is located generally controls its passage. *Northwestern Nat. Cas. Co. v. Doucette*, 817 S.W.2d 396 (Tex. App. Fort Worth 1991), writ denied, (Jan. 29, 1992). The laws of the domicile of a person who dies intestate control in the succession of movable or personal property of his estate. *Van Hoose v. Moore*, 441 S.W.2d 597, 617 (Tex. Civ. App.--Amarillo 1969, pet. ref. n.r.e.); *Saner-Ragley Lumber Co. v. Spivey*, 238 S.W. 912, 915 (Tex. Comm'n App. 1930, judgm't adopted); *Estates of Garcia-Chapa*, 33 S.W.3d 859, 861 (Tex. App. Corpus Christi 2000, no pet.).

### D. A Creature of Statute, Sometimes Affected by Common Law

Since the right of inheritance is wholly created by statute, the legislature may alter it. *Lee v. Smith*, 18 Tex. 141 (1856). Some examples are:

1. the ability to burden inheritance with an allowance for the surviving spouse and minor children. (Tex. Est. Code Chap. 353);
2. allowing certain debts that are enforceable even against the homestead. (Tex. Est. Code § 102.004);
3. specifying what property may be exempted from debts. (Tex. Est. Code § 353.051);
4. providing that death by casualty does not result in a forfeiture of the estate. (Tex. Est. Code § 201.059);
5. specifying that an heir is not disqualified because of not being an American citizen. (Tex. Est. Code § 201.060); or
6. not allowing death by suicide to affect a right of inheritance. (Tex. Est. Code § 201.061).

Similarly, the legislature has foreclosed the right of a former spouse to take:

1. under a will or trust executed before the dissolution of the marriage. (Tex. Est. Code Ch. 123);
2. under beneficiary designations on multi-party accounts. (Tex. Est. Code §§ 123.151ff);
3. under an insurance policy or retirement plan. (Tex. Fam. Code § 9.301).

### E. Vesting at Death

Subject to debts against the estate, when a person dies intestate in Texas, all of the person's estate vests immediately in his or her heirs at law. Likewise, all of the estate not devised in a testator's will vests immediately in the heirs at law.

Whether property passes under a will or by descent and distribution, title vests immediately on the owner's death. There is never a time when title is not vested in someone. Tex. Est. Code § 101.001(3); *Mow v. Baker*, 24 S.W.2d 1 (Tex. 1930).

#### **F. Legal Title/Equitable Title**

During the administration of the estate, the testator's executor holds legal title to estate assets and retains the right of possession, but the devisees hold the equitable title to the assets. *In re O'Quinn*, 355 S.W.3d 857 (Tex. App. Houston 1st Dist. 2011).

There is no distinction in the vesting of title between real property and personal property in an intestate estate. Title to both real property and personal property passes immediately to the heirs at the decedent's death. *Bourne v. Bourne*, 559 S.W.2d 844 (Tex. Civ. App. Houston 1st Dist. 1977) (personal property); *Carroll v. Fidelity & Deposit Co. of Maryland*, 107 S.W.2d 771 (Tex. Civ. App. Eastland 1937, writ refused) (real property).

#### **G. Descent and Distribution**

1. **BASIC LAW** - The distribution of property upon death, once heirship (title) is determined, is according to the *Laws of Descent and Distribution*, found in Tex. Est. Code §§ 201.001 to 201.152.

Following the title page of this paper is a chart displaying the basic division of property under these sections. The actual application of the law is best performed by examining the facts of the decedent's family history and comparing it to those persons surviving by classification on the chart.

The statutes in force at the time of death govern the disposition of the decedent's estate and determine the persons entitled to share in the estate. *Philleo v. Holliday*, 24 Tex. 38, 1859 WL 6364 (1859); *Estate of Self*, 591 S.W.2d 338 (Tex. Civ. App. Tyler 1979); *Adams v. Masterson*, 415 S.W.2d 535 (Tex. Civ. App. Dallas 1967), writ refused n.r.e.).

### **III. PATERNITY & MATERNITY**

#### **A. Paternity versus Heirship**

As opposed to heirship, paternity may or may not be related to the passage of title to property. Most often, it relates to the creation of a parent-child relationship. Tex. Fam. Code §§ 160.102(5), 160.201. However, in one case, the petitioner sought only to establish the identity of his

biological father, neither an obligation of support nor a right to inherit. *Interest of Sicko*, 900 S.W.2d 863 (Tex. App. Corpus Christi 1995, no pet.).

#### **B. Related Concepts**

1. **Maternity/Grand-Paternity** – In heirship proceedings, we are not always just looking at the father. The heir may be the mother, or a grandparent or great-grandparent.

2. **Reverse Paternity** – Sometimes parents outlive their children. Sometimes the paternity might need to be established to allow a father to claim an inheritance from a deceased child.

**C. History of Paternity** - The history of paternity (legitimation) has a centuries-old derivation. When the Texas Probate Code was enacted in 1955, Tex. Prob. Code § 42 was a verbatim transcription of the statutes from the 1840s (except the phrase “illegitimate children” was substituted for a term not now used in polite society). Legitimation still required the father to marry the mother for the non-marital child to inherit from the father. Act of March 17, 1955, ch.55, § 42, 1955 Tex. Gen. Laws 102.

As late as 1973, a father had no legal duty to support his illegitimate child *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208, 210 (Tex. 1966) and legitimation of a child born out-of-wedlock required some affirmative action by the father. *Pilgrim v. Griffin*, 237 S.W.2d 448, 450 (Tex. Civ. App. El Paso 1950, writ ref'd n.r.e.).

The Texas statute so holding was struck down in 1973 by the United States Supreme Court in *Gomez v. Perez*, 409 U.S. 535, 538, 35 L. Ed. 2d 56, 93 S. Ct. 872 (1973). The opinion also recognized a constitutional right in Texas to bring a paternity suit.

In 1977, the Texas Legislature added a provision to Tex. Prob. Code § 42 recognizing inheritance rights where the father voluntarily legitimated the child under Texas Family Code Chapter 13. Act of May 13, 1977, ch. 290, § 1, 1977 Tex. Gen. Laws 762. In 1979, the Family Code was amended to permit a child to be legitimated by court decree. Act of March 19, 1979, ch. 24, § 25, 1979 Tex. Gen. Laws 40.

Thereafter, in 1986, the Texas Legislature enacted a statutory framework for involuntary paternity proceedings. Tex. Fam. Code § 13.01 *et seq.* and in 1987, the Probate Code was amended giving a person claiming to be an illegitimate child or claiming through an illegitimate child, the right to petition the probate court for a determination of

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First appeared as part of the conference materials for the  
20<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference session  
"Heirship Determination"