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HOUSEKEEPING

- Note: PowerPoint and audio for the February "Advanced Search and Exam Techniques" webinar is now available at www.stewarttexas.com
- For Escrow Officer Credit please email password and attendees names to ken.wrider@stewart.com for certificate (Please do this as soon as possible. Certificates will not be produced after the start of our next webinar)
- Attorneys e-mail bar card number to Ken Wrider for CLE credit
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- We are now recording!

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Alternative Probate Procedures by Bill Pratt

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AFFIDAVITS OF HEIRSHIP

Section 52A, Texas Probate Code

A. What do they say

1. Decedent is dead
2. When they died, place of residence and place of death
3. Marital history and whether spouse survived
4. Surviving children and whether they were children of a surviving spouse
5. Deceased children, whether they were children of a surviving spouse, dates of their death, their marital history and their children (this may have to be covered in a separate affidavit)
6. Adopted children or children taken into the home and raised; adoption by estoppel
7. If there were no surviving descendants, whether the decedent had surviving parents



AFFIDAVITS OF HEIRSHIP
Section 52A, Texas Probate Code

- 8. If there were no surviving descendants, and if one or both parents were deceased, whether there were siblings or siblings' descendants
- 9. Whether the decedent left a will, if so, attach (if will has devisees other than the heirs, they must join in any conveyance for Stewart to insure)
- 10. Whether there has been any administration of the estate
- 11. That all debts of the decedent have been paid or debts are listed
- 12. That all estate and inheritance taxes have been paid



AFFIDAVITS OF HEIRSHIP
Section 52A, Texas Probate Code

- B. Who can do them (in order of preference)
 - 1. Disinterested parties (not family)
 - 2. Family members that aren't heirs
 - 3. Heirs
 - 4. People familiar with the family history
- C. When – how soon - can they be used, relevant factors:
 - 1. Principal residence?
 - 2. Size of transaction?
 - 3. Surviving spouse?



SMALL ESTATE AFFIDAVIT

- A. Small estates affidavit, Section 137, Texas Probate Code
 - 1. Intestate
 - 2. Value of estate, excluding homestead and exempt property is under \$50,000
 - 3. Identifies distributees, assets, debts and sets out family history
 - 4. Homestead can be transferred by affidavit
 - a. Affidavit identifies assets, liabilities and distributees
 - b. Court order approving the affidavit required

COMMUNITY ADMINISTRATION

- B. Community administration, Section 155, Texas Probate Code
 - 1. No administration required when community property passes to survivor
 - a. After 9-1-93, to spouse if decedent has no children with another person
 - b. Spouse has all necessary rights with no court orders
 - i. File an affidavit under section 160, Texas Probate Code
 - ii. Can sell in order to pay community debts
 - 2. When title passes to other than spouse, spouse can still administer the estate by application for Community Administration
 - a. Operates like a regular probate

JOINT TENANTS WITH RIGHT OF SURVIVORSHIP

Section 46, Texas Probate Code

- A. Will pass title without action of probate code
- B. Recitation in the deed is not enough
- C. Must be done by separate written agreement
- D. Not between spouses
- E. Require adjudication, Section 456-457, Texas Probate Code
- F. Court order adjudges agreement valid



JOINT TENANTS WITH RIGHT OF SURVIVORSHIP BETWEEN SPOUSES

- A. Section 451-462, Texas Probate Code
- B. Between spouses
- C. Community property
- D. Written agreement signed by both
- E. May be revoked according to agreement's terms or in writing by both or in writing by one delivered to the other
- F. Require adjudication under Section 456-457, Texas Probate Code unless inheritance under intestacy produces same result

PROBATE AS A MUNIMENT OF TITLE

- A. Sections 89A to 89C, Texas Probate Code
- B. "Muniment" means "proof"
- C. Requires all debts be paid, excluding debts on real estate
- D. Court determines there is no need for administration and enters order admitting to probate as a muniment of title
- E. No executor is appointed

PROBATE AS A MUNIMENT OF TITLE AFTER 4 YEARS

- A. Section 128B Texas Probate Code, notice required to probate a will more than 4 years after the death of the decedent
- B. Requires service on each of decedent's heirs or an affidavit from them that they do not object to the probating of the will
- C. Requires person offering will for probate to not be "in default" for failing to probate will within 4 years

SALES OF MINORS INTERESTS
Section 889, Texas Probate Code



- A. Interest of each minor must be under \$100,000
- B. Natural parent, adoptive parent, or managing conservator may apply
- C. Process
 1. Application to sell
 2. 5 day wait
 3. Order authorizing sale
 4. Deed should recite parent/conservator is acting in accordance with an order of the probate court entered under Section 889 of the Texas Probate Code
 5. Certified copy of the order should be filed in the real property records
 6. Minor's share of proceeds are paid into the registry of the court

SALES OF MINORS INTERESTS

Section 889, Texas Probate Code

- D. Minor may petition the court of have the disabilities of minority removed, Section 31.001, Texas Family Code
 - 1. Minor must be a resident of Texas
 - 2. Minor must be at least 17, or 16 if living apart from parents, guardian or managing conservator
 - 3. Minor must be self-supporting and managing their own business affairs
 - 4. Court may order removal of disabilities for general or specific purposes

- E. Marriage removes the disabilities of minority, Section 1.104, Texas Family Code



THE CURSE OF THE ADOPTED CHILD

- A. Section 3 (b), Texas Probate Code: "child" includes adopted children
- B. Section 40, Texas Probate Code: adopted children still inherit from their natural parents
- C. In an adoption proceeding, court can terminate the child's right to inherit from a natural parent, Section 162.507(c), Texas Family Code
- D. Adoption proceedings are sealed
- E. Known owners can file suit for partition against unknown heir and have a receiver appointed to sell the property, unknown heir's share of proceeds will be held by court

OPEN PROBATE PROCEEDINGS



- A. Within one year
 - 1. Executor can sell property if the will gives a power of sale or powers of a trustee under the Texas Trust Act, Section 332, Texas Probate Code
 - 2. Independent Executor or Independent Administrator can sell if the sale is necessary to pay the debts of the decedent without court order
 - 3. Other sales of real property, Section 331, Texas Probate Code
 - a. Application for sale, Section 341, Texas Probate Code
 - b. Order of sale, Section 34, Texas Probate Code
 - c. Report of Sale, Section 353, Texas Probate Code
 - d. Decree confirming sale, Section 355, Texas Probate Code
 - e. Deed is to refer to and identify the decree confirming sale, Section 356, Texas Probate Code

OPEN PROBATE PROCEEDINGS

- B. After one year
 - 1. Is the estate still being administered?
 - a. Duties of the executor/administrator
 - i. Take possession of the decedent's property
 - ii. Collect claims due to the decedent
 - iii. Pay the decedent's debts
 - b. If no debts, estate really isn't being administered
 - 2. Require an affirmative statement and an explanation that estate is still being administered from attorney or administrator/executor
 - 3. Title passes at time of death, Section 37, Texas Probate Code
 - 4. Places title in heirs immediately upon death subject to need for administration

ESTATE TAXES

- A. Compliance with Procedural Rule P-11b.(9)
 - 1. Examine a balance sheet of the estate or inventory
 - a. Includes assets and liabilities
 - b. Federal exemption amount based on date of death

1987 - 1997	\$600,000
1998	\$625,000
1999	\$650,000
2000 - 2001	\$675,000
2003	\$1,000,000
2004 - 2005	\$1,500,000
2006 - 2008	\$2,000,000
2009	\$3,500,000
2010	Tax Repealed
2011 (and after)	\$1,000,000

ESTATE TAXES

- 2. Indemnity from responsible person, executor/administrator and devisees/heirs/trustees if taxes will be due and estate has sufficient assets
- 3. Proceeds held in escrow pending partial or full discharge/release
- 4. Remember the unlimited marital deduction
- B. Value of the property is at risk
 - 1. If estate tax lien is more than property value, IRS can seize the house
 - 2. Estate tax lien is created at death and doesn't have to be filed to encumber the property
 - 3. Total title loss if not paid



INDEPENDENT EXECUTOR WITHOUT POWER TO SELL

- A. Power to sell must be created in will
- B. Court could grant the power to sell
 - 1. But just approving as independent executor without specific language isn't enough
 - 2. Unless sale was necessary to pay debts of the decedent, a sale would have to follow the application, order, report and confirmation process
- C. Get all the heirs to sign
 - 1. What if one has AJ?
 - 2. Disclaim within 9 months, doesn't work for Federal liens and watch for unintended consequences, may require affidavit

FOREIGN WILLS AND PROBATES: OTHER STATES AND COUNTRIES

- A. Documenting the passage of title, Sections 96 to 98, Texas Probate Code
 - 1. Copy of will and probate to be filed in the deed records
 - 2. Copies must be attested by clerk of the court
 - 3. Judge of the court must certify that the clerk's attestations is in correct form
- B. Where the will grants the executor a power of sale, Section 107, Texas Probate Code
 - 1. Executor can sell Texas real property
 - 2. Copy of will and probate, attested and certified to be filed in deed records
- C. Opening an ancillary proceeding in Texas, Section 95, Texas Probate Code
 - 1. Copy of will and probate, attested and certified to be filed in the probate proceeding
 - 2. Once filed here, follows our procedures



FULL GUARDIANSHIPS

- A. Not favored since they are expensive
- B. Requires annual accountings
- C. Must follow 5-step shuffle to get court authority to sell property





TRUST FOR WARDS WHO ARE PERMANENTLY DISABLED

- A. A court can create a trust for a ward who is permanently disabled
- B. Usually funded out of proceeds of medical insurance or malpractice awards
 - 1. With court approval, the property can be the homestead of the family
 - 2. Depending on the terms of the order, the trustee can sell or improve
 - 3. Require underwriter approval and a court order specifically allowing a home equity loan in this case.





THANK YOU!

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- Attorneys email bar card number to Ken Wrider for CLE credit
- Next Texas TIPS Online April 16, 2009, "Potpourri of Title Issues and Exceptions" by Richard Black
- Questions/Comments? Email fred.schraub@stewart.com
- Visit www.stewarttexas.com for presentation materials within 5 business days of the webinar
