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New Laws Impinging Wills and Probate

By Judon Fambrough

Unlike federal income tax laws, state laws governing wills and probate change slowly. Consequently, the topic receives only slight media attention after each legislative session. Brokers may become aware of changes only when it's too late to be advantageous.

In 1993, the 73rd Texas Legislature enacted the most extensive changes to the probate laws since the Texas Probate Code was created in 1955. Here's a summary of the more significant revisions. All became effective September 1, 1993.

Descent and distribution. Rules of descent and distribution determine how property is divided among heirs when an individual dies intestate (without a will). Formerly, the portion of the community property belonging to a deceased spouse went to the deceased's surviving children or their descendants.

Now there's an exception. If the deceased's children or descendants are also the children or descendants of the surviving spouse, all the community property goes to the surviving spouse.

Pretermitted children. A pretermitted child is one born or adopted after a person makes a will and who is not mentioned or provided for **in the will**. In such cases, the law allows the pretermitted child to receive a portion of the parent's estate.

The definition has changed. A pretermitted child is one born or adopted after the will is made and who is not mentioned or provided for in the will **or otherwise provided for** by the testator (used here to mean either a man or woman who makes a will). The new law allows children born or adopted after the will was made to be provided for outside the context of a will by trust or gift; they are not considered pretermitted.

Anti-lapse statute. The Texas anti-lapse statute, in effect, permits one or more persons to be substituted for another in certain devises. (A devise is a transfer of either real or personal property by will but primarily real property.) For instance, what happens to property that is devised to A, who dies before the testator? The anti-lapse statute substitutes A's offspring (descendants) in A's place. The offspring receive the property. This devise does not lapse or fail.

The anti-lapse statute, however, does not apply to all cases. Only devises to the testator's children, descendants, first-line collaterals (descendant's of the testator's parents) and members of a specified class are protected.

In 1993, three significant changes were made to this law.

First, the descendant being substituted must outlive (survive) the testator by 120 hours.

Second, new rules apply to class gifts. Formerly, when a class gift such as "to my brothers and sisters" was made, the offspring of the predeceased received their father's or mother's share of the devise. Now, if a brother or sister (member of the class) has predeceased the testator **when the will is made**, the descendants of the deceased receive nothing. The devise lapses. The testator is presumed to have defined the class as it existed when the will was executed, not at death.

Third, the insertion of the word *surviving* to a class gift overrides the anti-lapse statute. Consequently, if a testator makes a devise "to all my surviving brothers and sisters," only the brothers and sisters who survive the testator will share in the devise. Descendants of those who die prior to the testator receive nothing.

Contents. Generally, the devise or bequest (the transfer of personalty by will) of property such as a home, car, desk, case and so forth **did not** include the contents. Now, the issue is clarified. The bequest of personalty or the devise of realty does not include any of the property's contents unless the will directs otherwise.

The word *contents* includes only nontitled personal property. Titled property, such as a stock certificate, motor home, motor boat, car or other property requiring a formal transfer of title, is not included.

Mutation in securities. Under prior law, it was unclear whether a bequest of stock or other securities included any stock splits or increases occurring after the bequest but before the death of the testator.

Now, unless the will clearly provides otherwise, the bequest includes additional securities in the same organization after the will was made as a result of stock splits, stock dividends or as new issues resulting from reorganization, redemption or exchange.

Also, the bequest includes securities acquired from another organization by merger, consolidation or reorganization.

The bequest does not include securities subsequently acquired by reinvestment or by the exercise of a purchase option. Likewise, dividends or interest that has accrued on a security prior to the testator's death is not included.

Prohibiting a change of will. In most divorce cases, the court prohibits both parties from changing their will until the divorce is finalized. There was no statutory authority for this. Now, such court orders are invalid.

Survivorship rule. Generally, for a person to receive under another's will, the person must survive the will maker 120 hours unless the will requires a longer period. Now, the 120-hour rule has been extended to any real or personal property held by joint owners with right of survivorship. The rule specifically covers the right of survivorship that can be created in community property. (See "The Right of Survivorship Comes to Texas," *Law Letter*, Vol. 4, No. 2.)

Convenience accounts. Formerly, Texas case law recognized accounts from which the owner allowed others to draw for certain purposes, i.e., tuition, utility bills and so forth. These were known as convenience accounts.

Now **statutory** recognition has been given to such accounts when opened "in the names of the party (owner) and a cosigner and the terms of the account provide that it may be paid or delivered to the party or the cosigner *for the convenience* of the party." Deposits in the convenience account may be paid on the signature of either party, not both, as implied by the word *co-signer*.

The creation of the account does not evidence a gift of any interest nor confer a right of survivorship on the cosigner. Financial institutions are protected

4. multiple-party account with right of survivorship,
5. multiple-party account with right of survivorship and POD designation,
6. convenience account and
7. trust account.

Each account briefly describes the ownership rights. Blank lines are provided so the names of parties, cosigners, POD beneficiaries and trust beneficiaries may be inserted. Depositors are instructed to place their initials next to the type of account selected.

Financial institutions are **not required** to use the uniform form. Other deposit forms are permitted as long as the same information contained on the uniform contract forms is disclosed.

POD accounts and Totten Trusts. In 1987, the law governing joint accounts changed. The right of survivorship could be created in a joint account if there was a written agreement, signed by the party who died, providing for the survivorship. The written agreement was generally the signature card.

However, the right of survivorship in POD or Totten Trust accounts was not addressed. A POD account is payable to the surviving payee or payees when the original account owner dies. A Totten Trust account is created by the deposit into an account as trustee for another. The money in the account is payable to the surviving beneficiaries of the trust when the depositor (trustee) dies.

Now a POD account will belong to the surviving payee or payees only if there is a written agreement signed by the original account owner (payee) to this effect. Likewise, when the trustee of a Totten Trust dies, the account belongs to the surviving named beneficiaries only if there is a written agreement signed by the depositor (trustee) to this effect.

Deceased spouse's final paycheck. Formerly, a surviving spouse could legally, but not practically, collect the deceased spouse's final paycheck. Because no protection was afforded the payor, employers were hesitant to release the funds until the administration of the deceased's estate began.

Now, the surviving spouse is allowed to collect not only the deceased's final paycheck but also any accrued sick pay and vacation pay via an affidavit. The affidavit must state that the affiant is the surviving spouse and that no one has qualified as executor or administrator of the deceased's estate. The employer is released from all liability without inquiring into the truthfulness of the affidavit.

Disclaimer statute. This statute permits an heir (someone taking property by descent and distribution) or a beneficiary of a will, a life insurance policy, an annuity, a retirement plan or other contractual arrangement to disclaim (refuse to accept) the property or other benefits. To do so, the recipient must file a written memorandum of disclaimer within nine months after the property or benefits become available or payable.

In the past, several unresolved questions have arisen concerning disclaimers. In 1993, Texas legislators resolved the issues.

Surviving spouses may now collect not only the deceased's final paycheck but also any acquired sick and vacation pay.

from liability if payments are made to the cosigner after the death of the owner but before written notice of the owner's death is received.

Uniform signature cards. Until now, Texas financial institutions have had no uniform signature cards or contracts of deposit. Depositors have had to review each signature card or deposit contract to determine the rights.

To alleviate the problem, Texas legislators created a **uniform contract of deposit form** with seven possible types of accounts:

1. single-party account without payment on death (POD) designation,
2. single-party account with POD designation,
3. multiple-party account without right of survivorship,

First, creditors of a disclaimant have no interest in and cannot reach the disclaimed property for payment of debt. Disclaimers relate back to the instant the property became available or payable, not to the time the formal disclaimer is filed.

Second, a survivorship interest can be disclaimed. A person who receives property in a cotenancy with the right of survivorship can disclaim the jointly held interest.

Third, a disclaimed future interest is viewed as if the disclaimant predeceased the testator or other donor. The property goes to the next recipient in the chain. For instance, suppose A receives a life estate with the remainder to B. If A disclaims the devise, the property goes automatically to B. The gift does not fail.

Finally, a disclaimer under one entitlement does not disqualify the recipient under another. For instance, if a surviving spouse disclaims a specific devise under the deceased spouse's will, the spouse can still receive property under another clause of the will.

This article is based on "Section Legislation Produces Significant Improvements in Texas Probate

Code" by W. Reed Quilliam, Jr., George Herman Mahon Professor of Law, Texas Tech University. The article appeared in *Real Estate Probate and Trust Law Reporter*, Volume 31, No. 2. Other topics discussed in the original article include: advancements, pour-overs to inter vivos trusts, multiparty account rules extended to security brokers, probate of will as muniment of title, exempt property and family allowances, allocation of estate income and expenses during administration, protection afforded probate judges.

Topics such as durable powers of attorney and transfer of title to homestead by affidavit are discussed in the original article and also in the special edition of the *Law Letter* that highlights new laws passed by the 73rd Texas Legislature.

This article is for information only; it is not a substitute for legal counsel. ☐

Fambrough is an attorney, member of the State Bar of Texas and senior lecturer with the Real Estate Center at Texas A&M University.

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