

# PROPERTY: SEPARATE OR COMMUNITY

PROPERTY CHARACTERIZATIONS - DO THEY MATTER?

# DEFINITIONS

Texas Constitution, Article 16, Section 15:

Sec. 15. *SEPARATE AND COMMUNITY PROPERTY OF SPOUSES.* All *property*, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the *separate property* of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to *separate* and community *property*; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their *property*, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any *property* for the community interest of the other spouse or future spouse in other community *property* then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the *separate property* and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or *property* from all or part of the *separate property* then owned or which thereafter might be acquired by only one of them, shall be the *separate property* of that spouse; if one spouse makes a gift of *property* to the other that gift is presumed to include all the income or *property* which might arise from that gift of *property*; spouses may agree in writing that all or part of their community *property* becomes the *property* of the surviving spouse on the death of a spouse; and spouses may agree in writing that all or part of the *separate property* owned by either or both of them shall be the spouses' community *property*.

# WHO OWNS WHAT? AS FOR COMMUNITY OR SEPARATE, ONLY MATTERS UPON DEATH OR DIVORCE OR LITIGATION

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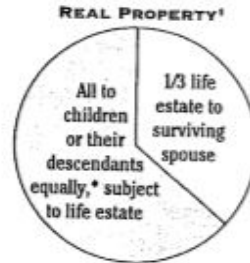


**"I found happiness in my own back yard, but my neighbor claims it's on his side of the property line."**

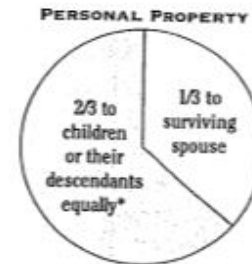
# DESCENT AND DISTRIBUTION – MARRIED WITH CHILDREN\*

## 16-A. TEXAS DESCENT & DISTRIBUTION—MARRIED PERSON WITH CHILDREN

### A. SEPARATE PROPERTY



Applies regardless of whether decedent's children and their descendants are also those of surviving spouse.



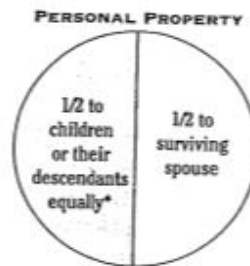
### B. COMMUNITY PROPERTY



Applies when all surviving children and their descendants are also those of surviving spouse.



Applies when there are surviving children and their descendants who are not those of surviving spouse.

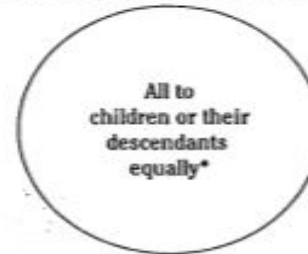


# DESCENT AND DISTRIBUTION – MARRIED, NO CHILDREN



# DESCENT AND DISTRIBUTION – CURRENTLY UNMARRIED

## A. CHILDREN OR THEIR DESCENDANTS SURVIVE



## B. NO CHILDREN OR THEIR DESCENDANTS SURVIVE

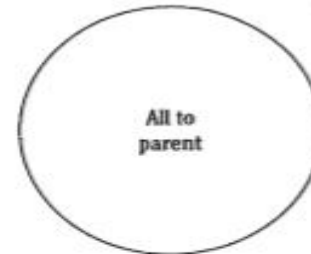
### BOTH PARENTS SURVIVE



### ONE PARENT & SIBLINGS OR THEIR DESCENDANTS SURVIVE



### ONE PARENT & NO SIBLINGS OR THEIR DESCENDANTS SURVIVE



### SIBLINGS OR THEIR DESCENDANTS & NO PARENTS SURVIVE



# FAMILY CODE: PARTITION AGREEMENTS


Cannot be used to avoid paying creditors

Sec. 4.102. *PARTITION OR EXCHANGE OF COMMUNITY PROPERTY.* At any time, the spouses may *partition* or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred to a spouse by a *partition* or exchange agreement becomes that spouse's separate property. The *partition* or exchange of property may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse.

Sec. 4.103. *AGREEMENT BETWEEN SPOUSES CONCERNING INCOME OR PROPERTY FROM SEPARATE PROPERTY.* At any time, the spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner.

Sec. 4.104. *FORMALITIES.* A *partition* or exchange agreement under Section 4.102 or an agreement under Section 4.103 must be in writing and signed by both parties. Either agreement is enforceable without consideration.

# DOCUMENTS TO EFFECTUATE TITLE

- 1) Will
  - 2) Transfer on Death Deed (TODD)
  - 3) Lady Bird Deed
  - 4) Beneficiary Designations
  - 5) Designations on account titles or land titles
  - 6) Affidavit of Heirship
- 





# WILLS

A document created by a person stating where their property (real and personal) should go upon their death.

There are requirements for a basic Will in the Texas Estates Code

Persons receiving items under a Will, will be receiving “separate property” under Texas’ Constitutional definition  
(anything inherited by devise or descent)



# WHAT DO LETTERS TESTAMENTARY GET THE EXECUTOR?

With all powers, executor can sign and sell the properties without the beneficiaries....

# LETTERS GIVE EXECUTOR THE POWER TO ACT FOR THE ESTATE INCLUDING SELLING THE PROPERTY!

Per the Estates Code, property passes to heirs/devisees at the time of death [Tex Estates Code 101.001, 101.003], therefore whoever is the end devisee (under Will) or the heirs (per Declaration or Affidavit) is the immediate owner. So the heir or devisee has to give the Executor the authority to sign for them (OR the court order as to give Executor the power).

See Tex Estates Code 402.053 (power of sale language in the Will or Order) OR

Tex Estates Code 402.053(1) (Affidavit by Executor that sale is necessary in order to pay funeral expenses, expenses of administration, expenses of last illness, and claims against the Estate)

# TODD: “TRANSFER **ON DEATH** DEED”

It is statutory (Texas Estates Code, Section 114.151 and 114.152)

It is statutorily revocable

It does NOT transfer a present interest

Can have primary and contingent beneficiaries



# LADYBIRD DEED (ENHANCED LIFE ESTATE DEED) – THERE IS NO STATUTORY PARAMETERS FOR THIS DOCUMENT IN TEXAS. IT IS A COMMONLAW DOCUMENT

NAELA position – This document is fully REVOCABLE without joinder of the remainder owner

Texas Supreme Court has not ruled on this issue (and title companies disagree with NAELA), however, the Texarkana appellate court in December 2017 ruled that a LadyBird Deed (or enhanced life estate deed) gives a current interest to the grantee subject to the grantor's right to mortgage or encumber the property and it *MIGHT* be revocable depending on the exact language in the Deed itself. In the case decided here, the grantor had reserved a very specific right to transfer or sell without joinder, so when she later conveyed to her trust it did not require approval of the son she had provided an interest to.

# JOINT TENANTS WITH RIGHT OF SURVIVORSHIP

The courts have stated that this is a valid designation as long as all parties are in agreement. **RARELY can this be used on a deed to real property.**

Real estate deeds are usually only signed by the grantors (sellers) and not by the buyers/purchasers, so a Deed that states, John and Mary Doe, JTWRORS, but is not signed by John and Mary Doe does not evidence their agreement to take title in this manner.





To determine how far back you need to go, you have to determine who is the last DEEDED owner(s). Is it mom?

Is it mom and dad?

Is it grandparents?

Were there any probate matters in the interim that tie the links in the chain of title together?



# THE ESTATES CODE SECTION ONLY REQUIRES ONE PERSON TO SIGN AN AFFIDAVIT OF HEIRSHIP. TEX ESTATES CODE 203.002

Then per Estates Code, the Affidavit must be on file five years before it is prima facie evidence. Tex Estates Code 203.001(a)(1)(B)(2)

Does your client want to wait that long?

*By the time most clients “need” an Affidavit of Heirship they are in the process of selling a piece of property and do not want to wait another five years for the Affidavit to become prima facie evidence.*

**\*\*September 1, 1993 is important date for intestacy**



# TITLE COMPANY WILL TAKE THE RISK IF.....

The alternative is to make the Heirship Affidavit conform to the requirements of a Declaration of Heirship. Have two additional witnesses who are disinterested sign off as Corroborating Witnesses on the Affidavit which state that the information provided by the family member is true and correct.

The witnesses should have known the deceased for a period of at least 10 years (preferred).

The Title Company underwriters also prefer that the Affidavit acknowledge that the Affidavit is provided to induce the title company to issue its title policy and a paragraph acknowledging the implications of perjury.



**THE PROPERTY IS OWNED BY MY MINOR CHILD**

**“I am the natural parent of the minor. I can sign to sell (convey/transfer/close out) the property/account. I do not need to obtain guardianship of my own child.”**

# NICE TRY, BUT NO WAY

A parent is the natural guardian of the PERSON of their minor child, but not the automatic guardian of the ESTATE of their child. Depending on the minor's interest in the property, your client will need to obtain guardianship, create a 1301 Management Trust or apply to sell the minor's interest without guardianship but with a court order provided the proceeds will be under \$100,000.00 (Tex Estates Code 1351).

Parents can open monetary accounts under UTMA or as Custodian for their child, but those designations imply a fiduciary responsibility to the child(ren).

# TRUSTS IN TEXAS

## Conveyance by Trustee

- Title Exam standard requires the name of the Trust, a copy of the Trust showing Trustee's powers and a Certification of Trust (Tex Prop Code 114.086)
- Trust as holder of real property is enforceable with written evidence of the terms of the Trust (Tex Prop Code 112.004) but if you do not want entire Trust document recorded a Certification is required
- Not "John Doe, Trustee" --- this would be a blind trust. From Title Co stance, does a trust really exist?
- Prefer not "Doe Trust"
  - Trusts are not valid entities under TBOC ("legal fiction")
  - Trust is usually created by a private document
- "John Doe, Trustee of the Doe Trust" (can include the date of the creation of the Trust)
  - Certification of Trust will identify Trustee powers and possible successor trustees
- Trustee may be able to appoint an agent to sign on his behalf depending on Trust document rights

# BUT ARE TRUSTS NECESSARY?

Special Needs Trusts

Medicaid Planning

To protect a family member from themselves (gambling, drug addictions)

But probably not in relation to estate tax dispersal (now that it is at 11 million per person)

# ABSTRACT OF JUDGMENT ON HOMESTEAD

Attorney – The abstract of judgment cannot attach to  
homestead!!!



Abstracts attach to any property owned by the judgment debtor unless the judgment debtor has claimed property as exempt. If the property is your homestead and you would like have the PROPERTY released from the judgment for purposes of refinance or sale, there is a method by which to accomplish this goal. It takes time and has specific statutory requirements. Tex Prop Code 52.001

- \*\*\* Divorce decree cannot convey property from one spouse to the other thereby defrauding a judgment creditor. This means your spouse's judgments attach to his interest as of the time he conveys his interest so spouse accepts his interest and his outstanding debt.
- \*\* Deceased ex-spouse cannot sign Affidavit for Release from Judgment on Homestead because (a) no longer his homestead and (b) one cannot obtain his signature from grave
- \* Partition Agreement cannot convey property from one spouse to the other to defraud a judgment creditor.

BUT





SO WHO NEEDS A LAWYER AT THE CLOSING?  
I SAVED LEGAL FEES AND THE SELLER  
THREW IN SEVEN LIENS FOR NOTHING.

# SEPARATE PROPERTY

We agree that property was Deceased separate property, and so my surviving spouse client gets 1/3 the total value of the sales price at closing.

No, it's a 1/3 Life Estate so we will value your client's 1/3 life estate interest based on the Mortality Tables (IRS or other)