Dennis R. Hower

Texas Supplement To Accompany

WILLS, TRUSTS, AND ESTATE ADMINISTRATION FOR THE PARALEGAL

Fifth Edition

Prepared by

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To my students and those of other Legal Assistant Programs:

In addition to my twenty years working with wills, trusts, and probate, I have been teaching paralegal students for eighteen years at last count. Of all the courses I have taught, none has allowed me the hands-on approach that this area has. From the simulated interview of a probate client, to the drafting of probate documents as new facts were presented to the students each week, to the execution of a new will for the hypothetical client, my students receive a close look at what paralegals really do. I am therefore honored to offer some assistance to teachers and students in the area of wills, trusts, and probate.

Although I could have hit on the corresponding Texas citation for each Uniform Probate Code Section given in the main text book, I felt it would be more appropriate to hone in on those areas that the teacher and paralegal student will need to best prepare them for practicing in this area, most notably in the area of probate.

To simplify things, I have abbreviated the Texas Probate Code as TPC and the Uniform Probate Code, naturally, as UPC. Likewise, Family Code is abbreviated as Fam. C., Property Code as Prop. C., and the Texas Tax Code as Tax. C. The term letters includes letters testamentary and letters of administration unless otherwise specified.

Finally, I have included some forms as examples of those I use in my private practice. The instructor may wish to use some of these for drafting assignments. They are clearly no substitute for a good Texas form book, and I have not spent much time cleaning them up. Nevertheless, I think they help the paralegal student relate to the substantive material.

Best of luck in your course of studies!
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In this supplement, a page reference follows each head—(Hower 000). This page reference correlates with Dennis Hower’s textbook, *Wills, Trusts, and Estate Administration for the Paralegal*, Fifth Edition.
THE PURPOSE OF WILLS (HOWER 5)

Of course, the primary reason to have a will is so property may pass the way you want it to. Texas law permits you to specifically provide who you do not want the property to go to or direct how property is not to be disposed of. TPC §§ 3(ff), 58(b). Thus, it is not necessary to leave someone “a dollar” just to be sure they receive nothing more.

Another important function a will serves is the appointment of executors, guardians, and trustees. In a technical sense, a will could consist of nothing more than an appointment of fiduciaries (TPC § 3(ff)s)—without deciding who should receive the inheritance. Under a will, a person has the absolute right and power to appoint the person he or she chooses as executor, as long as the person is qualified to act as executor. TPC § 77(a); see also In re Estate of Roots, 596 S.W.2d 240, 243 (Civ. App.-Amarillo 1980, no writ). Without exercising this option, TPC § 77 sets out a priority list in the absence of a selection by the testator. Therefore, to ensure the appointment of an acceptable executor, the client needs to have a will.

In addition to naming a personal representative, a properly executed will may specify that no bond or security is to be required of the person named as executor. TPC § 195(a).
Forms of Concurrent Ownership—
Ownership by Two or More Persons (Hover 34)

Since various common laws, as well as statutory forms of co-ownership of property, affect estate planning, the paralegal must be knowledgeable of how the community property system coexists with other forms of joint ownership (except for tenancy by the entirety, which is not recognized in Texas). Many of these forms of co-ownership provide for a transfer on the death of a co-owner and are often referred to as “transfers by operation of law,” “non-probate transfers,” or “non-testamentary transfers.”

Non-testamentary transfers must also be considered in estate planning. As in other states, the proceeds of a life insurance policy are not included in the estate. See TPC § 450(a). Likewise, retirement accounts, deferred compensation arrangements, trust agreements, and custodial agreements are beyond the dictates of testate and intestate distribution. TPC § 450. While the traditional approach in Texas was that, in order to avoid probate, property could be held in joint tenancy with the right of survivorship rather than as community property, this technique is less common with the enactment of statutes that allow community property to pass outright to a surviving spouse without probate administration. See TPC §§ 451-462.

Community Property With Right of Survivorship (Hover 54)
The law in Texas presumes tenancy in common unless there is a written agreement to the contrary. Without such an agreement, ownership of the jointly held property descends to the decedent’s heirs and devisees. *Stegall v. Odra*, 868 S.W.2d 290, 292 (Tex. 1993).

While fairly new to Texas, a right of survivorship in jointly held property may be created by a written agreement between the owners. TPC § 46(a). While this is typically found right in the ownership document, such as a deed or bank account card, spouses may also create a right of survivorship in their community property by a separate written agreement. Tex. Const. Art. 16 § 15; TPC § 451. The marital property will remain community property for most purposes related to management, control, disposition during marriage, liability, and division on divorce, but on the death of either spouse it will pass to the survivor as would separate property held by joint tenants. See TPC §§ 453, 460, 461. Transfers under this type of agreement are non-testamentary transfers and thus are not subject to the general probate rules. TPC § 454. Formerly, a right of survivorship could only be created by first partitioning the community property into separate property and then creating a joint tenancy with a right of survivorship.

TPC § 452 sets out the formalities for such an agreement. The agreement must be in writing and signed by both spouses. Although not absolutely necessary, it is presumptive of the right of survivorship if it uses any of the following phrases:

1. “With right of survivorship.”
2. “Will become the property of the survivor.”
3. “Will vest in and belong to the surviving spouse.”
4. “Shall pass to the surviving spouse.”

The agreement may apply to all or any portion of the spouses’ community property and may apply to existing property or to property yet to be acquired.

Once made, such an agreement may be revoked either according to its own prescribed method of revocation or, failing such terms in the agreement, it may be revoked by a written instrument signed by both spouses, or signed by one spouse and delivered to the other. Also, if specific property subject to the agreement is disposed of by the spouses, the agreement is automatically revoked with regard to that property, provided the disposition is not inconsistent with the terms of the agreement or with applicable law. TPC § 455.

After the death of a spouse, the surviving spouse may apply to the court for an order stating that the agreement is effective. TPC § 456. In my experience, this order greatly assists with title companies since under TPC § 458 the order constitutes sufficient authority to the decedent’s creditors, agents, and others having custody over the property.
THE PARTICIPANTS

TPC § 3 sets out most of the definitions for the Texas Probate Code. A few which correspond to this chapter are:

1. **Probate Court**—County courts in the exercise of their probate jurisdiction, courts created by statute and authorized to exercise original probate jurisdiction, and district courts exercising probate jurisdiction in contested matters.
2. **Probate Judge**—The presiding judge of any court having original jurisdiction over probate proceedings, whether it be a county court in the exercise of its probate jurisdiction, a court created by statute and authorized to exercise probate jurisdiction, or a district court exercising probate jurisdiction in contested matters.
3. **Devises**—Includes legatee.
4. **Independent Executor**—Includes the term “Independent Administrator.”
5. **Interested Persons**—Means heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered; and anyone interested in the welfare of a minor or incompetent ward.
6. **Minors**—All persons under eighteen years of age who have never been married or who have not had disabilities of minority removed for general purposes.
7. **Personal Representative**—Includes executor, independent executor, administrator, independent administrator, and temporary administrator, together with their successors. The inclusion of independent executors herein shall not be held to subject such representatives to control of the courts in probate matters with respect to settlement of estates except as expressly provided by law.
8. **Statutory Probate Court**—Refers to any statutory court presently in existence or created after the passage of this Act, the jurisdiction of which is limited by statute to the general jurisdiction of a probate court, and such courts whose statutorily designated name contains the word “probate.” County courts at law exercising probate jurisdiction are not statutory probate courts under this Code unless their statutorily designated name includes the word “probate.”

**Venue (Hover 84)**

In addition to the definition of county court and statutory court as to jurisdiction (see TPC §§ 4, 5), venue is set out in TPC § 6, which provides that venue lies:

1. In the county where the deceased resided, if he or she had a domicile or fixed place of residence in this state.
2. If the deceased had no domicile or fixed place of residence in this state but died in this state, then either in the county where his or her principal property was at the time of death, or in the county where he or she died.
3. If he or she had no domicile or fixed place of residence in this state, and died outside the limits of this state, then in any county in this state where his or her nearest of kin reside.

4. If he or she had no kindred in this state, then in the county where his or her principal estate was situated at the time of his or her death.

5. In the county where the purpose is only receiving funds or money due to the deceased person or his or her estate from any governmental source or agency, provided that unless the mother or father or spouse or adult child of the deceased is the applicant, citation shall be served personally on the living parents and spouses and adult children, if any, or upon those who are alive and whose addresses are known to the applicant.

TPC § 8 states that when two or more courts have concurrent venue, the first filing of an application containing sufficient facts to confer venue gets jurisdiction to the exclusion of all other courts. However, TPC § 8(c)(2) does provide for transfers for the convenience of the estate.
DEATH WITH A WILL—TESTACY (HOWER 90)

The right to inherit property under the laws of descent and distribution does not vest until the death of the intestate (Davis v. First National Bank of Waco, 139 Tex. 36, 161 S.W.2d 467 (1942)), or of the testate (TPC § 37; Casey v. Kelly, 185 S.W.2d 492 (Tex. Civ. App. 1945, writ ref’d)). Likewise, in Clark v. Gauntt, 138 Tex. 558, 161 S.W.2d 270 (1942), the court held that merely being an expectant heir grants no present interest in, or right to, an intestate’s property while that would-be intestate person is still living, and thus the would-be heir could not file a lawsuit to protect the property he or she expected to inherit, saying it “is nothing more than a hope of a possibility of title.” Id. at 272.

As in other states, property left to others in a will, such as as those heirs in intestate situations, technically vests immediately in those persons subject to payment of the debts and expenses of the estate. TPC § 37.

Holographic Will (Hower 91)

In Texas a holographic will must be written wholly in the handwriting of the testator. TPC § 60. Typewriting, even if done by the testator, is not sufficient to qualify as a holographic will. Dean v. Dickey, 225 S.W.2d 425, 427 (Civ. App.—El Paso 1949, ref.). However, this does not mean that extraneous material invalidates an otherwise complete and valid holographic will. As long as the portion of the instrument that is in the testator’s handwriting is complete within itself as a will, the will is valid and may be probated. Price v. Taliaferro, 254 S.W.2d 157, 159 (Civ. App. Fort Worth 1952, ref. n.r.e.). The court will disregard the extraneous portion that is not in the testator’s handwriting and admit to probate the portion of the will in the testator’s handwriting that is complete within itself as a will. Watkins v. Boykin, 536 S.W. 2d 400, 403 (Civ. App. El Paso 1976, ref. n.r.e.).

TPC § 59(a), pertaining to all wills, requires that a holographic will must be signed, but no specific location is mandated and so it is not necessary that the signature appear at the bottom or end of the instrument. In re Estate of Brown, 507 S.W.2d 801, 806 (Civ. App.—Dallas 1974, ref). A signature by initials has been held to be sufficient. (Trim v. Daniels, 862 S.W.2d 8 n.r.e., Tex. App.—Houston 1992, den.). In Texas, unlike in other states, a holographic will need not be dated. Trim v. Daniels, Id. at 10.

A holographic will may be self-proved if, during the testator’s lifetime, the testator attaches an affidavit to the will. If not self-proved, a holographic will must be proved as to the testator’s handwriting by two witnesses. TPC § 84(b).

Nuncupative (Oral) Will (Hower 92)

For complete verification, I am including the Texas section dealing with nuncupative wills verbatim:

No nuncupative will shall be established unless it be made in the time of the last sickness of the deceased, at his home or where he has resided for 10 days or more preceding the date of such will, except when the deceased is taken sick away from home and dies before he returns to such home; nor when the value exceeds thirty dollars, unless three credible witnesses that
the testator called on a person to take notice or bear testimony that such is his will, or words of like import.

TPC § 65.
In 20 years of practicing probate law, I have never seen a nuncupative will hold up in court.

Terminology Related to Intestacy (Hower 106)

Chapter 573 of the Government Code sets out degrees of kinship relations and the method for determining the degree of such relationships. The degree of relationship between a person and the person’s descendant is determined by the number of generations that separate them. Gov. C. § 573.023. If two persons are married to each other, or the spouse of one of the persons is related by consanguinity to the other person, they are in “affinity” to each other. Termination of a marriage by divorce or death generally terminates affinity relationships created by that marriage, but if a child of the marriage is living, the marriage is treated as continuing to exist as long as a child of the marriage lives. Gov. C. § 570.024.

According to Chapter 573, if two people are related by consanguinity, but neither is descended from the other, the degree of relationship is determined by adding:

1. The number of generations between the first person and the nearest common ancestor of the first person and the second person.
2. The number of generations between the second person and the nearest common ancestor.

The statute also specifies all the relatives who fall within the first three degrees of relationship, which becomes critical in certain probate situations, as you will see, and sets them out as follows (Gov. C. § 570.023(b)):

1. Relatives in the first degree are the parent or child.
2. Relatives in the second degree are the brother, sister, grandparent, or grandchild.
3. Relatives in the third degree are great-grandparent, great-grandchild, aunt and uncle who are siblings of one of the person’s parents, or niece and nephew who are children of a person’s brother or sister.

Related to the issue of family relations is that of “whole” and “half” bloods. Texas takes a fundamentally different approach to the issue of half bloods when compared to the UPC. As used in TPC § 41b, the term descendant includes persons who are issue of the testator’s kindred of the half as well as the whole blood. See also Rogers v. First National Bank of Midland, 448 S.W.2d 149, 150-151 (Civ. App.-El Paso 1969, ref. n.r.e.), dealing with grandchildren of half and whole bloods. However, if the inheritance passes to collateral kindred of both the whole and the half bloods, those kindred of the half blood receive only half as much as those of the whole blood. TPC § 41(b). An easy formula for this is 2/N + 1/N = N/N, with 2 representing each full blood (getting twice the half-blood share), 1 representing the single amount that each half blood receives, and N being the total number of 2s plus 1s, which will then be used as the denominator. To illustrate this, if a deceased left only 2 brothers from both his parents and one sister with whom he only shares one parent, the formula would look like 2/5 + 2/5 + 1/5 = 5/5. If we had 3 whole bloods and 3 half bloods, the formula would look like 2/9 + 2/9 + 2/9 + 1/9 + 1/9 + 1/9 = 9/9.

Intestate Distribution (Hower 106)

TPC § 37 codifies the common law rule that when a person dies without a will, or with a will that does not dispose of his or her entire estate, the person’s estate vests in his or her heirs in proportions established by the laws of descent and distribution. It is important to note that the TPC speaks
in terms of the total community estate which includes the yet to be divided half that the spouse had prior to death. In other words, if the TPC gives the surviving spouse 50 percent of the community estate, that is no more than what that spouse would have been entitled to prior to death, say in a divorce. It does not mean that the surviving spouse receives 50 percent on top of his or her pre-existing community share.

Separate versus Community Property

As you know, Texas is a community property state. The way property is characterized can have a substantial effect on how it is distributed in an intestate situation. This fact requires the Legal Assistant to pay very close attention to how the property was acquired. These rules apply whether there was a formal marriage or a common-law marriage. In re Glasco, 619 S.W.2d 567, 571 (Civ. App.-San Antonio 1981, no writ) and Persons v. Persons, 666 S.W.2d 560, 563 (Tex. App.-Houston (1st Dist.) 1984, ref. n.r.e.). Here again we see that the Probate Court may take on similarities of a Family Court in determining the existence of a common-law marriage. Also keep in mind that as in every case, the community estate passes charges with the debts against it. TPC § 45(b).

When separate property is divided, particularly in the situation of a spouse and descendants from a former relationship, things only become more complicated. The Legal Assistant must categorize the separate property into personalty and realty. The status of property as personal or real is determined as of the time of the death of the intestate.

Distribution of Community Property

If an intestate dies while married, the community property of the intestate is inherited in accordance with TPC § 45(a). The community property estate of the deceased spouse passes to the surviving spouse if:

1. No child or other descendant of the deceased spouse survives the deceased spouse.
2. ALL surviving children and descendants of the deceased spouse are also children or descendants of children of the surviving spouse.

If even a single child or descendant is not a child or descendant of a child of the surviving spouse (i.e., a stepchild), then:

1. One-half of the community estate is retained by the surviving spouse.
2. One-half passes to the children or descendants of the deceased spouse, even those born with the surviving spouse.

In other words, it is an all or nothing proposition.

The descendants of a predeceased child share in the property to which they would be entitled under TPC § 43, with per stirpes and per capita rules akin to those under the UPC.

Separate Property

When Both Spouse and Child Survive Decedent

When there is a surviving spouse and surviving children or further descendants, different rules apply for separate realty and personalty.

In the case of separate personalty (non-realty) property of an intestate decedent who is survived by both a spouse and a child, children, or descendants of a child:

1. The surviving spouse will receive one-third of the personal property.
2. The children (whether of the surviving spouse or not) will receive equally the remaining two-thirds of the personal property, per stirpes. TPC § 38 (b) (1).
In the case of dividing an interest in separate real estate:

1. The surviving spouse will receive a life estate in one-third.
2. The children will receive the remaining two-thirds and a remainder interest in the surviving spouse’s life estate in the real property. TPC § 38(b)(1).

When a Spouse But No Children or Descendants Survive Decedent

In the case of the separate property of an intestate decedent survived by a spouse but no children, or descendants of such children:

1. The surviving spouse inherits all of the personal property and one-half of the real estate, without remainder to any person TPC § 38(b).
2. The other half of the real estate is inherited as follows:
   a. By a surviving mother and father in equal proportion, or if only one parent is surviving, that parent shares an equal proportion of the real estate with any surviving brothers and sisters of the deceased.
   b. If no parent survives, any surviving sisters and brothers of the deceased, or the descendants of each, share the one-half interest in the real estate in equal proportion.

   When the deceased has no surviving father, mother, brothers, or sisters, or their descendants, the entire estate is received by the surviving spouse. TPC § 38(a)(2).

When There Is No Surviving Spouse

In the case of an intestate not survived by a spouse, all of the separate property, whether real or personal, passes as follows:

1. To the child or children and their descendants. TPC § 38(a)(1).
2. If there are no surviving children or descendants of children, a surviving mother and father each receive equal portions. If only one parent is surviving, and there are surviving siblings of the deceased, or surviving descendants of siblings of the deceased, the surviving parent receives half of the estate, and the other half is divided between the siblings and descendants. If only one parent survives and there are no surviving siblings or descendants of siblings, the surviving parent inherits the entire estate. TPC § 38(a)(2).
3. If no parent of the intestate survives, the entire estate passes to the surviving siblings and their descendants. TPC § 38(a)(3).
4. If no children, descendants of children, siblings, descendants of siblings, or parents survive the deceased, the estate is divided into two halves, referred to as moieties. One moiety passes to the paternal kindred and the other passes to the maternal kindred. Each moiety is distributed as follows: (1) equal shares to the grandparents; (2) if only one grandparent survives, one-half to that grandparent and the other half to the descendants of the deceased grandparent; (3) if only one grandparent survives and there are no descendants of the deceased grandparent, all passes to the surviving grandparent; (4) if there are no surviving grandparents, all passes to the descendants of the grandparents; (5) if there are no surviving grandparents or descendants of grandparents, all passes in like manner to the nearest lineal ancestors and their descendants. If there are no kindred to inherit either the paternal or the maternal moiety under the statute, that moiety will pass to the kindred who inherit the other moiety. TPC § 38(a)(4).
Adopted Children (Hower 126)

The term child, as used in the Probate Code, includes an adopted child, whether adopted by a statutory procedure or by estoppel. TPC § 3(b). Thus, an adopted child is treated as a natural child of the adoptive parents for purposes of inheritance and other Probate Code purposes. Under TPC § 40 as well as Fam. C. § 162.017, the adopted child and his or her descendants may inherit from and through a parent by adoption and that parent’s family, and the parent by adoption and the parent’s family may inherit from or through the adopted child.

Additionally, the adopted child is entitled to inherit from his or her natural parents, even if the parent-child relationship was terminated in the adoption proceeding, unless the decree terminating the relationship expressly provided that the child did not retain the right of inheritance, which is rare. TPC § 40; Fam. C. § 161.206; Go Intern., Inc. v. Lewis, 601 S.W.2d 495, 498 (Civ. App.-El Paso 1980, ref. n.r.e.—involving the right to bring a wrongful death suit). However, the natural parents do not inherit from or through a child of theirs who has been adopted and whose rights terminated. TPC § 40.

Nonmarital (Illegitimate) Children (Hower 127)

The parent-child relationship extends equally to every child and parent regardless of the marital status of the parents. Fam. C. § 151.001(b). Thus, no distinction between legitimate and illegitimate children exists under Texas law. Like the UPC, for purposes of inheritance, a child is considered the child of his or her biological mother, and thus the child and the child’s descendants may inherit from the mother and from her kindred, and she and her kindred may inherit from the child and the child’s descendants, according to the rules of intestate succession. TPC § 42(a).

TPC § 42(b)(1) states that the father-child relationship may be established in a probate proceeding by evidence that one of the Family Code presumptions of paternity apply. Fam. C. § 151.002(b) provides that a child is the child of his or her biological father for purposes of inheritance if: (1) the relationship is presumed under Fam. 151.002(a), (2) the father executes a voluntary statement of paternity pursuant to Family Code provisions or to similar provisions in another jurisdiction, (3) the matter is adjudicated in a paternity suit under Family Code provisions and the court decrees that the relationship exists, or (4) the father adopts the child. In Seyffert v. Briggs, 727 S.W.2d 624 (Tex. App.-Texarkana 1987, ref. n.r.e.), the court stated that a properly executed statement of paternity is not merely evidence of paternity but is conclusive on the question for intestacy purposes and held that TPC § 42(b) provides that the statement executed by the father is conclusive on the question for intestacy purposes.

A child born out-of-wedlock may sue to establish paternity at any time within two years after the child becomes an adult. TFC § 160.002a. In Dickson v. Simpson, 807 S.W.2d 726, 727-728 (Tex. 1991), the Texas Supreme Court held that if the child has had no opportunity to institute a paternity action under the Family Code, equal protection guarantees that this opportunity must be provided in the probate proceedings.

A person claiming to be a descendant or claiming to be a biological child of the decedent, may petition the probate court under TPC § 42(b) for a determination of the right of inheritance if the parent-child relationship is not presumed. If the court finds by clear and convincing evidence that the purported father was the biological father of the child, the child is treated as any other child of the decedent for the purpose of inheritance, and the child and the child’s issue may inherit from the paternal kindred, and the paternal kindred may inherit from the child and the child’s issue. TPC § 42(b)(1).

An illustrative case for study is Matherson v. Pope, 852 S.W.2d 285 (Tex. App.-Dallas 1993, den.). Here, the paternal collateral relatives were the ones seeking to inherit from an illegitimate child. The Court held that because the Probate Code does not provide for the biological father, or a person claiming through the biological father, to petition the court for a determination of the right to inherit from or through the child, the father and his kindred cannot inherit from or through his biological child unless the relationship is presumed or is established under Family Code proceedings.
After letters have been issued, one of the first issues to be addressed is insuring that the surviving spouse and children are financially taken care of during the pendency of the probate. Texas law does grant rights as to homestead, certain exempt property, and family allowance for their benefit.

The court ordinarily sets aside the homestead and awards the exempt property after it approves the inventory, appraisement, and list of claims (TPC § 271(a)), unless exigent circumstances require quicker action. This claim to exempt property is a matter of right and is not dependent on the claimants’ showing of need. Generally, any property set aside as exempt is not subject to attachment, execution, or forced sale for the payment of debts. TPC § 271(a). The Property Code enumerates the items of exempt personal property (see Prop. C. §§ 42.001(b), 42.002), and is liberally construed in favor of the express exemptions. The aggregate fair market value of the exempt property for a single adult cannot exceed $30,000, and that for a family cannot exceed $60,000. Prop. C. § 42.001.

If the decedent does not own any or all of the specific objects that his or her family is entitled to have set aside, the Probate Code requires the judge to make a reasonable allowance to the family in lieu of the property. TPC § 273. The right to this allowance depends solely on the absence of the exempt property from the decedent’s effects and not on any showing of need for the items. In re May’s Estate, 43 S.W.2d 306, 307 (Civ. App.-Beaumont 1931, ref.). The amount of the allowance awarded to the claimants lies within the discretion of the judge. San Angelo Nat’l Bank v. Wright, 66 S.W.2d 804, 805 (Civ. App.-Austin 1933, ref.).

Family or “Widow’s” Allowance (Hower 131)

Separate and apart from the exempt property, the surviving spouse and the minor children of the deceased are entitled to an allowance sufficient for their maintenance for one year after the death of the deceased. TPC § 287. This claim to an allowance is not a matter of right but is dependent on the claimants’ needs. It may be paid in one lump sum or in installments. The amount of the family allowance is within the discretion of the court and depends on the facts and circumstances then existing and those anticipated to exist during the first year after the decedent’s death. TPC § 287.
WILLS: VALIDITY REQUIREMENTS, MODIFICATION, REVOCATION, AND CONTESTS

REQUIREMENTS FOR THE CREATION OF A VALID WILL (HOWER 142)

TPC § 57 states that a person has the right and power to make a will if that person meets both of the following conditions:

1. Person is at least eighteen years of age, is or has been lawfully married, or is a member of the armed forces of the United States or of the auxiliary of the armed forces or of the maritime service.

2. Person is of sound mind.

Texas statutes do not explicitly define the form that an instrument must take to constitute a will. A will is generally defined as any instrument that: (1) disposes of a person’s property, (2) is effective on that person’s death, and (3) by its own nature is ambulatory and revocable during the lifetime of the testator. In re Estate of Brown, 507 S.W.2d 801, 803 (Civ. App.-Dallas 1974, ref. n.r.e.). However, a testamentary instrument can still be a will even if it merely revokes another will, or appoints an executor or guardian, or if it directs how property may not be disposed of.

In Thomasson v. Kirk, 859 S.W.2d 493 (Tex. App.-Houston [14th Dist.] 1993, den.), the use of the phrase “my will and desire” was construed as mandatory testamentary language, though desire, standing alone, would have been considered only precatory language. In Huffman v. Huffman, 329 S.W.2d 139 (Civ. App.-Fort Worth 1959), AFF'D, 161 Tex. 267, 339 S.W.2d 885, (1960), it was held that the testator’s intent must be ascertained only from the intrinsic meaning of the words used by the testator in the purported will and not from anything extrinsic that the testator may have meant to say, but did not say, in the instrument.

Joint or Reciprocal Will versus Contractual Will

The execution of joint wills or reciprocal wills does not by itself suffice as evidence of the existence of a contract. TPC § 59A(b). TPC § 59A(b) makes it clear that courts may not use the fact of a will’s joint or reciprocal nature, alone, as sufficient evidence of the contractual nature of the will. Contracts to make wills entered into or executed on or after September 1, 1979, may be established only by provisions in a will stating that a contract does exist, and setting out the material provisions of the contract. TPC §59A. Any wills made pursuant to these contracts may always be revoked.
Intent of the Testator (Hower 143)

An essential characteristic of a valid will is that it is intended to transfer the testator’s property only after the testator’s death as opposed to a present interest by way of deed or contract. In Trim v. Daniels, 862 S.W.2d 8 (Tex. App.-Houston [1st Dist.] 1992, den.), testamentary intent was held not to be dependent on the maker’s realization that the instrument was a will or merely the designation of an instrument as a will, but rather on the maker’s intention to create a revocable disposition of property which is to take effect only after death.

The Court, in In re Craft Estate, 358 S.W.2d 732 (Civ. App.-Amarillo 1962, ref. n.r.e.), found that an instrument providing for payments during the life of the alleged testator and to continue from his or her estate after his or her death was not a will since it was not limited to post-mortem effectuation. If the instrument passes a present interest in property, even though the right of its possession and enjoyment may not occur until a future time, the instrument is a deed or a contract.

Capacity of the Testator (Hower 143)

As previously mentioned, TPC § 57 states that a person has the right and power to make a will if a person is of sound mind.

Although “sound mind” is not specifically defined by statute, the terms sound mind and testamentary capacity have been held to be synonymous. Chambers v. Chambers, 542 S.W.2d 901, 906 (Civ. App.-Dallas 1976, no writ). Testamentary capacity is generally defined as the testator’s ability to know and understand the business in which the testator was engaged, the effect of the act of making a will, the objects of the testator’s bounty and their claims upon the testator, and the general nature and extent of the testator’s property. Gillispie v. Reinhardt, 596 S.W.2d 558, 559 (Civ. App.-Beaumont 1980, no writ). The testator must also have had memory sufficient to collect in his or her mind the elements of the business to be transacted, to hold them long enough to perceive the elements’ obvious relations to each other, and to be able to form a reasonable judgment concerning them. Bettis v. Bettis, 518 S.W.2d 396, 397-398 (Civ. App.-Austin 1975, ref. n.r.e.). For example, in Jones v. LaFargue, 758 S.W.2d 320 (Tex. App.-Houston [14th Dist.] 1988, den.) the testator who did not understand the extent of the property, failed to recognize members of his family, and suffered from dementia lacked testamentary capacity.

In determining testamentary capacity, the focus is on the condition of the testator’s mind on the very day the will was executed. In Lowery v. Saunders, 666 S.W.2d 226 (Tex. App.-San Antonio 1984, ref. n.r.e.), it was stated that consideration of the testator’s state of mind, either before or after the execution, is allowable to show lack of testamentary capacity only if it is demonstrated that the state of mind persisted and had some probability of being the same condition that existed at the time of execution. In Campbell v. Groves, 774 S.W.2d 717 (Tex. App.-El Paso 1989, den.), the grandson’s testimony that the testator referred to instances of persecution that did not happen and had hallucinations was insufficient to show the lack of testamentary capacity. The Court stated that a testator “may appear bizarre or absurd with reference to some matters and still possess the assimilated and rational capacities” necessary to establish testamentary capacity, and therefore the testimony did not contradict the direct evidence of the testator’s assimilated and rational capacities to execute the will.

Formal Requirements for a Will (Hower 145)

TPC § 59 sets out the main requirements for all wills in Texas. Texas recognizes formal (statutory) wills, holographic wills, and nuncupative wills. TPC § 59 states that all formal wills require two witnesses, and all but nuncupative wills are to be signed by the testator, or at his or her direction and in his or her presence. These requirements are discussed in greater detail later in the chapter.
**Signature of the Testator (Hower 147)**

TPC § 59 states that written wills must be signed either by the testator or by another person for the testator at the direction and in the presence of the testator. The testator’s signature may, in certain circumstances, even be typewritten. *Thomason v. Gwinn*, 184 S.W.2d 542 (Civ. App.-Amarillo 1944, ref.). As a general rule, it does not matter where the testator’s signature is placed on the will, provided that the signature is affixed to the will with testamentary intent. *Burton v. Bell*, 380 S.W.2d 561, 568-569 (Tex. 1964). A testator’s mark, made with the intent that it serve as a signature, will suffice if the testator is unable to sign his or her name. *Anderson v. Dubel*, 580 S.W.2d 404, 409 ( Civ. App.-San Antonio 1979, ref. n.r.e.).

**Signatures of Witnesses (Hower 150)**

TPC § 59 states that every written will that is not holographic must be attested by two or more credible witnesses above the age of fourteen, who must sign their names to the will in their own handwriting in the presence of the testator. TPC § 59a. A witness is not ordinarily considered ineligible merely because the will appoints the witness as executor or an officer or member of a religious or charitable institution that will benefit by the will. *Moos v. First State Bank of Uvalde*, 60 S.W.2d 888 (Civ. App.-Beaumont 1933, dis.). However, under TPC § 61, when one of the witnesses is designated as a devisee or legatee, if the will cannot be established by other means, the bequest to the witness will be void and the witness must give testimony as if the bequest had not been made. Somewhat as a savings provision, TPC § 61 provides that if the witness would have been entitled to a share of the testator’s estate if there had been no will, the witness will be entitled to that share to the extent that it does not exceed the value of the bequest to him or her in the will. Another alternative is if at least one disinterested and credible person corroborates the testimony of a subscribing witness to whom the will makes a bequest and testifies that the testimony of the subscribing witness is true and correct, the bequest to the subscribing witness will not be void. TPC § 62.

**REVOCATION AND REJECTION OF A WILL (HOWER 156)**

All wills are revocable during the life of the testator. *Richardson v. Lingo*, 274 S.W.2d 883, 885 ( Civ. App.-Galveston 1955, ref. n.r.e.). A testator may revoke any written will and any clause or devise in a will only by one of the following methods:

1. A subsequent will.
2. A later codicil.
3. A subsequent declaration executed by the testator with the formalities required for a will.
4. The testator’s destruction or cancellation of the will or the testator’s instructions to destroy or cancel it in the testator’s presence.

TPC § 63.

However, obliterations of words, erasures, or interlineations are not effective because changes in a will may be made only with the formalities required in making an original will. *Pullen v. Russ*, 209 S.W.2d 630, 635-636 (Civ. App.-Amarillo 1948, ref. n.r.e.). Similarly, changes may not be made by replacing one or more pages of a will without the requisite formalities for making an original will. *Goode v. Estate of Hoover*, 828 S.W.2d 558, 560 (Tex. App.-El Paso 1992, den.). Therefore, a testator who desires to change his or her will should execute a new will that expressly revokes the old one, or execute a formal, attested codicil.

**Lost Wills (Hower 157)**

Even if the will cannot be located, TPC § 85 provides the procedure for proving up a lost will. Essentially, there must be sufficient proof that it could not be produced by due diligence and the contents of such a will must be substantially proved by the testimony of a credible witness who has read it or heard it read.
Mistake (Hower 163)

In the absence of undue influence or fraud, a mistake of fact or law will not defeat the probate of a will. *Lehmann v. Krahl*, 155 Tex. 270, 285 S.W.2d 179 (1955)—construing R.C.S. Art. 8283, predecessor to TPC § 59. However, in *Scandurro v. Beto*, 234 S.W.2d 695 (Civ. App.-Waco 1950, no writ), it was held that unless a testator is under a mistaken belief with respect to the identity of a document or of its contents, insufficient basis exists to set aside the will on this theory.

Fraud (Hower 163)

Fraud has generally been defined as the successful employment of cunning, deception, or artifice to cheat or deceive and thereby injure another. *Guest v. Guest*, 235 S.W.2d 710, 713 (Civ. App.-Fort Worth 1950, ref. n.r.e.)—construing R.C.S. Art. 8283, predecessor to TPC § 59. The courts have held that fraud occurs when a false representation of a material fact is made with intent to induce the listener to act on it, and the listener acts in reliance on the misrepresentation, and suffers an injury as a consequence.

Undue Influence (Hower 164)

In *Whatley v. McKanna*, 207 S.W.2d 645 (Civ. App.-Eastland 1948, ref. n.r.e.), undue influence was defined as compelling the testator (by fear, the desire for peace, or some feeling the testator is unable to resist) to do something that is against his or her will. To prove undue influence, the following must be shown to exist:

1. The existence and exertion of influence.
2. The effective operation of the influence sufficient to subvert and overpower the mind of the testator at the time of the will’s execution.
3. The execution of a testamentary instrument that the testator would not have executed but for such influence.

Ascertaining whether undue influence has been exercised requires consideration of all material facts and circumstances at the time of execution, including: (1) the relationship of the maker and the beneficiaries; (2) the motive, character, and conduct of those who benefit by the will; (3) the participation of beneficiaries in the preparation and execution of the will; (4) the words and acts of those attending the execution; (5) the physical and mental condition of the testator; (6) the testator’s age, weakness, infirmity, and dependency on, or subjection to, control by the beneficiaries; and (7) any unjust, unreasonable, or unnatural dispositions in the will. However, a person of sound mind has a perfect legal right to dispose of his or her property as he or she wishes. Thus, even an unnatural disposition of property may not be taken as a sign of influence of the testator unless there is no reasonable explanation for it.
There is no Texas-specific law dealing with this subject.
Self-Proving Affidavit Clause That Creates a Self-Proved Will (Hower 224)

A will may be self-proved either when it is executed or on any subsequent date during the lifetime of the testator and the witnesses. TPC § 59(a). A will becomes self-proved when the testator and the attesting witnesses make affidavits before an officer authorized under Texas law to administer oaths. The affidavits must be evidenced by a certificate, with the official seal affixed, of the officer; must be attached or annexed to the will and must be substantially in the form provided by the statute. TPC § 59(a).

The self-proving affidavits and the certificate are technically not part of the will, but constitute a separate instrument. Because of this, a defective self-proving affidavit does not invalidate the entire will; rather, it merely makes it necessary to prove the will by other means. Cutler v. Ament, 726 S.W.2d 605 (Tx. App.—Houston [14th Dist.] 1987, ref. n.r.e.). A signature on a self-proving affidavit is considered a signature to the will when necessary to prove that the will was signed by the testator, or witnesses, or both. However, the will cannot be considered a self-proved will. TPC § 59(b).

A copy of the statutory language follows:

**SELF PROVING AFFIDAVIT**

STATE OF TEXAS )

)  

COUNTY OF XXX )

BEFORE ME, the undersigned authority, on this day personally appeared (Testator’s Name), __________________________________ and __________________________________, known to me to be the testator, and the witnesses, respectively, whose names are subscribed to the foregoing instrument in their respective capacities, and all of said persons being by me duly sworn, the said (Testator’s Name), testator, declared to me and to the said witnesses in my presence, that the said instrument is his LAST WILL AND TESTAMENT and that he has willingly made and executed it as his free act and deed for the purposes therein expressed; and the said witnesses each on their oath stated to me, in the presence and hearing of said testator that said testator had declared to them that said instrument is his LAST WILL AND TESTAMENT and that he executed same as such and wanted each of them to sign as witnesses; and upon oaths each witness stated...
In 1993, the Texas Legislature adopted the current version of the Durable Power of Attorney Act and incorporated it into TPC §§ 481 through 506. A statutory form is given as suggestive and follows. Although it states that the form is not exclusive, when a power of attorney which “substantially follows” this form is used, third parties may rely on it in good faith, without fear of liability to the principal (TPC § 490) and can incorporate the effect of the Act. Only powers of attorney relating to real estate need to be recorded in the county clerk’s office of the county in which the real estate is located. (TPC § 489.) See the form that follows.

### STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, ________________________, of ________________________, __________________, __________________ County, __________________, appoint __________________ of __________________, __________________, __________________ County, __________________, as my agent to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below. (continued)
TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD.

Real property transactions;
Tangible personal property transactions;
Stock and bond transactions;
Commodity and option transactions;
Banking and other financial institution transactions;
Business operating transactions;
Insurance and annuity transactions;
Estate, trust, and other beneficiary transactions;
Claims and litigation;
Personal and family maintenance;
Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;
Retirement plan transactions;
Tax matters.

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.

SPECIAL INSTRUCTIONS:

Special instructions are applicable to gifts (initial in front of the following sentence to have it apply):

I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

None.

OR __________________________________________________________________________

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney is effective immediately and is not affected by my subsequent disability or incapacity.

This power of attorney becomes effective upon my disability or incapacity.
If a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician’s medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor[s] to that agent:

______________________ .

Signed on _______________ , ________ .

______________________________
THE STATE OF ___________ §

§

§

COUNTY OF ___________ §

This document was acknowledged before me on _____ , _____ , by _____ .

Notary Public, State of Texas
Notary’s Printed Name:

My Commission Expires:

THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

Right to Die Laws and Related Advance Medical Directive Documents (Hower 228)

Texas provides its suggested forms for advanced directives in the Health and Safety Code § 166.001 et. seq.

Living Will: Death with Dignity (Hower 229)

Contained in the Texas Health and Safety Code is a suggested form which contains a very good explanation which I have slightly modified to “humanize” in the first section. My sample form with explanation follows:
INFORMATION CONCERNING THE DIRECTIVE TO PHYSICIANS AND FAMILY OR SURROGATES

The Directive to Physicians and Family or Surrogates, also known as an Advance Directive, is an important legal document. It is designed to help you communicate your wishes about medical treatment at some time in the future when you are unable to make your wishes known due to illness or injury. These wishes are usually based on personal values. In particular, you may want to consider what burdens or hardships of treatment you would be willing to accept for a particular amount of benefit if you were seriously ill.

You are encouraged to discuss your values and wishes with your family or chosen spokesperson, as well as your physician. Your physician, other health care provider, or medical institution may provide you with various resources to assist you in completing your advance directive. Brief definitions are listed below and may aid you in your discussions for advance planning. Initial the treatment choices that best reflect your personal preferences. Provide a copy of your directive to your physician, usual hospital, and family or spokesperson. Consider a periodic review of your directive. By periodic review, you can best assure that your directive reflects your preferences.

In addition to the Advance Directive, Texas law provides two other types of directives that can be important during a serious illness. These are the Medical Power of Attorney and the Out-of-Hospital Do-Not-Resuscitate Order. You may wish to discuss these with your physician, family, hospital representative, or other advisors. You may also wish to complete a directive related to the donation of organs and tissues.

Definitions

“Artificial Life Support” means the provision of nutrients or fluids by a tube inserted in a vein, under the skin in the subcutaneous tissues, or in the stomach (gastrointestinal tract).

“Irreversible Condition” means a condition, illness, or injury:

1. that may be treated but is never cured or eliminated;
2. that leaves a person unable to care for or make decisions for that person's own self, and;
3. that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is fatal.

Explanation: Many serious illnesses such as cancer, failure of major organs (kidney, heart, liver, or lung), and serious brain disease such as Alzheimer's dementia may be considered irreversible early on. There is no cure, but the patient may be kept alive for prolonged periods of time if the patient receives life-sustaining treatments. Late in the course of the same illness, the disease may be considered terminal when, even with treatment, the patient is expected to die. You may wish to consider which burdens of treatment you would be willing to accept in an effort to achieve a particular outcome. This is a very personal decision that you may wish to discuss with your physician, family, or other persons in your life.

“Life-sustaining treatment” means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient would die. The term includes both life-sustaining medications and artificial life support such as mechanical breathing machines, kidney dialysis treatment, and artificial hydration and nutrition. The term does not include the administration of pain management medication, the performance of a medical procedure necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain. “Terminal Condition” means an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within six months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care.

Explanation: Many serious illnesses may be considered irreversible early in the course of the illness, but they may not be considered terminal until the disease is fairly advanced. In thinking about terminal illness
and its treatment, you again may wish to consider the relative benefits and burdens of treatment and discuss your wishes with your physician, family, or other important persons in your life.

Signed on this ___________ day of ___________ , 20_____ , to confirm that I received this information statement prior to execution of my Directive to Physicians and Family or Surrogates and that I have read it and understand it.

________________________________
Client's Signature

______ Withhold life-sustaining treatment—I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible; OR

______ Do not withhold life support treatment—I request that I be kept alive in this terminal condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

If I have an “irreversible condition.” If in the judgment of my physician, I am suffering with an irreversible condition (other than a “terminal condition” which is provided for above) so that I cannot care for myself or make decisions for myself and am expected to die (but not necessarily within the next six months) without life-sustaining treatment provided in accordance with prevailing standards of care (indicate your preference by initializing in front of one of the following paragraphs):

________ Do not permit full treatment—(This selection does not apply to hospice care.)

________ Do not resuscitate (DNR) if I am unconscious or in a persistent vegetative state and I desire to be kept alive in this condition with minimum medical interventions. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

________ Do not intubate and feed me by stomach tube if I am unconscious or in a persistent vegetative state and I desire to be kept alive in this condition with minimum medical interventions. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

________ Do not give treatment, drugs, or blood if I am unconscious or in a persistent vegetative state and I do not desire to be kept alive in this condition with minimum medical interventions. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

(continued)
Withhold life-sustaining treatment—I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible; OR

Do not withhold life support treatment—I request that I be kept alive in this terminal condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

(a) Additional requests.
_______________________________________________________________________________
_______________________________________________________________________________
_______________________________________________________________________________

For example, in those circumstances where I have indicated that certain treatments are to be withheld: procedures to be discontinued or withheld include cardiac resuscitation, mechanical respiration, tube feeding, and antibiotics; however, I do want the administration of saline solutions so that I will not die from dehydration, and I do want medication to alleviate pain (including any pain resulting from withholding or withdrawing treatment) even though it may shorten my life. I do not want to be maintained in or approaching what is known as a vegetative state. I prefer to live out my last days at home rather than in a hospital if it does not jeopardize the chance of my recovery to a meaningful life and does not impose undue burden on my family.

Whether I have either a terminal condition or merely an irreversible condition: (a) for so long as there is a reasonable possibility of my recovery to a meaningful and sentient life, even if only for a matter of weeks or even days, I request that I be kept alive using available life-sustaining treatment; on the other hand, (b) whenever there is not a reasonable possibility of my recovery to a meaningful and sentient life, I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible.

Effect on electing hospice care
After signing this directive, if my representative or I elect hospice care, I understand and agree that only those treatments needed to keep me comfortable would be provided and I would not be given available life-sustaining treatments.

Additional Matters
If I do not have a Medical Power of Attorney, I have not designated a spokesperson, and I am unable to make my wishes known, I understand that a spokesperson will be chosen for me following the standards in the laws of Texas. If, in the judgment of my physician, my death is imminent within minutes to hours, even with the use of all available medical treatment provided within the prevailing standard of care, I acknowledge that all treatments may be withheld or removed except those needed to maintain my comfort. This directive will remain in effect until I revoke it. No other person may do so.

I have been provided with an information statement (a copy is attached) containing instructions for completing this directive as well as certain definitions of the terms used in this directive. I have read and understand the information contained in that information statement.

SIGNED THIS ___________ day of ___________ , 20_____.

________________________________
CLIENT, of XXX County, Texas
**Witnesses**

Two competent adult witnesses must sign below, acknowledging the signature of the declarant. The witness designated as Witness may not be a person designated to make a treatment decision for the patient and may not be related to the principal by blood or marriage. This person would not be entitled to any portion of the principal's estate on the principal's death. This person may not be the attending physician of the principal or the employee of a health care facility in which the principal is a patient. This person may not be involved in providing direct patient care to the principal and may not be an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility.

Witness: WITNESS NUMBER ONE
Signature of first witness: ________________________________________________________
Address of first witness: _________________________________________________________

Witness: WITNESS NUMBER TWO
Signature of second witness: ________________________________________________________
Address of second witness: _________________________________________________________

SUBSCRIBED AND SWORN TO BEFORE ME by said Declarant, CLIENT, and by the said witnesses, WITNESS NUMBER ONE and WITNESS NUMBER TWO on this ___________ day of ___________ , 20____ .

__________________________________
Notary Public for the State of Texas

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**Medical Power of Attorney (Hower 231)**

Texas also has a suggested statutory form for medical power of attorney which contains an explanation. It is as follows:

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**INFORMATION CONCERNING THE MEDICAL POWER OF ATTORNEY THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:**

Except to the extent you state otherwise, this document gives the person you name as your agent the authority to make any and all health care decisions for you in accordance with your wishes, including your religious and moral beliefs, when you are no longer capable of making them yourself. Because “health care” means any treatment, service, or procedure to maintain, diagnose, or treat your physical or mental condition, your agent has the power to make a broad range of health care decisions for you. Your agent may consent, refuse to consent, or withdraw consent to medical treatment and may make decisions about withdrawing or withholding life-sustaining treatment. Your agent may not consent to voluntary inpatient mental health services, convulsive treatment, psycho-surgery, or abortion. A physician must comply with your agent’s instructions or allow you to be transferred to another physician.

Your agent’s authority begins when your doctor certifies that you lack the capacity to make health care decisions.

(continued)
Your agent is obligated to follow your instructions when making decisions on your behalf. Unless you state otherwise, your agent has the same authority to make decisions about your health care as you would have had.

It is important that you discuss this document with your physician or other health care provider before you sign it to make sure that you understand the nature and range of decisions that may be made on your behalf. If you do not have a physician, you should talk with someone else who is knowledgeable about these issues and can answer your questions. You do not need a lawyer’s assistance to complete this document, but if there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

The person you appoint as agent should be someone you know and trust. The person must be 18 years of age or older, or be a person under 18 years of age who has had the disabilities of minority removed. If you appoint your health or residential care provider (e.g., your physician or an employee of a home health agency, hospital, nursing home, or residential care home, other than a relative), that person has to choose between acting as your agent or as your health or residential care provider; the law does not permit a person to do both at the same time.

You should tell the person you appoint that you want the person to be your health care agent. You should discuss this document with your agent and your physician and give each person a signed copy. You should indicate on the document itself the people and institutions who have signed copies. Your agent is not liable for health care decisions made in good faith on your behalf.

Even after you have signed this document, you have the right to make health care decisions for yourself as long as you are able to do so. Treatment cannot be given to you or stopped over your objection. You have the right to revoke the authority granted to your agent by informing your agent or your health or residential care provider orally or in writing, or by your execution of a subsequent durable power of attorney for health care. Unless you state otherwise in the power of attorney, your appointment of a spouse dissolves on divorce.

This document may not be changed or modified. If you want to make changes in the document, you must make an entirely new one.

You may wish to designate an alternate agent in the event that your agent is unwilling, unable, or ineligible to act as your agent. If the agent designated is your spouse, the designation is automatically revoked by law if your marriage is dissolved. Any alternate agent you designate has the same authority to make health care decisions for you.

THIS POWER OF ATTORNEY IS NOT VALID UNLESS IT IS SIGNED IN THE PRESENCE OF TWO OR MORE QUALIFIED WITNESSES. THE FOLLOWING PERSONS MAY NOT ACT AS WITNESSES:

1. The person you have designated as your agent;
2. A person related to you by blood or marriage;
3. A person entitled to any part of your estate after your death under a will or codicil of a will executed by you or operation of the law;
4. Your attending physician;
5. An employee of your attending physician;
6. An employee of a health care facility in which you are a patient if the employee is providing you with direct patient care or is an officer, director, partner, or business office employee of the health care facility or any parent organization of the health care facility; or
7. A person who, at the time this power of attorney is executed, has a claim against any part of your estate.

Signed on this ___________ day of ___________ , 20_____ , to confirm that I have received this disclosure statement prior to execution of my Medical Power of Attorney for Health Care and that I have read and understood it.

__________________________________

CLIENT
MEDICAL POWER OF ATTORNEY
DESIGNATION OF HEALTH CARE AGENT

I, (CLIENT), of XXX County, Texas, appoint (DESIGNATED POWER OF ATTORNEY) of (COUNTY OF RESIDENCE), home telephone number (HOME NUMBER), work telephone number (WORK NUMBER), as my agent to make all health care decisions for me, except to the extent I state otherwise in this document. This medical power of attorney takes effect if I become unable to make my own health care decisions and this fact is certified in writing by my physician.

Limitations on This Decision Making Authority of My Agent Are as Follows:

If I have executed a Directive to Physicians and Family or Surrogates and that Directive has not been revoked, then that Directive shall stand as the final expression of my right to refuse medical or surgical treatment and my Agent shall have no authority to countermand that Directive, whether executed before, after, or at the same time as this Medical Power of Attorney. If I do not have in place a Directive to Physicians and Family or Surrogates, my Agent shall have authority to refuse or consent to life-sustaining treatments, considering the following guidelines. In those circumstances where certain treatments are to be withheld, procedures to be discontinued or withheld include cardiac resuscitation, mechanical respiration, tube feeding, and antibiotics; however, I do want the administration of saline solutions, so that I will not die from dehydration, and I do want medication to alleviate pain (including any pain from withholding or withdrawing treatment) even though it may shorten my life. I do not want to be maintained in or approaching what is known as the vegetative state. I prefer to live out my last days at home rather than in a hospital, if it does not jeopardize the chance of my recovery to a meaningful and sentient life and does not impose an undue burden on my family.

Whether I have either a terminal condition or merely an irreversible condition: (a) for as long as there is a reasonable possibility of my recovery to a meaningful and sentient life, even if only for a matter of weeks or even days, I request that I be kept alive using available life-sustaining treatment, on the other hand, (b) whenever there is not a reasonable possibility of my recovery to a meaningful and sentient life, I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible.

Designation of Alternate Agents

You are not required to designate an alternate agent but you may do so. An alternate agent may make the same health care decisions as the designated agent if the designated agent is unable or unwilling to act as your agent. (If the agent designated is your spouse, the designation is automatically revoked by law if your marriage is dissolved.) If the person designated as my agent is unable or unwilling to make health care decisions for me. I designate the following person to act as my agent to make health care decisions for me as authorized by this document, who will serve in the following order:

<table>
<thead>
<tr>
<th>First Alternate Agent:</th>
<th>Second Alternate Agent:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name:</td>
<td>Name:</td>
</tr>
<tr>
<td>Address:</td>
<td>Address:</td>
</tr>
<tr>
<td>Phone#: (H)</td>
<td>Phone#: (H)</td>
</tr>
<tr>
<td>Phone#: (W)</td>
<td>Phone#: (W)</td>
</tr>
</tbody>
</table>

Location of Original Document and Copies

The original of this document is kept at my residence, located at (DESIGNATED POWER OF ATTORNEY’S ADDRESS). The following person has a copy of this document and that copy is kept at:

(continued)
Duration
(I understand that this power of attorney exists indefinitely from the date I execute this document unless I establish a shorter time or revoke the power of attorney. If I am unable to make health care decisions for myself when this power of attorney expires, the authority I have granted my agent continues to exist until the time I become able to make health care decisions for myself.) This power of attorney has no expiration date; it shall continue to be valid until I revoke it.

Prior Designations Revoked
I revoke any prior medical power of attorney.

Acknowledgment Of Disclosure Statement
I have been provided with a disclosure statement explaining the effect of this document. I have read and understand that information contained in the disclosure statement.

(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY)
I sign my name to this power of attorney on this the _______________ day of ______________, 20____ at XXX County, Texas.

__________________________________
CLIENT

Statement Of First Witness
I am not the person appointed as agent by this document. I am not related to the principal by blood or marriage. I would not be entitled to any portion of the principal's estate on the principal's death. I am not the attending physician of the principal or the employee of a health care facility in which the principal is a patient, I am not involved in providing direct patient care to the principal and am not an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility.

Signature of first witness: __________________________________________
Printed name: ____________________________________________________
Address: _________________________________________________________
SIGNED THIS _______________ day of ______________ , 20____.

Signature of second witness: _________________________________________
Printed name: ____________________________________________________
Address: _________________________________________________________
SIGNED THIS _______________ day of ______________ , 20____.
Anatomical Gifts are also a part of the estate planning discussions. The Texas Anatomical Gift Act is found in Health & Safety C. §§ 692.001 et. seq. and sets out the rules and procedures governing the gift of entire bodies and body parts for medical research and education or transplantation by persons still living and by the relatives of a decedent. “Decedent” is defined to include a stillborn infant or fetus. Health & Safety C. § 692.002(2).

Any individual who has testamentary capacity may, by will or other document, dispose of all or any part of his or her own body. Health & Safety C. § 692.003(a). A person who at death is younger than eighteen years of age also requires the approval or consent of the person’s parents or legal guardian. Health & Safety C. § 692.003(a). The designation can be made on one’s driver’s license or personal identification card with an anatomical gift symbolized on it, or a document executed in accordance with section 692.003 of the Health and Safety Code.

If the decedent is not a declared donor, the code sets out the following persons, in the order of priority stated, who may give all or part of a decedent’s body:

1. The spouse.
2. An adult daughter or son.
3. Either parent.
4. An adult sister or brother.
5. A guardian of the person of the decedent at the time of his or her death.
6. Any other person authorized or under obligation to dispose of the body.

Health & Safety C. § 692.004.

However, a relative may not make such a gift if he or she has: (1) actual notice of contrary indications by the decedent, or (2) actual notice of opposition by a member of the same or a prior class. Health & Safety C. § 692.004(b). Be aware, however, that the designated donee can always reject the gift. Health & Safety C. § 692.010(a).

After removal of the part, custody of the remainder of the body vests in the surviving spouse, next of kin, or other persons under an obligation to dispose of the body. Health & Safety C. § 692.010(d). When the gift is of the entire body, the surviving spouse or next of kin may authorize embalming and have the use of the body for funeral services, subject to the terms of the gift. Health & Safety C. § 692.010(c).

WHERE TO KEEP THE WILL (HOWER 240)

The first issue the legal assistant may have to deal with is helping the bereaved family locate the will. TPC § 75 requires anyone in possession of the will of a deceased to deliver the will to the clerk of the court that has jurisdiction of the estate on receiving notice of the testator’s death. If that will is believed to be in a bank’s safe deposit box, the financial institution may allow any of the joint holders to enter the box and remove its contents, even after the death of a joint holder. TPC § 36. Alternatively, the financial institution may deliver a will found in a safe deposit box to the person named in the will as executor or to the clerk of the court having probate jurisdiction without the necessity of a court order. TPC § 36E(a)(1). This same section applies to documents appearing to be a deed to a burial plot or burial instructions as well as delivery of insurance policies on the decedent’s life to a beneficiary named in the policy. Further, the financial institution is authorized to let the following persons into the safe deposit box without a court order:

1. The decedent’s spouse.
2. The decedent’s parent.
3. A descendant of the decedent who is at least eighteen years old.
4. A person named as the executor of the decedent’s estate in a copy of a document that the person has and that appears to be a will of the decedent.

TPC § 36D.
If an applicant for probate believes that the testator left the will in a safe deposit box, and the above methods have not worked, the applicant or any other interested person may petition the court, either before or after filing the application for probate, to allow the applicant or other interested person to enter the safe deposit box, examine the contents, and remove the will, as well as any insurance policy on the decedent’s life, and the deed to the burial plot in which the decedent is to be buried. TPC § 36 C.

If all else fails, contact the clerk’s office of the county where the decedent resided at the time of death and other Texas counties where the decedent lived in earlier years to see if the testator deposited the will there. TPC § 71a allows a testator, or a person acting on the testator’s behalf, to deposit his or her will with the clerk of the county where the testator resides. When doing so, the will must be in a sealed wrapper, endorsed with the phrase “Will of,” followed by the testator’s name, address, and signature as well as the name and current address of each person who must be notified of the deposit of the will after the testator’s death. TPC § 71(b). On notice of the decedent’s death, the clerk then must notify the persons listed by the decedent on the endorsement by registered mail with return receipt requested and deliver the will to any of those persons upon their request. TPC § 71(e). If the names of the persons to be notified are not properly endorsed on the wrapper, this same section goes on in detail that the clerk then opens the wrapper, inspects the will, notifies any named executor of the will’s whereabouts, delivers the will to the named executor, and if there is no named executor, or if the named executor is dead or does not collect the will within thirty days, the clerk must send a notice to the devisees and legatees named in the will and then deliver the will to any one of them.
INTRODUCTION TO TRUSTS

TERMINOLOGY RELATED TO TRUSTS (HOWER 245)

In Texas, the regulation of trusts is found within Title 9 of the Property Code. First, as to the terminology used in the trust code, the person who creates a trust may be referred to as the “settlor,” the “trustor,” or the “grantor.” Prop. C. § 111.004(14). However, “settlor” is the word generally used in the Texas Trust Code. See Prop. C. § 112.003.

THE ESSENTIAL ELEMENTS OF A TRUST (HOWER 250)

In accordance with Prop. C. § 112.001, an express trust may be created by any of the following methods:

1. A property owner’s declaration that the owner holds the property as trustee for the benefit of another person.
2. A property owner’s inter vivos transfer of the property to another person as trustee for the benefit of the settlor or a third person.
3. A property owner’s testamentary transfer of the property to another person as trustee for the benefit of a third person.
4. An appointment under a power of appointment to another person as trustee for the benefit of the donee of the power of a third person.

A trust is created only if the settlor manifests an intention to create a trust. Prop. C. § 112.002. However, there is no particular word or phrase required, and it is not necessary to have a legal estate conveyed or devised in specific terms to a trustee, as long as the intent to create a trust is otherwise clear. Najvar v. Vasek, 564 S.W.2d 202, 210 (Civ. App.-Corpus Christi 1978, ref. n.r.e.). For example, in Perfect U. Lodge No. 10 v. Interfirst Bank, 748 S.W.2d 218 (Tex. 1988), it was held that a trust by implication may arise, notwithstanding a failure to convey legal title to the trustee, if the intent to create a trust appears reasonably clear from the terms of the trust instrument construed in light of the surrounding circumstances. While consideration is not required for the creation of a trust, a promise to create a trust is enforceable only if the requirements for an enforceable contract are met. Prop. C. § 112.003.

Legal capacity of the settlor is also necessary. Prop. C. § 112.007. A person has the same capacity to create a trust by declaration, inter vivos transfer, testamentary transfer, or appointment that the person has to transfer, devise, or appoint the property free of trust. Prop. C. § 112.007. Also the trustee must have the legal capacity to take, hold, and transfer the trust property. Prop. C. § 112.008(a). Acceptance by a beneficiary of an interest in a trust is presumed. Prop. C. § 112.010(a).

Generally the terms of a trust must be stated in a writing signed by the settlor (Prop. C.§ 112.004) under the Texas version of the Statute of Frauds. However, this same code section has two exceptions set out. First, in the situation where the settlor transfers the property to a trustee who is neither the settlor nor a beneficiary, and prior to or simultaneously with the transfer the settlor expressed the intent to create the trust. The other situation is where the owner declares in writing that he or she is
holding personal property as trustee for another person, or for the owner and another person as a beneficiary.

A trust may be created for any purpose other than those that are illegal, such as requiring the trustee to commit a criminal or tortuous act or one that is contrary to public policy. Property C. § 112.031. The rule against perpetuities applies to trusts other than charitable trusts. Prop. C. § 112.036.

The Trustee: The Fiduciary and Administrator of the Trust (Hower 253)

There are only a few points with regard to statutory requirements that may affect the selection of trustees. If the settlor decides on three or more co-trustees, then a majority of them may exercise any power conferred by the trust instrument, unless the trust instrument provides otherwise. Prop. C. § 113.085(1). Also, if there are exactly three, the death, resignation, or removal of one of them creates the same potential for stalemate as would be the case if only two were appointed initially. See Prop. C. § 113.085(2)—surviving trustees may administer trust and exercise powers.

If a sole trustee refuses to accept the trust or, after accepting the trust, resigns or dies, and the trust instrument does not name an alternate or successor trustee (or provide a practical method of appointing one), the court is authorized to appoint a trustee to fill the vacancy. Prop. C. § 113.009(c).

The Beneficiary: The Recipient of the Trust Property of Benefits (Hower 267)

A trust cannot be created unless there is trust property. Prop. C. § 112.005. Property is normally transferred to a trust by the settlor, but persons other than the settlor may also contribute property to a trust, either initially or by making additions to the trust after it has been created. See TPC § 58a—Uniform Testamentary Additions to Trusts Act.

If a trust is created in whole or in part with community property, the spouse may be regarded as the settlor only as to one-half of the community property. This is because both spouses have property rights in the community estate. Lee v. Lee, 112 Tex. 392, 247 S.W. 828, 832 (1932). To complicate matters further, the characterization of transfers of community property by one spouse depends to a large extent on whether the property is classified as sole management property, or joint management property, as those terms are defined in Fam. C. § 56.22. Joint management property can only be disposed of with the consent of both spouses. Williams v. Jennings, 755 S.W.2d 874, 881 (Tex. App.-Houston [14th Dist.] 1988, den.) As a practical matter, and regardless of whether the property that will be transferred is characterized as sole management or joint management, it makes sense to require that both spouses join in any conveyance of community property. The legal staff must also be careful if the trust is being designed to remove all or part of the trust property from the spouse’s ownership for income or estate tax purposes, particularly as to what powers that spouse may have over, or interests in, the trust property.

TERMINATION OF TRUSTS (HOWER 272)

A trust is revocable by the settlor unless it is expressly made irrevocable by the instrument creating the trust or an instrument modifying the trust. Prop. C. § 112.051(a). Revocation of a trust created by a written instrument must be in writing. Prop. C. § 112.051(c).
An express trust is defined in Texas law as a fiduciary relationship with respect to property arising out of a manifestation by the settlor to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person. Prop. C. § 111.004(4). An express trust does not specifically include resulting trusts, constructive trusts, or business trusts. Prop. C. § 111.003.
No Texas specific law applies to this chapter.
PERSONAL REPRESENTATIVES: TYPES, PRE-PROBATE DUTIES, AND APPOINTMENT

TYPES OF PERSONAL REPRESENTATIVES (HOWER 360)

The person named in the will to be the executor or any other interested person (as that term is defined in TPC § 3) may apply to the court for letters. TPC § 77 sets out the order of persons qualified to serve as follows:

1. To the person named as executor in the will of the deceased.
2. To the surviving husband or wife.
3. To the principal devisee or legatee of the testator.
4. To any devisee or legatee of the testator.
5. To the next of kin of the deceased, the nearest in order of descent first, and so on. Next of kin includes a person and his or her descendants who legally adopted the deceased or who have been legally adopted by the deceased.
6. To a creditor of the deceased.
7. To any person of good character residing in the county who applies therefore.
8. To any other person not disqualified under the following section.

Persons disqualified to serve under TPC § 78 are:

1. A minor (a minor is defined as incapacitated in TPC § 3p).
2. An incompetent.
3. A convicted felon, under the laws of either the United States or any state or territory of the United States, or of the District of Columbia, unless such person has been duly pardoned, or his or her civil rights restored, in accordance with law.
4. A non-resident (natural person or corporation) of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate, and caused such appointment to be filed with the court.
5. A corporation not authorized to act as a fiduciary in this state.
6. A person whom the court finds unsuitable.

A person is also able to waive his or her right to serve and, if he or she is the surviving husband or wife, or an heir if there is no surviving spouse, they may renounce their right to letters specifically in favor of another. TPC § 79.
When a creditor applies, his or her right to serve can be defeated by payment of the claim, filing of a bond for payment, or a showing that the claim is without merit. TPC § 80.

A successor representative may be appointed because of the death, resignation, or removal of a personal representative, or because of someone with a higher right to appointment, including a minor who has become of age and is no longer disqualified. TPC § 220. TPC § 221 describes the procedure to follow for a personal representative to resign. Any application to resign must be accompanied by a final, verified accounting of the condition of the estate. If necessary, the court can accept an immediate resignation and appoint a successor representative, but there cannot be a discharge of the person resigning or release of his or her bond or sureties until there has been approval on his or her final accounting. TPC § 221(b).

Personal representative is a voluntary position that requires quite a bit of responsibility. Compensation is available. Executor’s, administrator’s, and temporary administrator’s compensation is set out in TPC § 241. In short, compensation is limited to five percent of the income received and five percent of all sums paid out in the administration of the estate. This does not include funds belonging to the decedent which were on hand in a financial institution or brokerage firm at the time of death, to include checking accounts, savings accounts, and CDs, nor for collecting on life insurance policies. Fortunately, if the personal representative manages a business for the estate, or if the compensation calculated as set out above is unreasonably low (including any unusual efforts to collect on insurance policies), the court is empowered to grant additional compensation. In addition, all reasonable and necessary expenses incurred in the preservation, safekeeping, and management of the estate (TPC § 242) and in defending the estate (TPC § 243) are reimbursable.

Inventory and Appraisement (Hower 372)

Within ninety days after qualifying, unless a longer time is granted by the court, the representative must file with the clerk of the court a verified, full, and detailed inventory of all the property of the estate that has come to his or her possession or knowledge, giving the fair market value of each item as of the date of death. TPC § 250. As part of this report, there is a requirement that a list of all claims due to the estate be disclosed. TPC § 251. Upon return of the inventory, appraisement, and list of claims, the judge must examine and approve or disapprove them. TPC § 255. After the filing of the inventory and appraisement, if property or claims not included in the inventory come to the possession or knowledge of the representative, he or she must file with the clerk of the court a verified, full, and detailed supplemental inventory and appraisement. TPC § 256. A successor representative has the same obligation. TPC § 227. A sample form follows:
INVENTORY, APPRAISEMENT, AND LIST OF CLAIMS

Date of Death:

The following is a full, true, and complete Inventory and Appraisement of all personal property and of all real property situated in the State of Texas, together with a List of Claims due and owing to this Estate as of the date of death, which have come to the possession of knowledge of the undersigned. The deceased was not married at the time of death and therefore all property is separate property.

INVENTORY AND APPRAISEMENT

<table>
<thead>
<tr>
<th>Real Property Separate Interest—</th>
<th>Value</th>
<th>Lien</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$</td>
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</tbody>
</table>

**Total Estate Interest—Real Property — $**

<table>
<thead>
<tr>
<th>Personal Property Separate Interest—</th>
<th>Value</th>
<th>Lien</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$</td>
<td>$</td>
</tr>
</tbody>
</table>

**Total Estate Interest—Personal Property — $**

**Total Estate Value $**

The forgoing Inventory, Appraisement, and List of Claims should be approved and ordered entered of record.

Respectfully submitted,

_______________________________
Attorney for Applicant

TBN:
Address
Fax #
Phone #

Creditors Claims’ (Hower 375)
Within 30 days after the granting of letters, the personal representative must publish notice in that county’s paper that all persons having claims against the estate must file same within the prescribed time. TPC § 294(a). Proof of the publication in the form of an affidavit from the publisher is filed with the clerk of the court. TPC § 294(b). Within 4 months of letters, the representative must also send actual notice to each secured creditor, recorded lien claimant, or to the comptroller of public accounts if taxes are due. TPC § 295. A sample form follows:
**NOTICE TO CREDITORS**

Notice is hereby given that original Letters Testamentary for the Estate of ______________, Deceased, were issued on _____, in Docket No._____, pending in the County Court of XXX County, Texas, to: (Executor’s Name).

The residence of the Executor is in XXX County, Texas, the post office address is:

(Executor’s Name)  
c/o Attorney’s Name  
Attorney at Law  
Street Address  
City, State, Zip

All persons having claims against this Estate which is currently being administered are required to present them within the time and in the manner prescribed by law.

DATED the _________________ day of ______________, 20_____.

________________________________________  
Attorney for the Estate

**PUBLISHER’S AFFIDAVIT**

I solemnly swear that the above notice was published once in XXX, a newspaper printed in XXX, XXX County, Texas, and of general circulation in said county, as provided in the Texas Probate Code for the service of citation or notice by publication, and the date that the issue of said newspaper bore in which said notice was published was _______________. A copy of the notice published, clipped from the newspaper, is attached hereto.

________________________________________  
Publisher

SUBSCRIBED AND SWORN TO BEFORE ME BY _________________ this _____ day of _________________, 20_____, to certify which witness my hand and seal of office.

________________________________________  
Notary Public, State of Texas

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**Pre-Probate Duties of the Personal Representative and Paralegal (Hower 379)**

The first issue the legal assistant may have to deal with is helping the bereaved family locate the will. TPC § 75 requires anyone in possession of the will of a deceased to deliver the will to the clerk of the court that has jurisdiction of the estate on receiving notice of the testator’s death. If that will is believed to be in a bank’s safe deposit box, the financial institution may allow any of
the joint holders to enter the box and remove its contents, even after the death of a joint holder. TPC § 36. Alternatively, the financial institution may deliver a will found in a safe deposit box to the person named in the will as executor or to the clerk of the court having probate jurisdiction without the necessity of a court order. TPC § 36E(a)(1). This same section applies to documents appearing to be a deed to a burial plot or burial instructions as well as delivery of insurance policies on the decedent’s life to a beneficiary named in the policy. Further, the financial institution is authorized to let the following persons into the safe deposit box without a court order:

1. The decedent’s spouse.
2. The decedent’s parent.
3. A descendant of the decedent who is at least eighteen years old.
4. A person named as the executor of the decedent’s estate in a copy of a document that the person has and that appears to be a will of the decedent.

TPC § 36D.

If an applicant for probate believes that the testator left the will in a safe deposit box, and the previous methods have not worked, the applicant or any other interested person may petition the court, either before or after filing the application for probate, to allow the applicant or other interested person to enter the safe deposit box, examine the contents, and remove the will, as well as any insurance policy on the decedent’s life, and the deed to the burial plot in which the decedent is to be buried. TPC § 36C.

If all else fails, contact the clerk’s office of the county where the decedent resided at the time of death and other Texas counties where the decedent lived in earlier years to see if the testator deposited the will there. TPC § 71a allows a testator, or a person acting on the testator’s behalf, to deposit his or her will with the clerk of the county where the testator resides. When doing so, the will must be in a sealed wrapper, endorsed with the phrase “Will of,” followed by the testator’s name, address, and signature as well as the name and current address of each person who must be notified of the deposit of the will after the testator’s death. TPC § 71(b). On notice of the decedent’s death, the clerk then must notify the persons listed by the decedent on the endorsement by registered mail with return receipt requested and deliver the will to any of those persons upon their request. TPC § 71(e). If the names of the persons to be notified are not properly endorsed on the wrapper, this same section goes on in detail that the clerk then opens the wrapper, inspects the will, notifies any named executor of the will’s whereabouts, delivers the will to the named executor, and if there is no named executor, or if the named executor is dead or does not collect the will within thirty days, the clerk must send a notice to the devisees and legatees named in the will and then deliver the will to any one of them.

**Bond (Hover 385)**

Once the court has approved the appointment of the personal representative, that person must further qualify by taking the oath and posting any required bond. TPC § 189. These must be done before the expiration of twenty days after the date of the order granting letters. TPC § 192. It is the oath that legally binds the personal representative to perform and the bond to serve as that guarantee. A sample of the required oath is as follows:
TPC §§ 194 to 218 set out the rules and procedures governing bonds. Unless waived either in a will (TPC § 195 (a)) or because the personal representative is a corporate fiduciary exempt from bonds (TPC § 195 (b)), a bond is nondiscretionary. The court looks at the amount of assets easily liquidated, likely expenses and debts, and likely revenue in determining the amount of the bond. (TPC §194). Therefore, the legal assistant must obtain this information before the hearing on the application. The attorney may also attempt to have their bond reduced by agreeing to a “freeze order” under TPC § 194 (5) to prevent withdrawal of funds from a bank or trust company without prior court approval.

Probating (Proving) the Will or Granting Administration (Hower 390)

TPC § 84 through § 86 governs proof of a will at probate. If a will is self-proved, then nothing further is necessary. TPC § 84(a). A will may be self-proved either when it is executed or on any subsequent date during the lifetime of the testator and the witnesses. TPC § 59(a). A will becomes self-proved when the testator and the attesting witnesses make affidavits before an officer authorized under Texas law to administer oaths. The affidavits must be evidenced by a certificate, with official seal affixed, of the officer, must be attached or annexed to the will and must be substantially in the form provided by the statute. TPC § 59(a).

The self-proving affidavits and the certificate are technically not part of the will, but constitute a separate instrument. Because of this, a defective self-proving affidavit does not invalidate the entire will; rather, it merely makes it necessary to prove the will by other means. Cutler v. Ament, 726 S.W.2d 605 (Tx. App.—Houston [14th Dist.] 1987, ref. n.r.e.). A signature on a self-proving affidavit is considered a signature to the will when necessary to prove that the will was signed by the testator, or witnesses, or both. However, the will cannot be considered a self-proved will. TPC § 59(b).
If the will is not self-proved, a properly attested will may be proved by one of the following methods:

1. By in-court testimony or by affidavit by at least one of the subscribing witnesses. TPC § 87 also requires that all testimony taken in court be reduced to writing, and is usually done by a Proof of Death and Other Facts.

2. If all the witnesses are non-residents of the county, or otherwise unable to attend, then by deposition. If none of the witnesses are still living, or if all of them are members of the military and beyond the jurisdiction of the court, by two witnesses as to the testator’s signature [and handwriting if holographic—see TPC § 84(c).].

3. Failing all of the above after due diligence, the court may accept the testimony of one witness as to handwriting and signature.

TCP § 84(b)

Nuncupative wills are dealt with in TPC § 86, and in short, testimony is permitted only if fourteen days have passed since death, and not more than six months unless it was committed down to writing within six days of the making of the will.
Small Estate Settlement and Administration (Hower 398)

The Texas Probate Code establishes four procedures for settling small estates:

1. **Application for Order of No Administration:** This application may be filed if the value of the estate’s assets, excluding the homestead and exempt property, does not exceed the amount to which the surviving spouse and minor children of the decedent are entitled as a family allowance. TPC § 139. The effect of an order, following a court hearing, is sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent of property of the estate, and to all persons purchasing from or otherwise dealing with the estate. TPC § 141.

2. After the appointment of a personal representative and the filing of the inventory, appraisement, and list of claims, the representative may apply to summarily withdraw the estate from administration. Withdrawal is permitted if the value of the estate, exclusive of the homestead property, exempt property, and family allowance, does not exceed an amount sufficient to pay estate creditors whose claims are designated as class one, two, three, or four. TPC § 143.

3. **Heirship Determinations and Affidavits of Heirship:** In either case, the court is presented the information on who all the beneficiaries are of the estate. All heirs and beneficiaries must be made parties to the application. In many cases, a statement of facts containing family history, genealogy, and identity of all heirs is also included. A sample form follows:

**AFFIDAVIT OF HEIRSHIP**

**STATE OF TEXAS**

**KNOW ALL MEN BY THESE PRESENTS:**

**COUNTY OF XXX**

BEFORE ME, the undersigned, a Notary Public in and for the State of Texas, on this day personally appeared Applicant, of XXX County, Texas, to me well known, who, being first duly sworn, according to law, on oath says:

1. I am personally acquainted with the family history and facts of heirship under Decedent, deceased, having been personally acquainted with or related to the decedent for many years.

2. On Date of marriage, Decedent married Spouse in County and State of Marriage Service County, and was married to her at the time of his death. The children born to this marriage are:

   (Children)
4. Small Estate Affidavit (TPC § 137): For those who qualify, as set forth below, the summary probate of a small estate by filing the appropriate affidavit can result in a great savings of time and money. No administration is necessary and the property may be distributed quickly. Approval of this affidavit by the probate judge is generally routine and, in most cases, is done without even a hearing or court appearance by the estate’s representative. (However, the judge may require a hearing if there are questions that need to be resolved.)

To qualify as a small estate affidavit (TPC § 137), the decedent’s property and assets, not including the homestead and any other exempt property (see TPC § 3(m) for definition), must not exceed the debts owed by the decedent by more than $50,000. Not included in this $50,000 ceiling is the surviving spouse’s one-half interest in the community property the couple owned. Although this is a mandatory ceiling on the amount of property involved, many people will qualify once the homestead, debts, and spouse’s community share are deducted. This procedure cannot be used, however, if a petition for probate is pending or has already been granted. Furthermore, thirty days must have already passed, after the death, before the affidavit can be accepted by the court. TPC § 137(a)(2).

The affidavit should show the existence of the conditions specified above and must also include a list of the estate’s assets and liabilities, the names and addresses of the distributees, and their respective shares of the estate, and the facts supporting their right to receive the money or property of the estate. TPC § 137(a)(5). A distributee is any person entitled to a part of the estate under a lawful will, or under the statutes of descent and distribution. TPC § 3(j).

The affidavit must be sworn to by two disinterested witnesses and by the distributees who have legal capacity. TPC § 137(a)(4). If any of the distributees are minors or incompetents, the affidavit must be sworn to by the distributee’s natural guardian or next of kin. TPC § 137(a)(4).

The judge who has jurisdiction and venue must examine the affidavit. TPC § 137(a)(4). As mentioned above, approval of an affidavit is generally routine and made without a hearing, although the judge has the power to order a hearing. Upon approval, the clerk records it as an official public record under Chapter 194 of the Local Government Code or, if the county has not adopted a microfilm or micro-photographic process under Chapter 194, in “The Small Estates”
records. TPC § 137(a)(4). If title to a homestead is to be transferred, the deed must also be recorded in the deed records for the county in which the homestead is located. TPC § 137(c).

TPC § 138 states that any person making payment, delivery, transfer, or issuance pursuant to an approved affidavit of collection is released to the same extent as if it were made to the decedent’s personal representative. A person making payment in accordance with an approved affidavit is not required to inquire into the truth of any statement in the affidavit. Likewise, a person making payment need not be concerned with the proper distribution of the payment. The distributees to whom payment, delivery, or transfer is made, however, are liable to any person having a prior right and are accountable to any later-appointed personal representative. In addition, the affiants are liable for any damage or loss to any person that arises from any payment, delivery, transfer, or issuance made in reliance on the affidavit.

The affidavit procedure is extremely effective for collecting small bank accounts, wages, and insurance proceeds, or to transfer title to securities or vehicles when the decedent dies intestate or when the distributees under the decedent’s will and the decedent’s intestate heirs are the same. There are some drawbacks to proceeding in this manner. First, probates under § 137 do not affect the disposition of any property governed by the terms of a valid will or other testamentary document. TPC § 137(b). This very simplified and informal form of probate is thus used almost exclusively when a person dies leaving no will. The other drawback is that the affidavit procedure will not transfer title to real property other than a homestead that is the only real property in the decedent’s estate. Either an affidavit of heirship or an heirship determination will also be necessary if the decedent left real estate that needs to be transferred.

A sample form follows:

<table>
<thead>
<tr>
<th>NO. ______________</th>
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<tbody>
<tr>
<td>ESTATE OF )(</td>
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<tr>
<td>)</td>
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<tr>
<td>THE DECEdent )(</td>
</tr>
<tr>
<td>)</td>
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<tr>
<td>SSN: THE DECEDENT’S SSN )(</td>
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<tr>
<td>)</td>
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<tr>
<td>DECEASED )(</td>
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<tr>
<td>)</td>
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<tr>
<td>XXX COUNTY, TEXAS</td>
</tr>
</tbody>
</table>

**SMALL ESTATE AFFIDAVIT WITH HOMESTEAD AND ORDER**

On the day or days herein below written, personally appeared the distributee of this estate and two disinterested witnesses, who, on their oath swear to the following fact:

1. Decedent, (THE DECEdENT), died intestate on (DATE OF DEATH) at (LOCATION OF DEATH), XXX County, Texas; and
2. Decedent was a resident of and domiciled in XXX County, Texas, at the time of Decedent’s death; and
3. No administration is pending or has been granted in Decedent’s estate and none appears necessary; and
4. More than 30 days have elapsed since the death of Decedent; and
5. The value of the entire estate of Decedent, not including homestead and exempt property, does not exceed $50,000.00; and
6. The known assets and liabilities of Decedent’s estate are all community property and are as follows:

<table>
<thead>
<tr>
<th>ASSETS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description</td>
</tr>
<tr>
<td>TOTAL ESTATE VALUE</td>
</tr>
</tbody>
</table>
LIABILITIES

7. The names and addresses of each of the heirs of Decedent's estate and their fractional interest in Decedent's estate are as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Residence</th>
<th>Relationship to Decedent</th>
<th>Share</th>
</tr>
</thead>
<tbody>
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</tr>
</tbody>
</table>

8. Decedent's entire estate shall distribute to (HEIRS).
9. The right of the distributees to be entitled thereto, to the extent that the assets, exclusive of homestead and exempt property, exceed the liabilities of Decedent's estate, is shown by the following facts regarding Decedent's family history, to wit:
   a. Decedent was never married.
   b. No children were born to or adopted by Decedent during his lifetime.
10. The distributees of this estate understand that this affidavit and any court order approving the same does not transfer title to all real estate owned by Decedent or affect title to same, other than the title to homestead.

_______________________________
DISTRIBUTEE

SUBSCRIBED AND SWORN TO BEFORE ME by the said __________, this day __________, 20_____, to certify which, witness my hand and seal of office.

_______________________________
NOTARY PUBLIC

I have no interest in the estate of Decedent and am not related to Decedent under the laws of descent and distribution of the State of Texas. The facts contained in this affidavit are true to the best of my knowledge and belief.

_______________________________
Witness Signature

_______________________________
Printed Witness Name

SUBSCRIBED AND SWORN TO BEFORE ME by the said ________________, on this _____ day of _______________, 20_____, to certify which, witness my hand and seal of office.

_______________________________
NOTARY PUBLIC

(continued)
I have no interest in the estate of Decedent and am not related to Decedent under the laws of descent and distribution of the State of Texas. The facts contained in this affidavit are true to the best of my knowledge and belief.

_______________________________
Witness Signature

_______________________________
Printed Witness Name

SUBSCRIBED AND SWORN TO BEFORE ME by the said ____, on this ____ day of ________________, 20_____, to certify which, witness my hand and seal of office.

_______________________________
NOTARY PUBLIC

NO. ______________

ESTATE OF )( IN THE COUNTY COURT

DECEASED )( AT LAW NO. X OF

SSN: (DECEENT’S SSN) )( XXX COUNTY, TEXAS

DECEASED )( ORDER

On this the _____ day of ________________, 20_____, came on to be considered by the Court the forgoing Affidavit of Small Estate With Homestead, and the Court, after having examined same, finds that said Affidavit of Small Estate With Homestead complies with the terms and provisions of Section 137 of the Probate Code of the State of Texas and the same is hereby approved and ordered filed of record in the office of the Probate Clerk of XXX County, Texas.

SIGNED this ____ day of ____________________________, 20_____.

_______________________________
JUDGE PRESIDING

LAW OFFICE
ADDRESS
CITY, STATE, ZIP
Tel#
Fax#

BY: ________________________________,

ATTORNEY
Attorney for the Estate
BAR LICENSE NUMBER
Summary Administration (Hover 400)

*Muniment of Title* is the funny-sounding name for a summary probate under the laws of the state of Texas. This procedure can save a great deal of time, expense, and inconvenience when compared to the more sophisticated forms of probate. This very popular short cut to probate is unusual in that only one section of the probate code specifically governs it, that being TPC § 89A, and up until rather recently it was only a subsection! In essence, the will is authenticated by the court just as in the other forms of probate, but can only be used when it is proven to the court that no administration of the estate will be necessary. In other words, the will is probated, but no executor or administrator is appointed. The property can then be distributed according to the terms of the will without the many additional steps required in an independent administration (i.e., Inventory, Appraisal, and List of Claims, Notice to Creditors).

To qualify for this type of probate, an application is prepared by an attorney and presented to the court indicating that all debts of the estate not secured by real estate (such as mortgages and other such liens) have been paid and that there is no necessity to have an administration of the estate. TPC § 89B(4). While many estates will not be able to qualify due to the first requirement, there is plenty of time to pay the bills off first before applying for Muniment of Title. A four year statute of limitations applies here as it did with letters testamentary and letters of administration.

A court hearing is required, in which the will is authenticated as having being legally executed and to be the decedent’s last will and testament, along with the other matters of law common to all probates (proof of death, etc.). The representative of the estate is asked a few simple questions under oath (sometimes this is done in front of the clerk of the court) and the will and other paperwork are presented to the probate judge. Once accepted by the judge, s/he will sign an order admitting the will as a Muniment of Title. That paperwork, along with the original will, is filed with the clerk of the court. The client will then receive a certified copy of the court’s order to present to banks and other institutions and persons to transfer the property to the beneficiaries under the will.

TPC § 89(d) requires a filing of a follow-up affidavit within 181 days after the court has entered the order admitting the will into probate as a Muniment of Title, stating to what extent the terms of the will have been fulfilled as of that date. That section also provides that it may be waived upon request, which is routinely done, especially when there are just one or two beneficiaries named in the will. Strangely then, failure to file the affidavit when not waived does not affect title to property. TPC § 89A(d).

There are some disadvantages to be aware of with this type of probate alternative. Problems are sometimes encountered with out of state banks, securities transfer agents, and real estate title attorneys for reasons ranging from ignorance to old fashioned dogma. It may be helpful to contact them before beginning probate and show them § 89A(c) in which it states that the court order constitutes sufficient legal authority to all persons to transfer entire estate assets and may be relied on by third parties in transferring property. Probate under this methodology can also run into problems when the will designated a number of beneficiaries or specific bequests as financial institutions, or real estate title attorneys may insist on joinder of all beneficiaries before releasing funds or selling the real estate. Similarly, it is at such times when there is no one in charge that you miss having an independent executor.

Finally, do not think that will contests will necessarily preclude this short cut to probate. Will constructions can be handled first under a Motion for Declaratory Judgment under Chapter 37 of the Civil Practice and Remedies Code, and some will contests (such as determining which will to admit to probate) can also be resolved first with the estate, then proceeding as a Muniment of Title.
Samples of an Application and Order for Probate as a Muniment of Title, and the Proof of Death and Other Facts used in this kind of probate, are shown below:

NO. ______________

ESTATE OF (DECEASED), Decedent * IN THE COUNTY COURT

* *

SSN: (DECEDENT’S SSN) * AT LAW NO. X

* *

DECEASED * XXX COUNTY, TEXAS

APPLICATION FOR PROBATE OF WILL AS A MUNIMENT OF TITLE TO THE HONORABLE JUDGE OF SAID COURT:

(APPLICANT) Applicant, SS# _____ “Applicant”, furnishes the following information to the Court for the probate of the written Will of (THE DECEASED) Decedent, SS#, (THE DECEDENT’S SSN) as a Muniment of Title:

I. Applicant is an individual interested in this Estate, domiciled in and residing at (APPLICANT’S ADDRESS).

II. Decedent died on (DATE OF DEATH), at (LOCATION OF DEATH,) XXX County, Texas, at the age of (DECEDENT’S AGE AT TIME OF DEATH.)

III. This Court has jurisdiction and venue because Decedent was domiciled and had a fixed place of residence in this county on the date of death.

IV. Decedent owned real and personal property described generally as home, cash, bank accounts, automobiles, household goods, and personal effects, of a probable value in excess of $(DOLLAR AMOUNT OF ESTATE).

V. Decedent left a valid written Will which was dated (DATE OF WILL). The Will was made self-proved in the manner prescribed by law and the subscribing witnesses to the Will and their present addresses are (NAMES AND ADDRESSES OF THE WITNESSES WHO ATTESTED THE WILL). This Will was never revoked and is filed herewith.

OR

Decedent left a valid written Will which was not self-proved and the names and addresses of the witnesses are as follows: (NAMES AND ADDRESSES OF THE WITNESSES WHO ATTESTED THE WILL). This Will was dated DATE OF WILL; it was never revoked, and is filed herewith.
OR

Decedent left a valid written Holographic Will which was notarized and dated (DATE OF WILL). This Will was never revoked and is filed herewith.

VI.

The Will named (Name of Executor) as Executor who resides at (EXECUTOR'S FULL ADDRESS).

VII.

No children were born to or adopted by the Decedent after the date of the will.

VIII.

(Decedent was previously married to _______________. The divorce took place in _____ in XXX County, Texas.) Decedent was married to _____ at the time of his/her death.

IX.

Applicant has investigated the affairs of the Decedent and finds that to the best of Applicant's knowledge and belief, there are no unpaid debts owing by the Estate of the Decedent, exclusive of any debt secured by liens on real estate, and there is no necessity for administration on such Estate.

X.

The Decedent did/did not name any State, Governmental Agency of the State, or a Charitable Organization as a Devisee in his/her Will.

XI.

WHEREFORE, Applicant prays that citation issue as required by law to all persons interested in this Estate; that the Will be admitted to probate as a Muniment of Title only; that the requirement for the filing of an Affidavit of Fulfillment of Terms of Will be waived; and that all other Orders be entered as the Court may deem proper.

Respectfully Submitted,
Law Office
Address
City, State, Zip Code
Tel#
Fax#

_______________________________
BY:
Lawyer
Attorney of the Estate
BAR LICENSE NUMBER

(continued)
ORDER ADMITTING WILL TO PROBATE AS A MUNIMENT OF TITLE

On this day came on to be heard the Application for Probate of Will as a Muniment of Title filed by APPLICANT, SS# (APPLICANT’S SSN), in the Estate of (DECEDENT), SS# (DECEDENT’S SSN), Deceased.

The Court heard the evidence and reviewed the Will and the other documents filed herein and finds that the allegations contained in the Application are true; that notice and citation have been given in the manner and for the length of time required by law; that Decedent is dead and that four years have not elapsed since the date of Decedent’s death; that this Court has jurisdiction and venue of the Decedent’s estate; that Decedent left a Will dated (DATE OF WILL), executed with the formalities and solemnities and under the circumstances required by law to make it a valid Will; that on such date Decedent had attained the age of eighteen years and was of sound mind; that such Will was not revoked by Decedent; that no objection to or contest of the probate of such Will has been filed; that all the necessary proof required for the probate of
Open the Safe Deposit Box (Hower 429)

As mentioned earlier, the first issue the legal assistant may have to deal with is helping the bereaved family locate the will. TPC § 75 requires anyone in possession of the will of a deceased to deliver the will to the clerk of the court that has jurisdiction of the estate on receiving notice of the testator’s death. If that will is believed to be in a bank’s safe deposit box, the financial institution may allow any of the joint holders to enter the box and remove its contents, even after the death of a joint holder. TPC § 36. Alternatively, the financial institution may deliver a will found in a safe deposit box to the person named in the will as executor or to the clerk of the court having probate jurisdiction without the necessity of a court order. TPC § 36E(a)(1). This same section applies to documents appearing to be a deed to a burial plot or burial instructions as well as delivery of insurance policies on the decedent’s life to a beneficiary named in the policy. Further, the financial institution is authorized to let the following persons into the safe deposit box without a court order:

1. The decedent’s spouse.
2. The decedent’s parent.
3. A descendant of the decedent who is at least eighteen years old.
4. A person named as the executor of the decedent’s estate in a copy of a document that the person has and that appears to be a will of the decedent.

TCP § 36D.

If an applicant for probate believes that the testator left the will in a safe deposit box, and the above methods have not worked, the applicant or any other interested person may petition the court, either before or after filing the application for probate, to allow the applicant or other interested person to enter the safe deposit box, examine the contents, and remove the will, as well as any insurance policy on the decedent’s life, and the deed to the burial plot in which the decedent is to be buried. TPC § 36C.

### Procedures for Collecting Specific Estate Assets (Hower 432)

Immediately after receiving letters, the personal representative collects up and takes possession of the estate property (TPC §§ 232, 233) to which the estate has claim or title, and using at least ordinary diligence, collect all debts owing to the estate, unless there is no reasonable prospect of collecting on a claim. Contingent attorney fees of up to one third are permitted without court approval. (TPC § 233(c)). TPC § 233A authorizes suits by executors and administrators. TPC § 230 establishes that the standard of care is one where a “prudent man would take care of his own property,” and that he or she must keep the estate in good repair.

Prepare the Inventory (Hower 437)
Within ninety days after qualifying, unless a longer time is granted by the court, the representative must file with the clerk of the court a verified, full, and detailed inventory of all the property of the estate that has come to his or her possession or knowledge, giving the fair market value of each item as of the date of death. TPC § 250. As part of this report, there is a requirement that a list of all claims due to the estate be disclosed. TPC § 251. Upon return of the inventory, appraisement, and list of claims, the judge must examine and approve or disapprove them. TPC § 255. After the filing of the inventory and appraisement, if property or claims not included in the inventory come to the possession or knowledge of the representative, he or she must file with the clerk of the court a verified, full, and detailed supplemental inventory and appraisement. TPC § 256. A successor representative has the same obligation. TPC § 227. A sample form follows:

<table>
<thead>
<tr>
<th>NO. ______________</th>
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</thead>
<tbody>
<tr>
<td>THE ESTATE OF XXX</td>
</tr>
<tr>
<td>* IN THE COUNTY COURT</td>
</tr>
<tr>
<td>*</td>
</tr>
<tr>
<td>*</td>
</tr>
<tr>
<td>SSN: *</td>
</tr>
<tr>
<td>*</td>
</tr>
<tr>
<td>*</td>
</tr>
<tr>
<td>DECEASED * XXX COUNTY, TEXAS</td>
</tr>
<tr>
<td>INVENTORY, APPRAISALMENT, AND LIST OF CLAIMS</td>
</tr>
<tr>
<td>Date of Death:</td>
</tr>
</tbody>
</table>

54
The following is a full, true, and complete Inventory and Appraisement of all personal property and of all real property situated in the State of Texas, together with a List of Claims due and owing to this Estate as of the date of death, which have come to the possession of knowledge of the undersigned. The deceased was not married at the time of death and therefore all property is separate property.

INVENTORY AND APPRAISEMENT

Real Property Separate Interest—  Value  Lien
$ ___________  $ ___________

TOTAL ESTATE INTEREST—REAL PROPERTY — $ ___________

Personal Property Separate Interest—  Value  Lien
$ ___________  $ ___________

TOTAL ESTATE INTEREST—PERSONAL PROPERTY — $ ___________

Total Estate Value  $ ___________

The forgoing Inventory, Appraisement, and List of Claims should be approved and ordered entered of record.

Respectfully submitted,

__________________________________________
Attorney for Applicant
TBN:  
Address  
Fax #  
Phone #

STATE OF TEXAS  *

COUNTY OF XXX  *

I, __________________________, having been duly sworn, do state on oath that the forgoing Inventory and List of Claims is a true and complete statement of the property and claims of the Estate that have come to my knowledge.

EXECUTRIX OR EXECUTOR

SUBSCRIBED AND SWORN TO BEFORE ME, on this the _____ day of ______________, 20_____.

__________________________________________
NOTARY PUBLIC
The handling of claims can be one of the most critical areas of probate that the legal assistant must process. After notification has been perfected (see above), the law firm should verify that each claim has been properly authenticated. TPC § 310. Once a duly authenticated claim has been received, the personal representative must, within thirty days, prepare and sign a memorandum indicating what portion of the claim has been accepted or rejected. TPC § 309. The rejected claimant then has ninety days to file suit on the claim or it is barred. TPC § 313.

The classification and order of claims is as follows:

Class 1. Funeral expenses and expenses of last sickness for a reasonable amount to be approved by the court, not to exceed $15,000.00, any excess to be classified and paid as other unsecured claims.

Class 2. Expenses of administration and expenses incurred in the preservation, safekeeping, and management of the estate.

Class 3. Claims secured by mortgage on other liens, including tax liens, so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien, and when more than one mortgage or lien shall exist upon the same property, the oldest shall be first paid; but no preference shall be given to such mortgage or lien.

Class 4. Claims for the principal amount of, and accrued interest on, delinquent child support and child support arrearages that have been confirmed and reduced to money judgment, as determined under Subchapter F, Chapter 157, Family Code.

Class 5. Claims for taxes, penalties, and interest.

Class 6. Claims for the cost of confinement established by the Texas Department of Corrections under Section 501.017, Government Code.
Class 7. Claims for repayment of medical assistance payments made by the state under Chapter 32, Human Resources Code, for the benefit of the decedent.

Class 8. All other claims.

TPC § 322.

THE FINAL ACCOUNT AND CLOSING THE ESTATE (HOWER 454)

After the expiration of twelve months after the original granting of letters, the personal representative or heir may file with the clerk of the court an application for partition and distribution of the estate (TPC § 373(a)) although partial distributions may be requested at earlier times. TPC § 373(c).

A dependent personal representative is also required to file an account for final settlement when all the debts known to exist against the estate have been paid, so far as the assets in the representative’s hands will permit, and when there is no further need for administration. TPC §§ 405, 404(a). The accounting must be accompanied by proper vouchers in support of each item not already accounted for. TPC § 405.

Since the estate must be open for at least twelve months, it is not uncommon to have to file annual accountings. Twelve months after the date of qualification and receipt of letters, the personal representative is required to file an accounting with the clerk of the court. TPC § 399(a). Subsequent annual accounts also must be filed until the estate is closed. TPC § 399(b). The account must remain on file ten days before being considered by the judge. TPC § 401(b).

Special Administration (Hower 457)

A temporary administration is the functional equivalent to Special Administration under the UPC. Typically, this is done when immediate action is necessary and cannot await the normal processing for a Dependent or Independent Administration. The TPC also allows for such administrations when there is a will contest which delays the appointment of a personal representative. A temporary administrator may be appointed only if the interest of a decedent’s estate requires the immediate appointment of a personal representative. TPC § 131A. The person seeking the temporary administration has the burden of proving the immediate necessity for the appointment. A court may appoint a temporary administrator on its own motion as well (TPC §§ 131A(a), 132), such as during a contest, as a temporary solution. The duration of the appointment must be specified in the court order and may not exceed 180 days (TPC § 131A(a)) except when a temporary administrator is appointed solely because of a pending will or administration contest. TPC § 132(a).

An application for temporary letters of administration must include the following items:

1. The name, address, and interest of the applicant.
2. The facts showing an immediate necessity for the appointment of a temporary administrator.
3. The requested powers and duties of the temporary administrator.
4. A statement that the applicant is entitled to letters of temporary administration and is not disqualified by law from serving as a temporary administrator.
5. A description of the real and personal property that the applicant believes to be in the decedent’s estate.

TCP § 131 A(b).

In choosing a temporary administrator, a court has the discretion to choose any suitable and qualified person and is not bound to follow the statutory list of priorities that apply to permanent administrations. *Cravey v. Hennings*, 705 S.W.2d 368 (Tex. App.—San Antonio 1986, no writ).
Rather than blanket authority, as with normal letters testamentary or letters of administration, the court only gives the temporary administrator whatever powers are necessary under the circumstances (TPC § 132(a)), and the order must list the powers conferred on the appointee. TPC §§ 131A(c)(2), 132. However, in Thompson v. Southwestern Drug Corporation, 129 S.W.2d 350 (Civ. App.-Amarillo 1939, no writ), it was held that powers of the temporary administrator that are ancillary to the general powers conferred in the order need not be stated in the order. The key is good drafting so as to mitigate the chance of problems down the line.

Before the temporary letters of administration may be issued, the person appointed temporary administrator must take an oath to perform. TPC § 190(c). Under TPC § 131A, the appointee must also file a bond as set by the court, which cannot be waived even if the will so provides. TPC § 131A(d). A temporary administrator appointed solely because of a will or administration contest is required to post a bond in the same manner as a permanent administrator only if he or she is given the power to approve or disapprove claims, pay claims, or sell real or personal property to pay claims. TPC § 132(b).

On the date that the county clerk issues temporary letters of administration, the county clerk must post on the courthouse door a notice of the appointment to all interested persons. TPC §131A(f). On the same date, the appointee must notify the decedent’s known heirs of the appointment by certified mail, return receipt requested. TPC § 131A(g). A request for a hearing to contest the appointment of a temporary administrator must be made not later than the 15th day after the date that the letters of appointment are issued. TPC § 131A(i). If a timely request is made, a hearing must be held and a determination made not later than ten days after the request was made. TPC § 131A(i).

When the term of appointment of a temporary administrator ends, the court may, by written order, make the appointment permanent if such an appointment is in the interest of the estate. TPC § 131A(j).

**LIMITATIONS ON AND LIABILITY OF THE PERSONAL REPRESENTATIVE (HOWER 459)**

In addition to the issue of personal liability is that of removal from the position. TPC § 222 provides for removal of the personal representative. Not surprisingly, there are provisions for removal with and without notice. The grounds for removal of a personal representative without notice are those who:

1. Neglect to qualify in the manner and time required by law.
2. Fail to return within ninety days after qualification, unless such time is extended by order of the court, an inventory of the property of the estate and list of claims that have come to his or her knowledge.
3. Having been required to give a new bond, fail to do so within the time prescribed.
4. Absent themselves from the state for a period of three months at one time without permission of the court, or removes from the state.
5. Cannot be served with notices or other processes by reason of the fact that he or she is eluding service.
6. Have misapplied, embezzled, or removed from the state, or is about to misapply, embezzle, or remove from the state, all or any part of the property committed to his or her care.
THE CHOICE OF FORMAL OR INFORMAL PROBATE (HOWER 466)

Like Informal Administration under the UPC, the system of Independent Administration in Texas is designed to allow for the management of estates with a minimum of judicial supervision. TPC §§ 145 through 154A sets out the procedures governing Independent Administration. Like the Informal Probate, the independent executor is allowed to act without authorization or supervision from a probate court in situations when a dependent administrator would need a court order. See *Bunting v. Pearson*, 430 S.W.2d 470, 472-473 (Tex. 1968) involving an action on a claim. In Texas an Independent Administration can be set up regardless of the size of the estate.

Usually the only actions that will be taken in a court with regard to the Independent Administration of an estate are: (1) the initial application for the probate of the will; (2) the hearing to admit the will to probate; and (3) the filing of an inventory, appraisement, and list of claims. See TPC §§ 5A(b), 145(b)-(e). Although not required, many attorneys choose to voluntarily close the estate by having a court enter an order under TPC § 152(a) so that the personal representative is formally discharged. This is a practical necessity if a bond has been required in order to cancel the on-going obligation and release the sureties.

Just to demonstrate how powerful an independent executor can be, keep in mind that a probate court cannot interfere with an independent executor’s settlement of an estate unless the Probate Code specifically and explicitly permits court action. TPC § 145(h). This is not to say that an Independent Administration is completely free from judicial control. For example, in *Womack v. Redden*, 846 S.W.2d 5 (Tex. App.-Texarkana 1992, den.), the court held that a probate court properly exercised jurisdiction to determine homestead rights of a widow during an Independent Administration even though the estate was free from supervision per se.

The most common method of creating an Independent Administration is for the testator to name an independent executor in the will either explicitly or by using the words of TPC § 145(b) by providing that no action will be had in the courts other than the probating and recording of the will and the filing of an inventory, appraisement, and list of claims. As a last resort, the attorney may ask a probate court to construe the terms of the will as providing for an independent executor. Fortunately, it is not essential that any exact words be used. *Long v. Long*, 169 S.W.2d 763 (Civ. App.-San Antonio 1943, writ refused). For example, courts will grant Independent Administrations when the language of the will simply makes it clear that the testator intended that there be no court supervision of the estate (*In re Dulin’s Estate*, 244 S.W.2d 242, 244 (Civ. App.-Galveston 1951, no writ)) and courts have been liberal in construing terms to create an Independent Administration despite limitations imposed in the will upon the powers of the executor, such as requiring an executor to post bond or the necessity to file an annual report on the condition of the estate, but the mere power to sell and convey assets without court approval has been held to be insufficient. *Allen v. Reilly*, 131 S.W. 1152, 1153 (Civ. App. 1910, no writ). The TPC also provides a testator to expressly disallow the creation of an Independent Administration in which case the testator’s
wishes must be complied with and the probate court cannot create an Independent Administration. TPC § 145(o).

PRIORITY OF PERSONS SEEKING APPOINTMENT AS PERSONAL REPRESENTATIVES (HOWER 468)

The court may appoint “any qualified person, firm, or corporation” as the independent executor unless it is contrary to the best interests of the estate. TPC § 145(d),(e). If the testator’s will fails to create an Independent Administration or the decedent dies intestate, the court can appoint an independent executor with the agreement of all of the beneficiaries (“distributees”) of an estate. The creation of an Independent Administration by this method arises in four different situations:

1. When no executor is appointed in the will.
2. When the will names an executor but does not provide for Independent Administration.
3. When each executor is disqualified, is deceased, or declines to serve.
4. When the decedent dies intestate (under TPC § 3(q) the term “independent executor” includes the term “independent administrator”).

TCP § 145(c)-(e).

Clear and convincing evidence to the court that they constitute all of the decedent’s heirs is required under TPC § 145(g). Problems may arise when there are family disputes, or when heirship questions are involved since lack of unanimity among distributees on this issue prevents the creation of an Independent Administration, which gives each distributee, in effect, a veto over the creation of an Independent Administration. When a minor is a distributee of the estate, the guardian of the person of the distributee has authority to sign the application on the distributee’s behalf. TPC § 145(i).

As mentioned in Chapter 11, the person named in the will to be the executor or any other interested person (as that term is defined in TPC § 3) may apply to the court for letters. TPC § 77 sets out the order of persons qualified to serve as follows:

1. To the person named as executor in the will of the deceased.
2. To the surviving husband or wife.
3. To the principal devisee or legatee of the testator.
4. To any devisee or legatee of the testator.
5. To the next of kin of the deceased, the nearest in order of descent first, and so on. Next of kin includes a person and his descendants who legally adopted the deceased or who have been legally adopted by the deceased.
6. To a creditor of the deceased.
7. To any person of good character residing in the county who applies therefore.
8. To any other person not disqualified under the following section.

Persons disqualified to serve under TPC § 78 are:

1. A minor (a minor is defined as incapacitated in TPC § 3(p).
2. An incompetent.
3. A convicted felon, under the laws of either the United States or any state or territory of the United States, or of the District of Columbia, unless such person has been duly pardoned, or his or her civil rights restored, in accordance with law.
4. A non-resident (natural person or corporation) of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate, and caused such appointment to be filed with the court.

5. A corporation not authorized to act as a fiduciary in this state.

6. A person whom the court finds unsuitable.

A person is also able to waive his or her right to serve and, if he or she is the surviving husband or wife, or an heir if there is no surviving spouse, they may renounce their right to letters specifically in favor of another. TPC § 79.

When a creditor applies, his or her right to serve can be defeated by payment of the claim, filing of a bond for payment, or a showing that the claim is without merit. TPC § 80.

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**APPLICATION FOR PROBATE OF WILL AND ISSUANCE OF LETTERS TESTAMENTARY**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Applicant, SS# (Applicant’s SSN), Applicant, makes this application for admission of the will to probate and issuance of letters testamentary of the Estate of the Deceased, Decedent, SS# (the deceased’s SSN), and in support of the application states to the Court the following:

1. Applicant is (Name of Applicant), an individual domiciled in and residing at Applicant’s address.

2. Applicant is (relationship to the deceased) of the deceased.

3. Decedent, (the deceased), died on (date of death), at (county of death) County, Texas at the age of (age of deceased) years.

4. This Court has jurisdiction and venue is proper in this county because Decedent was domiciled and had a fixed place of residence in this county at the time of death.

5. Decedent owned real and personal property described as home, cash, annuities, automobile, household goods, and personal effects of a probable value in excess of $(amount of estate).

6. To the best of Applicant’s knowledge, as of the time this application was filed, (Decedent was divorced from _____ on or about _____ in _____.) Decedent was married to _____ at the time of death.

7. Decedent left a valid will dated (DATE OF WILL), which was never revoked and is filed herewith.

8. The will was made self-proved in the manner prescribed by law and the witnesses and their addresses are as follows:

9. No child or children were born to or adopted by Decedent after the date of the will.

10. A necessity exists for the administration of the Estate.

(continued)
11. Decedent’s will named (APPLICANT) to act as an Independent Executor. (APPLICANT) is entitled to letters testamentary and is not disqualified by law to act as Independent Executor.

Applicant prays that citation issue as required by law to all persons interested in this Estate; that the will be admitted to probate; that letters testamentary be issued to (APPLICANT); and that all other orders be entered as the Court may deem proper.

Respectfully submitted,

LAW OFFICE
ADDRESS
CITY, STATE, ZIP
TELEPHONE NUMBER
FAX NUMBER

VERIFICATION

STATE OF TEXAS *

COUNTY OF XXX *

On this day appeared before me, (APPLICANT), and stated that he is an heir in the above estate, that he has read the forgoing application for probate, and that he agrees that the estate should be opened as an Independent Administration. (APPLICANT) further stated that he waives issuance and service of citation.

_______________________________
APPLICANT

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public, this day of ______________, 20____.

NOTARY PUBLIC

BY:

_______________________________
(ATTORNEY)
Attorney for the Estate
BAR LICENSE NUMBER
Proof of Death and Other Facts

On this day, (NAME OF AFFIANT), “Affiant” personally appeared in Open Court, and after being duly sworn, deposed and said that:

1. (NAME OF DECEASED), “Decedent” died on (DATE OF DEATH) at (ADDRESS OF DEATH), XXX County, Texas, at the age of (AGE AT TIME OF DEATH), and four years have not elapsed since the date of Decedent's death.
2. The Court has jurisdiction and venue over the estate in that Decedent was domiciled and had a fixed place of residence in Bell County, Texas on the date of her death.
3. No child or children were born to or adopted by Decedent after the date of the will.
4. So far as I know and believe, Decedent did leave a Will which was made self-proved in accordance with Texas law.
5. Decedent was a widow/widower at the time of death.
6. A necessity exists for the administration of this Estate.
7. Citation has been served and returned in the manner and for the length of time required by the Texas Probate Code.
8. The Applicant for Letters Testamentary is not disqualified by law from accepting such Letters or from serving as Executor of the Estate of (THE DECEASED), “Decedent” and is entitled to such Letters.

SIGNED this _____ day of ______________, 20_____.

(NAME OF AFFIANT), Affiant

address:

SWORN TO AND SUBSCRIBED BEFORE ME on this the _____ day of ______________, 20_____ by (NAME OF AFFIANT), to certify which witness my hand and seal of office.

Presiding Judge/County Clerk

LAW OFFICE
ADDRESS OF LAW OFFICE
CITY, STATE, ZIP CODE
TELEPHONE NUMBER
FAX NUMBER

BY:

ATTORNEY
Attorney for the Estate
BAR LICENSE NUMBER
Order Admitting Will to Probate and Authorizing Letters Testamentary

On this day the Court heard the Application For Probate of Will and Issuance of Letters Testamentary filed by (APPLICANT), in the Estate of (THE DECEASED), SS# (DECEASED’S SSN), Deceased.

The Court heard the evidence and reviewed the Will and the other documents filed herein and finds that the allegations contained in the Application are true; that notice and citation have been given in the manner and for the length of time required by law; that Decedent is dead and that four years have not elapsed since the date of Decedent’s death; that this Court has jurisdiction and venue of the Decedent’s estate; that Decedent left a Will dated (DATE OF WILL), executed with the formalities and solemnities and under the circumstances required by law to make it a valid Will; that on such date Decedent had attained the age of 18 years and was of sound mind; that the Will was not revoked by Decedent; that no objection to or contest of the probate of the Will has been filed; that all of the necessary proof required for the probate of the Will has been made; that the Will is entitled to probate; that in the Will, Decedent named (APPLICANT) as Independent Executor, to serve without bond, who is duly qualified and not disqualified by law to act as such and to receive Letters Testamentary; that a necessity exists for the administration of this estate; and that no interested person has applied for the appointment of appraisers and none are deemed necessary by the Court.

It is ORDERED that the Will is admitted to probate, and the Clerk of this Court is ORDERED to record the Will, together with the Application in the Minutes of this Court.

It is ORDERED that no bond or other security is required and that upon the taking and filing of the Oath required by law, Letters Testamentary shall issue to (APPLICANT), who is appointed as Independent Executor of Decedent’s Will and Estate, and no other action shall be had in this Court other than the return of an Inventory, Appraisement, and List of Claims as required by law.

SIGNED this _____ day of ______________, 20_____.

____________________________________
Judge Presiding

NAME OF LAW OFFICE
ADDRESS OF LAW OFFICE
CITY, STATE, ZIP CODE OF LAW OFFICE
TELEPHONE NUMBER OF LAW OFFICE
FAX NUMBER OF LAW OFFICE

BY:

____________________________________
ATTORNEY
Attorney for the Estate
BAR LICENSE NUMBER
DUTIES AND POWERS OF THE PERSONAL REPRESENTATIVE IN INFORMAL PROBATE (HOWER 475)

TPC § 234(b) sets out what the representative may do without application to, or order of, the court:

1. Release liens upon payment at maturity of the debt secured by them.
2. Vote stocks by limited or general proxy (see Bus. Corp. Act Art. 2.29(F)).
3. Pay calls and assessments.
4. Insure the estate against liability in appropriate cases.
5. Insure property of the estate against fire, theft, and other hazards.
6. Pay taxes, court costs, and bond premiums.

Upon application to the court, and by order granting authority, the personal representative may also:

1. Renew or extend any obligation owed by or to the estate.
2. Purchase or exchange property.
3. Take claims or property for the estate in payment of any debt owed to the estate.
4. Compound bad or doubtful debts owed to the estate.
5. Make compromises or settlements in relation to property or claims in dispute or litigation.
6. Compromise or pay in full any secured claim which has been allowed and approved as required by law against the estate by conveying to the holder of the claim the real estate or personalty securing it, in full payment of the claim, and in consideration of cancellation of notes, deeds of trust, mortgages, chattel mortgages, or other evidences of liens securing payment of the claim.

TPC § 234(a).
TAX CONSIDERATIONS IN THE ADMINISTRATION OF ESTATES

State Inheritance Tax Return (Hower 525)

Due to the recent legislation dramatically changing the Federal Estate and Gift Tax, it is too early to see what changes there will be to the state inheritance tax. Therefore, for purposes of reference, the existing laws will be discussed.

Like many states, Texas imposes a tax for transfers of property at the death of a Texas domiciliary equal to the amount of the maximum allowable federal credit for state death taxes under section 2011 of the Internal Revenue Code. Tax C. § 211.051(a). See also Tax C. § 211.001(4)-definition of federal credit; I.R.C. § 2011. A person is considered domiciled in Texas for purposes of the Texas Inheritance Tax return if he or she had a true, fixed, and permanent home and principal establishment to which he or she intended to return whenever absent. Tax C. § 211.001(13). Property for the purpose of taxation includes real property located in Texas, whether or not held in trust; all tangible personal property located in Texas; and all intangible property wherever located. Tax C. § 211.051(c). Non-residents and aliens also must pay Texas inheritance taxes on the transfer of death property (real or tangible) located in Texas. Tax C. § 211.052(a). Apportionment formulas are found in Tax C. § 211.051(b) when death taxes are also required to another state. Texas also imposes a tax on generation-skipping transfers that is based on the generation-skipping transfer tax credit under federal law. Tax C. § 211.054. All this will change with the enactment of the tax relief of 2001.

If no specific directions are given, the representative of an estate charges each person interested in the estate with a portion of the estate tax assessed against the estate, and the amount each interested person must be charged is based on the ratio that his or her taxable interest bears to the total taxable value of all persons interested in the estate. TPC § 322A(b)(1). However, a testator may make special provision for the apportionment of estate taxes or may give discretion to determine the apportionment to another person. TPC § 322A(b)(2). This can be very useful to reduce subsequent estate taxes.
No Texas specific laws are involved for this chapter.