

**THE
INTESTACY MANUAL
2016**

**FOR PROCEEDINGS
IN
TEXAS PROBATE COURTS**

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JUDGE
TARRANT COUNTY PROBATE COURT NUMBER ONE
FORT WORTH, TEXAS
REVISION DATE – OCTOBER 2015

DIVISION OF PROPERTY UPON INTESTACY IN TEXAS

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

1. With Surviving Spouse, and Children (or their descendants):

- A) where Surviving Spouse and Decedent are parents of all Children
Surviving Spouse ----- All
- B) where Surviving Spouse and Decedent are **NOT** the parents of all Children:
Surviving Spouse retains Surviving Spouse's 1/2, takes **NONE** of Decedent's 1/2
Children or their descendants -----take **ALL** of Decedent's 1/2

2. **With Surviving Spouse only:** Surviving Spouse----- All

3. **With Children or their descendants only** Children or their descendants ----- All

II. SEPARATE PROPERTY

1. With Surviving Spouse (§201.002, Texas Estates Code)

A) With Children or their descendants

- 1) Pers Prop: a) Surviving Spouse ----- 1/3
b) Children and their descendants ----- 2/3
- 2) Real Prop: a) Surviving Spouse has life interest in ----- 1/3
(with remainder to Children and their descendants)
- b) Children and their descendants have fee in ----- 2/3
& remainder in ----- 1/3

B) Without Children or their descendants

- 1) Pers Prop: Surviving Spouse ----- All
- 2) Real Prop: a) Surviving Spouse has fee in ----- 1/2
- b) 1) Both Parents Survive: Father ----- 1/4
& Mother ----- 1/4
- or 2) One Parent surviving ----- 1/4
& Siblings and their descendants ----- 1/4
- or 3) One Parent surviving alone ----- 1/2
- or 4) Siblings and their descendants alone ----- 1/2
- or 5) Surviving Spouse alone ----- All

2. Without Surviving Spouse (§201.001, Texas Estates Code)

A) **With** Children or their descendants: Children & their descendants ----- All

B) Without Children or their descendants:

- 1) Both Parents survive: Father ----- 1/2
& Mother ----- 1/2
- or 2) One Parent surviving ----- 1/2
& Siblings and their descendants ----- 1/2
- or 3) One Parent surviving alone ----- All
- or 4) Siblings and their descendants alone ----- All
- or 5) a) Paternal Kin: 1) Both Grandparents: Grandfather ----- 1/4
& Grandmother ----- 1/4
- or 2) One Grandparent surviving ----- 1/4
& descendants of deceased Grandparent ----- 1/4
- or 3) One Grandparent surviving alone ----- 1/2
- or 4) descendants of deceased Grandparent alone ----- 1/2
- & b) Maternal Kin: ----- other half in same order

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The Intestacy Manual 2016

I. INTRODUCTION

The law of intestacy, or intestate succession, is among the oldest concepts in recorded history, as the necessity for having fixed rules determining shares of property of the deceased were of paramount importance in primitive cultures. One of the earliest recorded intestacy proceedings is found in the Old Testament Book of Numbers, Chapter 27, where Moses obtained a ruling from a Higher Authority on whether the daughters of one of the descendants of the twelve tribes of Israel could inherit their father's share where he had no sons, but only daughters. Numbers 27:8.

II. INTESTACY

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

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

B. Fixed Nature of Distribution

"While a testator has an almost unrestricted power to dispose of his or her property by will, short of violating the homestead right of the surviving spouse, *Dominguez v. Duran* 540 S.W.2d 567 (Civ. App. Houston 1st Dist. 1976, ref. n.r.e.) a failure to effectively dispose of one's property by will results in the passage of that property according to the laws of intestacy, or as it is sometimes called 'descent and distribution.' Such property passes in the manner fixed by statute, even if it results in a disposition entirely at odds with any other stated intentions of the decedent." *Najvar v. Vasek* 564 S.W. 2d 202 (Civ. App. Corpus Christi 1978, ref. n.r.e.).

C. Which Law Controls?

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

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

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

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

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

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

E. Vesting at Death

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

Whether property passes under a will or by

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

F. Legal Title/Equitable Title

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

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

G. Descent and Distribution

1. BASIC LAW - The distribution of property upon death, once heirship (title) is determined, is according to the *Laws of Descent and Distribution*, found in Tex. Est. Code §§ 201.001 to 201.152. Following the title page of this paper is a chart displaying the basic division of property under these sections. The actual application of the law is best performed by examining the facts of the decedent's family history and comparing it to those persons surviving by classification on the chart.

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

III. PATERNITY & MATERNITY

A. Paternity versus Heirship

As opposed to heirship, paternity may or may not be related to the passage of title to property. Most often, it relates to the creation of a parent-child relationship. Tex. Fam. Code §§ 160.102(5), 160.201. However, in one case, the petitioner sought only to establish the identity of his biological father, not an obligation of support nor a right to inherit. *Interest of Sicko*, 900 S.W.2d 863 (Tex. App. Corpus Christi 1995, no pet.).

B. Related Concepts

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

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

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

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

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

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

Thereafter, in 1986, the Texas Legislature enacted a statutory framework for involuntary paternity proceedings. Tex. Fam. Code §13.01 *et seq.* and in 1987, the Probate Code was amended giving a person claiming to be an illegitimate child or claiming through an illegitimate child, the right to petition the probate court for a determination of a right of inheritance. Tex. Prob. Code §42(b), (now Tex. Est. Code § 201.052).

D. Current Provisions

1. DURING THE ALLEGED FATHER'S LIFETIME - A child may establish paternity either

voluntarily (pursuant to Tex. Fam. Code §160.302) or **involuntarily** (pursuant to Tex. Fam. Code §160.636).

2. AFTER THE DEATH OF THE ALLEGED FATHER

A. Common Law - At common law, any right to seek establishment of paternity did not survive the death of the putative father. *Interest of George*, 794 S.W. 2d 875 (Tex. App. Tyler 1990, no pet.). (Ignoring the earlier case of *Manuel v Spector*, *infra*.)

B. Statutory Construction - In *Manuel v. Spector*, 712 S.W.2d 219 (Tex. App. – San Antonio 1986, orig. proceeding), the San Antonio court of appeals held that legitimation is a creature of statute, and that the legislature had directed that such statutes should be liberally interpreted to achieve their purpose and promote justice. Tex. Gov't. Code §313.006. As a result, even after the death of the alleged father, an action to establish the paternity of an illegitimate child can be brought, and paternity be established if clear and convincing evidence is presented. *Interest of A.S.L.*, 923 S.W. 2d 814 (Tex. App. – Amarillo, 1996, no pet.).

C. Proof of Paternal Inheritance Tex. Est. Code § 201.052 - The Estates Code now sets forth the methods by which a child may prove paternal inheritance.

1. For purposes of inheritance, a child is the child of the child's biological father if:
 - a. the child is born under circumstances giving rise to the presumption of paternity established by Tex. Fam. Code § 160.204;
 - b. by execution of an acknowledgment of paternity by the man;
 - c. a court decree adjudicating the man's paternity in the family courts;
 - d. adoption of the child by the man;
 - e. the man's consenting to assisted reproduction by his wife under Tex. Fam. Code §§ 160.701 – 160.707, which resulted in the birth of the child.

Note: If the child is to be born pursuant to a "gestational agreement" (surrogate parenting) under Tex. Fam. Code §§ 160.751-160.763, and the agreement defines the 'intended parents,' the child is the child of the intended parents and not the biological father unless the biological father is also the intended father.

2. A child described under "a." above and the child's issue inherit from the child's father and the child's paternal kindred, both descendants, ascendants, and collateral kindred in all

degrees, and they may inherit from the child and the child's issue.

3. A person may petition the probate court for a determination of right of inheritance from a decedent if the person:
 - a. claims to be a biological child of the decedent and is not otherwise presumed to be a child of the decedent; or
 - b. claims inheritance through a biological child of the decedent who is not otherwise presumed to be a child of the decedent.
4. If under "c." the court finds **by clear and convincing evidence** that the purported father was the biological father of the child:
 - a. the child is treated as any other child of the decedent for purposes of inheritance; and
 - b. the child and the child's issue may inherit from the child's paternal kindred, both descendants, ascendants, and collateral kindred in all degrees, and they may inherit from the child and the child's issue.
5. This section does not permit inheritance by a purported father of a child, recognized or not, if the purported father's parental rights have been terminated.

E. Maternity

For purposes of inheritance:

1. a child is the child of the child's biological or adopted mother. Tex. Est. Code § 201.051(a).
2. the child and the child's issue shall inherit from the child's mother and the child's maternal kindred, both descendants, ascendants, and collateral kindred in all degrees, and they may inherit from the child and the child's issue. *Ibid*.
3. If the child is the subject of a validated gestational agreement under Tex. Fam. Code Ch. 160, Subch. I, the child is the child of the intended mother and not the biological mother or gestational mother unless the biological mother is also the intended mother. *Ibid*.
4. Tex. Est. Code §201.051 does permit inheritance by a child born after the death of the intestate deceased unless a right of inheritance accrues under Tex. Est. Code §201.056. Tex. Est. Code § 201.051(b) (see below).

F. Inheritance By Child In Gestation Tex. Est. Code § 201.056.

1. RIGHT TO INHERIT - A child can have a right to inherit if it is born before, or is in gestation

at the time of the intestate's death and survives for at least 120 hours.

2. GESTATION - A child is considered to be in gestation at the time of the intestate decedent's death if:

A. insemination or implantation occurs at or before the time of the intestate decedent's death; and

B. the child is born before the 301st day after the date of the intestate decedent's death.

3. OTHER CLAIMS ELIMINATED - This would seem to eliminate any claims for inheritance by children born from in vitro fertilization or other method of insemination or implantation (i.e. stored genetic material) done after the decedent's death. Tex. Est. Code §§ 201.051, 201.052(f), 201.056.

G. Proof by Genetic Testing: Presumptions

1. GENETIC EVIDENCE – As discussed in more detail below, the Estates Code was amended in 2007 to authorize the use of genetic testing in heirship proceedings. Tex. Est. Code §§ 204.001ff provides for a petition for a right of inheritance and the use of genetic testing to be brought in the probate court without the necessity of instituting a Uniform Parentage Act proceeding under Tex. Fam. Code Chap 160.

2. PRESUMPTIONS AND REBUTTAL - If genetic testing has been used to determine a familial relationship, the statutes create a rebuttable presumption of that relationship (paternity or sibling status) upon certain defined test results. Tex. Fam. Code § 160.505, Tex. Est. Code §§ 202.152 204.101. That presumption can only be rebutted with further genetic testing. Tex. Fam. Code § 160.505, Tex. Est. Code §§ 202.152 204.102.

IV. ESCHEAT

Escheat is a common law doctrine, derived from feudal law, which provides that when an individual dies intestate and without heirs, the property in question reverts to the sovereign (the state). It serves to ensure that property is not left in "limbo" without recognized ownership. See Black's Law Dictionary 640 (4th Ed. 1968).

Intestacy is not favored by the common law, so there are statutes which indulge in presumptions, both to prevent escheat and to prevent intestacy, e.g.: Tex. Est. Code Chap. 121 ("Survival Requirement For Intestate Succession And Certain Other Purposes"). *Ferguson v. Ferguson*, 45 S.W.2d 1096 (Tex. 1931); *Kuehn v. Bremer*, Tex. Civ. App., 132 S.W.2d 295 (Tex. Civ. App Waco 1939, wr. ref.); *Adams v. Masterson*, 415 S.W.2d

535, 536 (Tex. Civ. App. Dallas 1967, n.r.e.)

Although derived from common law, escheat of property in Texas is governed by Tex. Prop. Code Title 6, Chapters 71 through 76.

V. PROCEEDINGS TO DETERMINE HEIRSHIP

Checklist: Determination of Heirship

* local practice varies

1. Draft Pleadings, e-Sign & e-File, pay applicable fees*
 - A. Cover Letter to clerk/Filing Instructions
 1. Request issuance of citation
 2. Order/Pre-Pay for additional copies of Proofs of Death
 3. Order/Pre-Pay for certified copies of the Order
 4. Arrange to pick up or have documents mailed
 5. Other requests
 - B. Case Information Sheet
 - C. Case Information Sheet - Probate Supplement*
 - D. Application for Determination of Heirship (Appendix 1)
 - E. Other documents relating to initial filing
 - F. Proposed Proofs of Heirship Facts (Appendix 10)
 1. Applicant
 2. Disinterested Witness
 - G. Proposed Judgment Determining Heirship (Appendix 13)
2. Make Deposit for Ad Litem Fee: \$450.00*
3. Court makes Ad Litem Appointment (Appendix 5)
4. Clerk posts citation
5. Obtain citation from clerk and arrange for citation by publication*
6. Ad Litem begins investigation, files Answer (Appendix 6)
7. Attorney requests setting (after Ad Litem has had time to investigate and file Report)*
 - A. e-Serve Ad Litem with setting
 - B. Confirm setting with court by e-mail
8. Complete & e-File completed hearing documents (Proofs and Order) (court and date of hearing/signing filled in) in advance of hearing date*
9. e-Serve attorney ad litem with copies
10. Obtain service of required citations or obtain waivers per Tex. Est. Code Ch. 202 (Appendix 2)
11. Obtain Publisher's Affidavit and copy of citation by publication*

12. e-File Publisher's Affidavit and copy of citation by publication
13. e-File Affidavit of Notice by Applicant or Certificate by Attorney (Appendices 3,4)
14. Ad Litem files Report* (Appendix 7)
15. Attend and participate in hearing:
 - A. Case called
 - B. Witnesses sworn
 - C. Testimony of applicant
 - D. Testimony of disinterested witness
 - E. Ruling of court
 - F. Witnesses Execute Proofs of Heirship Facts
 - G. Judge signs Judgment Determining Heirship
 - H. Clerk certifies copies of Judgment Determining Heirship
16. Ad Litem submits Fee Application (Appendix 8)
17. Court reviews and acts on Ad Litem Fee Application and discharges Ad Litem
18. Attorney picks up copies/ certified copies from clerk.

A. General Comment on Heirship Prove-ups

1. PROVING UP THE OBVIOUS - In most cases, the heirship of a deceased person is relatively obvious. Proving up the case is merely a matter of verifying otherwise straightforward family history facts. In other cases, the existence of heirs will not be disclosed, either from ulterior motives or honest ignorance. In yet other situations, the existence of heirs "on the other side of the family" is simply a mystery.
2. MYSTERY CASE - If it appears that there are heirs whose very existence as well as whereabouts are unknown, you have just become a genealogist/skip tracer. Keep your time and understand what resources will be available to pay your fee. Your checklist is constrained by your imagination, the size of the estate and what the judge considers to be a reasonable effort to locate the "missing" heirs.
3. BURDEN OF PROOF - Obviously, the applicant has the burden of proof and task of the ad litem is to exercise due diligence and provide due process for the heirs whose identity or location is unknown or are incapacitated. It is not the job of the ad litem to duplicate all efforts made by the attorney for the applicant.

If the fact situation is such that there are heirs whose whereabouts or identities are unknown, it is crucial that the court be kept up-to-date on the activities of the attorneys and help coordinate the research efforts. Excess time spent by the ad litem

may quickly grow to unreasonable levels.

Caveat: Anyone trying to suppress information regarding the "black sheep" of a family will, of course, present all attorneys and the court with a well-concocted story of a 'happy family' - minus the black sheep. Truly disinterested witnesses must be consulted.

B. Statutory Bases for Heirship Proceedings -

Heirship is the relationship between an intestate Decedent (a person who dies owning or entitled to property and who leaves no will, or whose will fails to effectively dispose of all of that person's property) and an Heir (the person designated by the applicable Laws of Descent and Distribution to receive the property). Tex. Est. Code § 202.002.

C. Scope - "Heirship determinations," for purposes of Tex. Est. Code Chap. 202, will include:

1. stand-alone proceedings where no other administration is sought or pending, Tex. Est. Code §202.0023(1);
2. stand-alone proceedings where the decedent died with a will but the will is either invalid or too much time has elapsed for it to be brought forward to be probated, Tex. Est. Code §256.003;
3. stand-alone proceedings where the heirs of the decedent have reached a family settlement agreement not to probate a will. *Estate of Isaacs, 2012 Tex. App. LEXIS 1173 (Tex. App. Tyler, 2012, pet. den.);*
4. incident to a dependent administration; Tex. Est. Code § 202.002(2);
5. as a prerequisite to a court-created independent administration in an intestate situation, Tex. Est. Code § 401.003; and
6. pursuant to a declaratory judgment action where a personal representative or trustee finds it necessary to determine the heirs of the decedent because of a partial intestacy under a will, trust or other instrument, due to the omission of property from an instrument, omission of beneficiaries or some other unforeseen circumstance. Tex. Est. Code §§ 202.002(2), (3). (Appendix 14).

D. What It Is and What It Is Not...

1. A determination of heirship is:
 - A. the application of the laws of descent and distribution to a given set of facts concerning the family history of the decedent. Tex. Est. Code Ch. 201.

B. a statement of the effect of the statutes on a given configuration of heirs to declare:

1. who are a decedent's heirs and only heirs, Tex. Est. Code § 202.201(a)(1).
 2. the respective shares and interests of the heirs in the decedent's property, Tex. Est. Code § 202.201(a)(1).
2. A determination of heirship is not:
- A. a determination of the existence or non-existence of property in the Decedent's estate. That is the purpose of an inventory and appraisal in an estate administration. Tex. Est. Code § 309.051.
 - B. a characterization of the community or separate nature of the property in the estate.
 - C. a pronouncement of the effect of other laws such as
 - disclaimers (*see below*) or
 - assignments or settlement agreements among the parties to vary the effect of the laws of descent and distribution (other than as above).
3. A suit for declaratory relief pursuant to Chapter 39 of the Civil Practice and Remedies Code is the appropriate vehicle for requesting the court to take cognizance of these other matters and for determining their effect in light of the laws of descent and distribution and the particular facts of the decedent's marital and family history. Tex. Civ. Prac. & Rem. Code Ch. 39.

E. Necessity to Determine Heirship - Tex. Est. Code § 202.002 requires that the lawful heirs and their shares of the estate are to be determined in an intestate administration. In some instances, even if there is no need for administration, an heirship determination may be needed to pass title to various assets (e.g., where the decedent's estate is too large for a Small Estate Affidavit).

note: Items to Consider Before Filing Application to Determine Heirship

1. *Has the County Clerk's Will Depository been checked to see if a will was deposited?*
2. *Are there existing copies of wills so that Tex. Est. Code §§ 256.054, 256.156 & 256.203 ("Will Not Produced in Court") might be followed?*
3. *Has more than four years passed? Tex. Est. Code § 256.003. By complying with the additional notice requirements of Tex. Est. Code § 258.051, it might be possible to get a will admitted to probate after four years.*
4. *Wills or trusts with Partial Intestacies: Join heirship with Muniment of Title proceeding –*

virtually required where the will must speak for itself, but cannot speak to everything in the estate. Tex. Est. Code § 202.002(2)(a).

F. Jurisdiction

1. **COUNTY COURTS** - The County Court, sitting in probate, has exclusive original jurisdiction to determine heirship. TPC § 32.002(a).
2. **STATUTORY COUNTY COURTS** - In counties with one or more statutory county courts, pursuant to Tex. Est. Code §32.002(b) and depending on the statute creating each court, such courts may have original probate jurisdiction in conjunction with the county court.
3. **DISTRICT COURTS** - District Courts have no original jurisdiction to determine heirship, but in actions involving real property titles, the district court may, in a non-probate case, assume jurisdiction and determine the heirs of a decedent. *Estate of Torrance v State, 812 S.W.2d 393 (Tex. App. El Paso, 1991, no pet.). Estate of Maxey, 559 S.W.2d 458 (Tex Civ App Texarkana, 1977, writ refnre).* (Trespass to Try Title). *Trevino v Lerma, 486 SW2d 199 (Tex Civ App Beaumont 1972, no pet.)* (Suit to set aside deed from decedent).
4. **STATUTORY PROBATE COURTS** - Statutory Probate Courts have all jurisdiction necessary to hear all matters of administration, as well as any matters appertaining to or incident to the estate. Tex. Est. Code § 32.002(c).

G. Venue

1. **GENERAL** - Venue for an heirship proceeding:
 - A. if an administration is pending on the decedent's estate, in that county. Tex. Est. Code § 33.004 (a)(1).
 - B. if the decedent:
 1. died intestate or
 2. there is no administration of an estate pending, or
 3. a trustee seeks to determine heirship to distribute trust assets, in the county in which venue would be proper for commencement of an administration of the decedent's estate (above). Tex. Est. Code § 33.004 (a)(2).
2. **DECEDENT UNDER A GUARDIANSHIP** - If the deceased:
 - A. was under a guardianship on the date of death,
 - B. died intestate, and
 - C. there is no administration pending of the estate of the deceased ward, venue to determine the deceased ward's heirs is in the probate court in

which the guardianship was pending on the date of the ward's death. Tex. Est. Code § 33.004 (b).

3. SEPARATE PROCEEDING - Further, the heirship proceeding for a deceased ward must be filed as a separate proceeding and not as a part of the guardianship proceeding. *Ibid.*

4. TRANSFER OF PROCEEDINGS - If, after an heirship proceeding is filed, the decedent's will is admitted to probate elsewhere or an estate administration is granted, the heirship proceeding is required to be transferred to that other county. Tex. Est. Code §§ 202.101-202.103.

H. The Application - The pleading initiating the proceedings. Tex. Est. Code § 202.005.

1. PERSONS AUTHORIZED TO FILE - Tex. Est. Code § 202.004. The following may file an application to determine heirship:

- A. the personal representative of the decedent's estate,
- B. a person claiming part of an estate,
- C. a secured creditor of the decedent,
- D. the guardian of the estate of a deceased ward,
- E. a party seeking the appointment of an independent administrator under Section 401.003; or
- F. the trustee of a trust holding assets for the benefit of a decedent.

2. STANDING - The party bringing the application must be able to demonstrate that they 'skin in the game' by being one of the persons enumerated above or by showing they are a 'person interested in the estate.' Tex. Est. Code § 22.018(1).

A. Applicable in Both Will Contests and Heirships - A mere interloper has no more right to intervene in the administration of a decedent's estate than he does in the admission of a decedent's will to probate. Allowing uninterested strangers to interfere in the administration of a decedent's estate by merely alleging a factual scenario that, if true, would qualify them as 'interested persons' is repugnant to the public policy of this state. *Sheffield v. Scott*, 620 S.W.2d 691, at 693 (Tex. App. Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Womble v. Atkins*, 331 S.W.2d 294 (Tex. 1960). The same fundamental principle that bars an uninterested party from interfering in the probate of a will is equally important in the area of estate administration. *A & W Industries v. Day*, 977 S.W.2d 738, 742 (Tex. App. Fort Worth 1998, no pet.). These same principles were specifically recognized as applicable in heirship proceedings by *Estate of Armstrong*, 155 S.W.3d 448, 452-455

(Tex. App. San Antonio 2004, no pet.).

B. Motion In Limine - The proper procedure to follow on the issue of standing of a contestant is to try the issue separately in an *in limine* proceeding and in advance of a trial on the issues. *Sheffield v. Scott*, above; *Womble v. Atkins*, above.

C. Non-Jury Hearing - A hearing on a motion *in limine* proceeding is typically conducted before the court without a jury. *Id.*; see also *Estate of Hill*, 761 S.W.2d 527, 528-29 (Tex. App. Amarillo 1988, no writ). (But see *Estate of Armstrong*, contra, below.)

D. But a Right to a Jury on the Issue - These same principles were specifically recognized as applicable in heirship proceedings. *Estate of Armstrong*, 155 S.W.3d 448, 452-455 (Tex. App. San Antonio 2004, no pet.). There, the contestant claimed to be the common law wife of the decedent. (see discussion below on informal marriage.) The appeals court noted that the Contestant had the right to a trial by jury on the issue. See Tex. Est. Code § 55.002: "In a contested probate or mental illness proceeding in a probate court, a party is entitled to a jury trial as in other civil actions."

E. Res Judicata? - In *In re Evans' Estate*, 198 S.W.2d 743 (Tex. Civ. App. Beaumont 1946, no writ), the Beaumont court of appeals held that the trial court's denial of an application for letters of administration (based on a ruling that the Contestant was not related to the deceased and had no interest in the estate) was *res judicata* as to the contestant's attempted intervention in the heirship proceeding of the same decedent's estate.

F. Must not Be a Collateral Issue - It is important to note that in *Evans' Estate*, the exact issue was found to have been litigated, but in *Berger v. Kirby*, 135 S.W. 1122, 1126 (Tex. Civ. App. 1911), *aff'd* 153 S.W. 1130 (Tex. 1913), the *res judicata* argument was rejected where the earlier finding regarding any lack of relationship was not actually litigated and included only as a collateral finding. To be *res judicata* and work judicial estoppel, the issue must not be merely collateral to the issue in question. *In re Evans' Estate*, 198 S.W.2d at 746. *Accord*, *Estate of Armstrong*, 155 S.W.3d at 455. (Contestant's status as a surviving spouse at an *in limine* hearing was a collateral matter and was not conclusive for purposes of the heirship proceeding and could not bar Contestant's right to a jury trial on the issue of her status.)

3. REQUIREMENTS OF APPLICATION - Tex. Est. Code § 202.005 - The application must include the following:

- A. the decedent's name and date and place of

- death;
- B. the names and physical addresses where service can be had of the decedent's heirs, the relationship of each heir to the decedent, whether each heir is an adult or minor, and the true interest of the applicant and each of the heirs in the decedent's estate or in the trust, as applicable;
 - C. if the date or place of the decedent's death or the name or physical address where service can be had of an heir is not definitely known to the applicant, all the material facts and circumstances with respect to which the applicant has knowledge and information that might reasonably tend to show the date or place of the decedent's death or the name or physical address where service can be had of the heir;
 - D. a statement that all children born to or adopted by the decedent have been listed;
 - E. a statement that each of the decedent's marriages has been listed with:
 1. the date of the marriage;
 2. the name of the spouse;
 3. the date and place of termination if the marriage was terminated; and
 4. other facts to show whether a spouse has had an interest in the decedent's property;
 - F. whether the decedent died testate and, if so, what disposition has been made of the will;
 - G. a general description of all property belonging to the decedent's estate or held in trust for the benefit of the decedent, as applicable; and
 - H. an explanation for the omission from the application of any of the information required by this section.
4. SUPPORTED BY AFFIDAVIT - Tex. Est. Code § 202.007. The Application must be supported by an affidavit from each applicant that:
- A. all the allegations in the application are true; and
 - B. no material fact or circumstance has been omitted from the application.
5. REQUIRED PARTIES Tex. Est. Code § 202.008 – The applicant must make each of the following a party to the heirship proceeding:
- A. each person named as an heir;
 - B. all unknown heirs of the decedent; and
 - C. all co-owners of any real property with the decedent as shown by the deed records of that county as of the date of filing of the application.

note:

1. *It would be advisable to take the time to check the deed records if there is any real possibility*

of co-owner or tenants in common.

2. *Tex. Civ. Prac. & Rem. Code § 132.001 authorizes the use of unsworn declarations in lieu of an affidavit. That would be applicable here.*

6. THE APPLICATION: POINTERS

A. Relationship of Each Heir to the Decedent - If the deceased left a spouse surviving, the “relationship information” for each surviving child and other descendants who are heirs should designate who the other parent is. For decedents dying after 9/1/1993, the distribution of community property differs depending on whether the surviving spouse and the decedent were the parents of all the children. Tex. Est. Code § 201.003.

B. Express Shares in Fractions - Shares of the Estate are better noted as fractional interests (“½ of ¼ of ¼”) rather than as “1/88” or “.011363636.” This allows the court (and others) to better understand the division of the property in the tabular listing of the distributees. This will limit arguments over how many decimal places should be used to accurately express the share.

Leave the Fractions Divided - In addition, it is helpful to the court to ***leave the fractions divided*** to show how the suggested interest was calculated. For example, “2/9 of the separate personal property” is harder to understand than showing three heirs as receiving “1/3 of 2/3 of the separate personal property” each. The court can more easily check whether the division was made correctly.

C. Characterization of Property - Absent a request for a declaratory judgment, it is not incumbent on the Court to determine the characterization of the property the decedent owned. Consequently, where surviving spouses are involved, the application, the proof and the judgment should all indicate each heir’s interest in ***every possible type*** of property: separate personal property, separate real property, and community property.

D. Community Property Division - Tex. Est. Code § 201.003(c), which addresses the distribution of community property when a decedent had children from a prior marriage, causes many problems for attorneys new to the details of intestacy. The pertinent language is:

If the deceased spouse is survived by a child or other descendant who is not also a child or descendant of the surviving spouse, one-half of the community estate is retained by the surviving spouse and the other one-half passes to the deceased spouse’s children

or descendants. The descendants inherit only the portion of that estate to which they would be entitled under Section 201.101.

The statement that “one-half of the community estate is retained by the surviving spouse” does not mean that the surviving spouse is entitled to one-half of the decedent’s share of the community estate. Each spouse has a one-half interest in the community estate, and a determination of heirship only addresses *the decedent’s share* of the community estate. In other words, if there are heirs other than the children of the decedent and the surviving spouse, the surviving spouse takes none of the decedent’s share, but does retain his or her half of the community property. "In all cases, the surviving spouse retains his or her 1/2 community interest. This 1/2 interest belongs to the spouse - not by inheritance, but because death has dissolved the community entity and has compelled a division of the community estate." *Jones v. State, 5 S.W.2d 973, 975 (Tex. 1928).*

E. Imbedded Heirships - If one of the heirs has survived the decedent, then subsequently died, the trail ends there for this proceeding. For purposes of the instant case, the relevant determination is whether that deceased heir has had an estate administration opened or not. If so, any distributive share is payable to the personal representative of the estate. If not, the distributive share of the deceased heir is payable to the registry of the court.

Do not attempt to “double-up” and determine the heirs of an heir who survived, but died subsequent to the subject decedent, unless a separate heirship proceeding has been filed on that heir’s behalf. The court can only act within its jurisdiction and that jurisdiction (for these purposes) is determined by the pleadings and citation regarding the person whose heirship is being determined. An attempt by the court to act outside of or beyond its jurisdiction produces a void result. *Kowalski v. Finley, 2004 Tex. App. LEXIS 8393 (Tex. App. Houston 14th Dist. 2004, no pet.).*

F. Minor Heirs - Where minors are involved, it is necessary to specify whether the heir is an adult or a minor. Tex. Est. Code §202.005(2). It is advisable to include the date of birth of the minor as a reference to know when the minor is old enough to sell property and to know what type of service or waiver is appropriate. (see below).

G. Other Parties – All persons shown by the deed records to own any a share or interest in any real property described in the application must be made

parties to the proceeding. Tex. Est. Code §202.008. Unknown heirs of the decedent are required to be joined. Tex. Est. Code 202.008(1).

I. Citation - Tex. Est. Code § 51.001. The citation required here differs in several ways from citation and service required for an administration.

1. SERVICE OF CITATION OR WAIVER OF NOTICE

A. All heirs who are not applicants on the petition, including minor heirs, must be served with process **unless** they have executed valid waivers of notice. Tex. Est. Code §§ 202.051, 202.054.

B. A parent, managing conservator, guardian, Attorney Ad Litem, or Guardian Ad Litem of a distributee who is younger than 12 may waive citation required to be served on the distributee under this section. Tex. Est. Code § 202.051.

C. Minor heirs aged 12 through 18 must be served; they may not waive service, and no one may waive for them. Tex. Est. Code §§ 51.201 & 202.056.

D. The code allows service by certified or registered mail, but the Court can require **personal service** for all heirs that do not file a valid waiver. Tex. Est. Code § 51.001(b).

E. All persons shown by the deed records to own any of the estate property must waive or be served. Tex. Est. Code § 202.008.

E. “Unknown heirs” (heirs whose identity is unknown or whose location is unknown) are served with citation by publication (below).

2. POSTED CITATION - Under Estates Code §51.053 Citation shall also be posted in the county where proceedings are commenced and where decedent last resided except where there is citation by publication under Tex. Est. Code § 202.052. Tex. Est. Code § 51.053. The Court, in its discretion, may require posting regardless of whether citation by publication has been done. Tex. Est. Code § 51.001.

3. CITATION BY PUBLICATION is required in all heirship proceedings to be published in a newspaper of general circulation on: 1) all heirs whose identities are unknown and 2) heirs whose addresses cannot be found, in the county of the proceeding and the county of the decedent’s last residence. Tex. Est. Code § 202.052.

note:

1) *although the clerk prepares the citation, the responsibility for securing publication in a local paper and obtaining the publisher’s affidavit varies from county to county. It is sometimes the attorney’s responsibility and*

sometimes the clerk's. The original publisher's affidavit, with the newspaper clipping attached, should be filed before the hearing.

2) *If the decedent lived in another county for a substantial part of his or her life, citation by publication in that county may be necessary depending on the individual facts of the case.*

4. WHEN NO CITATION NECESSARY - Tex. Est. Code § 202.055 Service of citation is not required on:

- A. the applicant or applicants,
- B. anyone who enters an appearance in the proceeding, and
- C. anyone who has executed a waiver of citation.

5. AFFIDAVIT OF SERVICE OF CITATION - Similar to the affidavit of service in a guardianship application, Tex. Est. Code § 202.057 requires an applicant to file an affidavit sworn to by the applicant or a certificate signed by the applicant's attorney stating the citations given or waivers received and filed. A court may not enter an order determining heirship until the affidavit or certificate is filed.

6. OTHER MATTERS WHICH MAY BE INCLUDED IN A WAIVER OF CITATION

A. Consent to Independent Administration via Waiver of Service - In seeking the creation by the court of an independent administration in an intestate situation, it is common practice to include in the "Waiver of Citation and Entry of Appearance, Joinder in Application, Agreement as to Independent Administration, Designation of Independent Administrator and Request for Independent Administration" under Tex. Est. Code § 401.003 to include language allowing the natural guardian or guardians of a minor distributee to consent on the minor's behalf to the creation of an independent administration, if there is no conflict of interest between the minor and the natural guardian(s). Tex. Est. Code § 401.004(c).

note: The court may still deny the request for an independent administration or the waiver of bond if the court finds that it would not be in the best interest of the minor(s) or of the estate. Tex. Est. Code § 401.003.

B. Granting Power of Sale by Agreement - Also in a court-created independent administration, beneficiaries who are to receive an interest in real property may indicate their consent to the ability of the independent administrator to sell such real property. Tex. Est. Code § 401.006.

J. Attorney Ad Litem

1. UNKNOWN HEIRS - A court must appoint an Attorney Ad Litem for all heirs whose names or

whereabouts are unknown. Tex. Est. Code § 202.009. The appointment may be expanded to include representation of any heir who is an incapacitated person on a finding that the appointment is necessary to protect the interests of the heir. Pursuant to Tex. Est. Code § 53.104, the ad litem may also be appointed for a non-resident. An Attorney Ad Litem appointed under these sections is entitled to reasonable compensation for services in the amount set by the court and to be taxed as costs in the proceeding. Tex. Est. Code § 53.104.

Tex. R. Civ. Proc. 244 requires the appointment of an Attorney Ad Litem where service has been made by publication and no answer has been filed nor appearance entered. (Applies every time anyway.)

2. COST DEPOSIT FOR AD LITEM FEES - it is a common practice for courts to require the applicants to deposit an amount set by the court often in the range of \$450, in conjunction with the filing of the heirship application, to ensure the funds will be available to compensate the ad litem for the work to be performed in an heirship case. Besides assuring the ad litem some compensation, such a deposit can have an equalizing effect on the cost of the heirship determination.

3. DUTY AND STANDING OF THE ATTORNEY AD LITEM - It is the duty of attorney ad litem to defend the rights of his involuntary client with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose. *Estate of Tartt v. Harpold*, 531 S.W.2d 696, 698 (Tex. App.-Houston [14th Dist.] 1975, writ ref'd n.r.e.) (quoting *Madero v. Calzado*, 281 S.W. 328 (Tex. Civ. App.-San Antonio 1926, writ dismissed)). *Estate of Stanton*, 2005 Tex. App. LEXIS 10901 (Tex. App. Tyler 2005, pet. den). (dependent administration and heirship).

The attorney ad litem in an heirship proceeding appointed under Tex. Prob. Code § 34A (now Tex. Est. Code § 202.009) was found to have both standing and authority to oppose the appointment of a temporary administrator and apply for the appointment of an independent third-party administrator, to the same extent as if his clients had been present. *Estate of Stanton*, 2005 Tex. App. LEXIS 10901 (Tex. App. Tyler 2005). (dependent administration and heirship).

4. DUE DILIGENCE - the Attorney Ad Litem should:

- A. Obtain and Review All Relevant Pleadings & Documents.

- B. File an Answer on behalf of the clients. This ‘joins the issues.’
- C. Contact the Attorney for the Applicant to obtain:
 - 1. copies of the pleadings and any other ‘official’ documentation affecting descent and distribution.
 - 2. the names and contact information of family members and disinterested witnesses.
- D. Personally Interview the Applicant, other knowledgeable witnesses, including disinterested witnesses, to verify the heirship facts.
- E. Make an Independent Determination (if appropriate) whether the information provided is sufficient, whether anyone has been omitted or if any heirs may be minors or otherwise incapacitated or whose identity or whereabouts may be unknown.
- F. Prepare a Written Report (see Appendix 7) upon completion of the investigation, detailing:
 - 1. a statement of whether the ad litem agrees or disagrees with the application for determination of heirship;
 - 2. a distribution chart, fully showing how all interests devolve upon the heirs.
 - 3. a skeletal recitation of the documents reviewed and persons consulted;
- G. Attend and Participate in the Hearing; and
- H. Prepare and File a Written Application for Payment and Discharge (Appendix 8).

For further reference, see The Ad Litem Manual for 2016: www.tarrantcounty.com/epc01/lib/epc01/ad_litem_manual_2014.pdf

5. DISCHARGE THE AD LITEM - The order awarding the ad litem’s fees should include a provision discharging the attorney ad litem. However, any order awarding the ad litem’s fees and expenses must, by order of the Texas Supreme Court, be by a separate order. Mandatory Reports of Judicial Appointments & Fees, Misc. Docket No. Misc. Docket No. 07-9188 (Oct. 30, 2007) reprinted in *Texas Rules of Court 2015* at page 647.

K. The Hearing: Some General and Practical Observations

1. GENERALLY: HEARING IN OPEN COURT - Tex. Est. Code § 202.151 clearly requires a hearing “in open court” in a proceeding to declare heirship, either through live testimony or deposition on written questions. See “Evidence” below.

2. FOR THE HEARING AT THE BENCH (“*Even a fool is thought wise if he keeps silent.*”) *Proverbs 17:28 (NIV)*

Although counsel is most often standing at the bench rather than standing at the counsel table to address the court – this is still a formal proceeding and the conduct of counsel and the parties should reflect such.

A. PREPARED TESTIMONY: Unless a record is being made by a court reporter, always have your testimony reduced to writing (Appendix 10), in all cases, for all witnesses, every time.

B. PREPARED JUDGMENT: Although some courts (such as Travis County) wish to draft their own heirship judgments, be prepared to tender an appropriate form of judgment to the court.

C. SPEAK UP: it’s your show.

D. LEAD THE WITNESS and avoid droning repetition.

E. BE CONSIDERATE! If you think you are nervous, imagine how the applicant/witness feels! Don’t make your witness grasp for dates, names, etc. Phrase questions to be easy to answer. (e.g.: “*The answer is always ‘yes.’*”)

F. PREPARE YOUR WITNESSES: Discuss the testimony and any legal issues outside the presence of the Court and then ask summary questions as appropriate.

G. CANDOR TOWARD THE TRIBUNAL:

Texas Disciplinary Rules of Professional Conduct Rule 3.03: (a) A lawyer shall not knowingly: (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel...

Even if you are not actively contesting the application, make sure the court has a full picture of the situation. Rather than merely saying “No questions,” ask questions sufficient to highlight any points not covered by the Applicant or other counsel. But use some judgment. While “No questions” is often the proper tactic, don’t leave the judge with the impression that the whole story has not come to light. The result may not be pleasant for counsel.

H. BOND TESTIMONY: If a bond is involved, elicit sufficient testimony on the nature and extent of the Estate to enable the court to set the bond.

L. Evidence in Heirship Proceedings Tex. Est. Code § 202.151.

1. EVIDENCE REDUCED TO WRITING – The court may require all or any part of the testimony admitted as evidence to be reduced to writing and subscribed and sworn to by the witnesses. Tex. Est. Code § 202.151(a). Most courts use a form for the applicant’s testimony and for the disinterested witness or witnesses. See Appendix 10.

2. LIVE EVIDENCE – The evidence most often before the court in an heirship hearing is live testimony, given in open court, by witnesses with personal knowledge regarding the decedent’s family and marital history and the identity of the heirs. Tex. Est. Code § 202.151(b). This includes information regarding identity and relationship of the family members, births, deaths and marriages, as well as the order of deaths and marriages. Courts customarily will require at least one disinterested witness with personal knowledge of the decedent’s family history to testify.

3. DEPOSITION ON WRITTEN QUESTIONS – If, for some reason, live testimony is unavailable (usually because the witnesses reside a great distance from the site of the hearing), the testimony may be obtained through a deposition on written questions, prepared by the attorney for the applicant. Tex. Est. Code § 202.151(b). The procedure is specified in Tex. Est. Code § 51.203.

Although the Estates Code also authorizes the use of a regular stenographic deposition under the Texas Rules of Civil Procedure to provide this type of testimony, the procedure outlined in Tex. Est. Code § 51.203 and Appendix 11 is a much less expensive alternative.

4. EVIDENTIARY STANDARD - The Estates Code fails to specify a standard of proof for heirship proceedings beyond requiring “that level of proof which would create in the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established” *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994). Therefore the judge (or jury) in an heirship proceeding is guided by their own sense of what is right, just and true. *Ibid*.

5. POINTERS

A. Getting The Whole Picture - The Court should make sure that testimony, from both interested and disinterested witnesses, fully proves the identity of decedent’s heirs, including the possibility of common-law marriages, predeceased children and their descendants, or information about parents and predeceased siblings and their descendants when applicable.

B. Establishing the Fact of Death - If the fact of actual death of the supposed decedent cannot be proven by direct means, it may be proven by

adequate circumstantial evidence. Tex. Est. Code § 454.001. Otherwise, the court may have to indulge in a presumption of death arising from Tex. Civ. Prac. & Rem. Code §133.001 (the “Texas Presumption of Death Act”), where a declaratory judgment action asking the court to declare the date and place of death is coupled with the application to determine heirship. See King, “Mostly Dead: Disappearance and the Presumption of Death,” 2013 State Bar of Texas Advanced Estate Planning and Probate Course.

C. Statement of the Evidence (No Longer Required): Tex. Rules Civ. Proc. 244 provides: “A statement of the evidence approved by the Court must be filed with the record where service has been made by publication and no answer has been filed nor appearance entered.” Because Tex. Est. Code § 202.009 now mandates the appointment of an attorney ad litem for heirs whose identity or whereabouts are unknown, this provision is a relic of the past. If the heirship ad litem performs even cursory due diligence (see below), an answer will have been filed. Provided the court requires the testimony to be reduced to writing per Tex. Est. Code § 202.151(a), a properly drafted Proof of Heirship Facts (see Appendix 10) will contain the appropriate information to satisfy this requirement.

A separate “Statement of the Evidence” is simply no longer necessary.

D. Documentary Evidence - Do not allow the use of Affidavits of Heirship, as referenced in Tex. Est. Code § 203.002 for proof in an heirship proceeding *unless they have been filed of record for at least five years*. Tex. Est. Code § 203.001(a)(2). (Even though the Estates Code contains a form and specifies it is prima facie evidence of such matters.) The statute still clearly requires the affidavit to have been on file for at least five years by the time the heirship proceeding is commenced. Tex. Est. Code § 203.001(a)(2). Affidavits of heirship that were drafted, executed and filed only for the current proceeding are inadmissible and, essentially, a waste of time. *Compton v. WWV Enterprises*, 679 S.W.2d 668 (Tex. App. Eastland 1984, no pet.).

Live testimony, on the other hand, comes under the description of “oral statements of reputation concerning personal or family history” - Tex. R. Evid. 803(19), classified as hearsay exceptions without any authentication requirement other than a demonstration of personal knowledge. Tex. R. Evid. 901(b)(1).

E. Recorded Documents such as birth, marriage and death certificates are admissible because of Tex. R. Evid. 902(1) (“Domestic Public

Documents Under Seal”).

F. Written Statements of Fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, etc. are specifically excepted from the hearsay rule - Tex. R. Evid. 803(13), but are subject to the twenty-year authentication requirement of Tex. R. Evid. 901(b)(8).

G. Errors - Any errors contained in such recorded instruments may be proved by interested parties during the heirship proceeding. Tex. Est. Code § 203.001(b). This provision is not exclusive of any other methods of proof available under other rules or law.

M. Heirship Judgment -

1. REQUIREMENTS FOR FINALITY - Tex. Est. Code § 202.201 - For an order determining heirship to be a final judgment, it must include:

- A. The names of the heirs (listing places of residence of the heirs is no longer required) Tex. Est. Code § 202.201(a)(1);
- B. The respective shares and interests in the decedent’s property; Tex. Est. Code § 202.201(a)(2); and
- C. Whether the proof is deficient in any respect Tex. Est. Code § 202.201(b).

2. APPEALABLE JUDGMENT - If all of these elements are present, the judgment is final and may be appealed. Tex. Est. Code § 202.202. However, an heirship judgment that does not include all of the required elements is not a final judgment. *Estate of Loveless, 64 S.W.3d 564, 570 (Tex. App. Texarkana 2001), subsequent appeal after remand 2003 Tex. App. LEXIS 676 (Tex. App. Texarkana 2003, no pet.).*

3. FILING, RECORDING AND INDEXING OF JUDGMENT = CONSTRUCTIVE NOTICE - If a copy of the heirship judgment is filed for record in the deed records of the county where real property described in the judgment is situated, and indexed in the name of the decedent as grantor and the heirs named in such judgment are indexed as grantees; the filing of such judgment shall constitute constructive notice of the facts set forth therein. Tex. Est. Code § 202.206.

4. CORRECTION OF JUDGMENT AT REQUEST OF HEIR - An heir who was not served with citation may, within four years from the date of the judgment, have it corrected by bill of review. Upon proof of fraud, the four year limitation does not apply. The omitted heir may recover from the heirs named in the judgment, and

those claiming under them who are not bona fide purchasers for value, his just share of the property or its value. Tex. Est. Code § 202.203.

5. PROTECTION FOR PARTIES ACTING IN GOOD FAITH

A. BFPs - Even though the judgment may later be modified or set aside, a bona fide purchaser who purchased real or personal property after entry of the judgment without actual notice of the claim of an omitted heir will prevail over such omitted heir. Tex. Est. Code § 202.204(a).

B. Delivery of Goods or Other Transactions - Similarly, any person who has delivered funds or property of the decedent to or engaged in any other transactions with the heirs named in the judgment, in good faith, after the entry of such judgment, shall not be liable therefor to any person. Tex. Est. Code § 202.204(b).

C. Facility of Payment - If the judgment recites that there is no necessity for administration on the estate, such recital shall constitute authorization to all persons owing any money to the estate of the decedent, or having custody of any property of such estate, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, and to persons purchasing from or otherwise dealing with the heirs as determined in the judgment, to pay, deliver, or transfer such property or evidence of property rights to such heirs, or to purchase property from such heirs, without liability to any creditor of the estate or other person. Tex. Est. Code § 202.205(a).

D. Heir’s Right to Enforce Judgment - An heir named in the heirship judgment can enforce his or her rights under the judgment by suit. Tex. Est. Code § 202.205(b).

E. Other Creditor’s Rights Unaffected - Other than the specifics listed above, the rights or remedies of the creditors of the decedent who is the subject of the heirship proceeding are unaffected. Tex. Est. Code § 202.205(c).

6. POINTERS –

A. K.I.S.S. - Lawyers can spend hours on drafting the judgment. The judge will usually have only a few minutes to review the work. However, it is the judge who determines whether the order can be approved. Make the document easy to review and comprehend.

B. Combined Orders - The heirship judgment can (and should) be combined with any other orders in the same proceeding (granting letters of administration, creating an independent administration or granting declaratory relief, as applicable).

C. Tabular Listing - The heirship and property distribution information should be displayed in a tabular listing with all the types of property in one table to make it easier to verify all necessary information is included and that the shares are calculated correctly.

D. Cover All The Bases - As discussed earlier, the judgment determining heirship is a pronouncement identifying the heirs who take and their respective shares. It is not a finding of what property the decedent owned at death. That is a job for a declaratory judgment. The heirship judgment should reflect the appropriate distribution for all property, real and personal, community and separate. If the judgment needs to identify particular property for some reason, that is the job for a declaratory judgment action.

VI. OTHER AREAS OF PARTICULAR CONCERN

A. Per Stirpes and Per Capita Distributions - Tex. Est. Code §201.101.

1. PER CAPITA (“by heads”) - When property passes by intestacy to a group of people within the same level of kinship (“degree of consanguinity”) and all of the people in the group survived the decedent, each takes a full share according to the laws of descent and distribution.

This does not mean each person takes an equal share. Some heirs may take to the exclusion of others, such as lineal descendants (children) who would inherit to the exclusion of collateral heirs (siblings, aunts, uncles). However, within their group, each would take a full share. This is *per capita* (“by heads”) Tex. Est. Code § 201.101(a)

If none of the people of a certain generation survive, the per capita distribution is determined at the next generation at which there is a living relative. (hence “standing in the first or same degree alone”).

2. PER STIRPES (“by roots”) - However, if some of a group predeceased the Decedent and others of the group are still living, the descendants of the predeceased heirs will share the portion of the one through whom they inherit would have been entitled to.

Example: a mother dies with five children. If all five survive, each child takes one-fifth. If four children survive and the fifth child leaves three children (grandchildren as to the decedent), the three grandchildren share in their deceased parent’s one-fifth. Tex. Est. Code § 201.101(b)

B. Half-Blood and Whole-Blood Distributions

- Tex. Est. Code § 201.057

1. THINGS CAN GET MESSY - High divorce rates and serial marriages make this a real probability.

In a situation where there are collateral kindred, some of whom are of the whole blood and some of whom are of the half blood, each of those of half blood will inherit only half as much as each of those of the whole blood. However, if all of the collateral kindred are of the half blood, they each receive whole portions. Tex. Est. Code § 201.057 (paraphrased).

2. FIRST, A FEW DEFINITIONS - Because this concept is sometimes difficult to grasp, a few terms should first be defined:

“collateral kindred” – those that inherit by a relationship that is ‘sideways’ from the decedent – the siblings who are of the same generation.

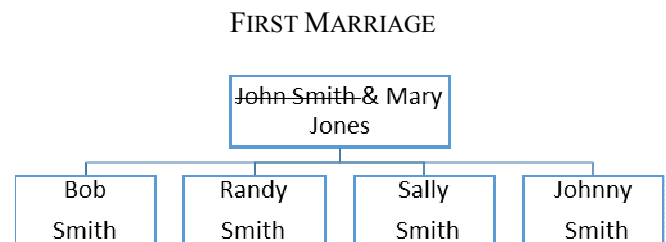
“whole blood” – siblings that share both of the same parents with the decedent.

“half blood” - that share only one parent with the decedent

3. EXAMPLE:

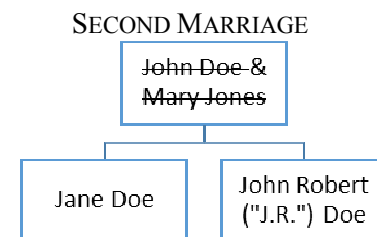
Background:

A. Mary Jones marries (1) John Smith. They had four children. John Smith dies intestate.



B. 1. Mary Jones Smith then marries (2) John Doe. They had two children.

2. Later, both John Doe and Mary Jones Smith Doe die intestate.



C. Bob Smith (a child of Mary’s first marriage)

dies intestate after his parents and his step-father and it is necessary to determine the distribution of his estate among his collateral kindred.

Solution:

A. First determine at what level the initial distribution is made. It must be at the highest level (generation closest to the decedent) at which someone is living. Tex. Est. Code § 201.101. (Here, all survivors are of the same generation.)

B. A *per capita* (“by head”) share is assigned to each person.

~~Mary Jones~~ (deceased)

m1: ~~John Smith~~ (deceased)

- a. ~~Bob Smith~~ (deceased)
- b. Randy Smith ● (one share)
- c. Sally Smith ● (one share)
- d. Johnny Smith ● (one share)

m2: ~~John Doe~~ (deceased)

- a. Jane Doe ● (one share)
- b. John Robert Doe ● (one share)

C. Then, each “Whole-Blood” (those sharing both ancestors (here, both parents) with the Decedent) get another share. The “Half-Bloods do not.

~~Mary Jones~~ (deceased)

m1: ~~John Smith~~ (deceased)

- a. ~~Bob Smith~~
- b. Randy Smith ● ● (two shares)
- c. Sally Smith ● ● (two shares)
- d. Johnny Smith ● ● (two shares)

m2: ~~John Doe~~

- a. Jane Doe ● (one share)
- b. John Robert Doe ● (one share)

D. As there are 8 shares, each share is 1/8. The Half-Bloods take 1/8 each, while the Whole-Bloods take 2/8 or 1/4 each.

~~Mary Jones~~

m1: ~~John Smith~~ (deceased)

- a. ~~Bob Smith~~
- b. Randy Smith 2/8 or 1/4
- c. Sally Smith 2/8 or 1/4
- d. Johnny Smith 2/8 or 1/4

m2: ~~John Doe~~

- a. Jane Doe 1/8
- b. John Robert Doe 1/8

note 1: This section applies only to collateral kindred, not lineal kindred. If the inheritance is determined in a straight

line, up or down, it is lineal. If lineage can only be determined by reference to a person other than the deceased, such as siblings, aunts, uncles, nieces, nephews, and cousins—who are not descendants or ancestors but are related to the decedent through an ancestor, they are collateral kindred. Blacks Law Dictionary 741 (8th ed. 2004).

note 2: If Mary were the decedent in the above example, there would be no half-bloods, since they are all her children. Additionally, if John Doe (Mary’s 2nd husband), were the decedent, the step-children from the first marriage would take nothing.

note 3: Grandparent adoptions of a favored grandchild can wreak havoc with the distributive scheme. Adoptions of stepchildren can “promote them” into being whole-bloods.

C. External Influences: Disclaimers, Assignments and CSAs - The judgment determining heirship is to show the identity of the heirs and their respective shares of the estate. Tex. Est. Code § 202.201. It should not reflect the effect of any disclaimers or transfers executed between or among the parties. *Welder v. Hitchcock*, 617 S.W.2d 294 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.).

1. FILE A ‘DEC ACTION’ - To determine if a disclaimer or transfer is effective for estate planning, tax purposes or for creditor avoidance, a declaratory judgment action is the proper vehicle. *Tate v. Siepielski*, 740 S.W.2d 92, 93 (Tex. App.-Fort Worth 1987, no writ). Such an action may be validly joined with the heirship proceeding to properly place before the court the legal effect of the disclaimer. Otherwise, it is asking the court to render judgment on the legal effect of the disclaimer by taking several shortcuts - without sufficient citation, pleadings, testimony and evidence.

2. A LEGAL FICTION? In *Welder, supra*, the appellants argued the language of the disclaimer statute created a legal fiction (“as if the person disclaiming had predeceased the decedent”) requiring a different distribution - one showing the effect of the disclaimer as a part of the heirship determination.

The Corpus Christi court of appeals rejected this argument, holding such an argument would require 1) a finding that the Legislature intended to alter partially the order of descent and distribution

set out in Tex. Prob. Code §43 (now Tex. Est. Code § 201.101) by the enactment of the disclaimer statute and 2) a finding that the effect of the disclaimer was to re-order and affect the distribution of the entire estate rather than "the property subject thereof," referring only to the property over which the disclaimant had authority by inheritance. The court in *Welder* held that, by enacting Tex. Prob. Code §37A (now Tex. Est. Code Ch. 122), the Legislature intended to affect only to whom a disclaimed share descends, and not the manner in which an entire estate is to be distributed.

3. FEDERAL PRECEDENT – In the 1999 U.S. Supreme Court case of *Drye v. United States*, 528 U.S. 29 (1999), an heir attempted to defeat enforcement of a federal tax lien against his inheritance by disclaiming it under Arkansas law (which created a legal fiction that he had predeceased the decedent).

The Supreme Court rejected this argument, ruling the state disclaimer law, applied retroactively, could not defeat a federal tax lien that attached to the disclaimant's property at death. 528 U.S. at 52. While the state law must be consulted to initially determine the property rights of the taxpayer, it was federal law that must determine how those interests or rights so created shall be taxed. 528 U.S. at 61.

4. CSAs – THE FAVORITE OF THE LAW – Even though the Texas supreme court has held family agreements are “a favorite of the law.” *Shepherd v. Ledford*, 962 S.W.2d 28, 32 (Tex. 1998), unless a declaratory judgment action is joined with the heirship proceeding, the judgment determining heirship must still reflect only the heirs’ respective shares and interests under the laws of this state (meaning the laws of descent and distribution found in Tex. Est. Code Ch. 201). Tex. Est. Code § 202.001(2).

D. Informal Marriage

1. BACKGROUND – Informal (“Common Law”) marriages have been recognized in Texas since 1847. *Tarpley v. Poage's Adm'r*, 2 Tex. 139, 149 (Tex. 1847). However, Texas' recognition of informal marriages has been described as "grudging." Kathryn S. Vaughn, Comment, The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?, 28 Hous. L. Rev. 1131, 1150 (1991); *Texas Employers' Insurance Ass'n v. Elder*, 274 S.W.2d 144, 147 (Tex. Civ. App. -- Fort Worth 1954), *aff'd on other grounds*, 155 Tex. 27, 282 S.W.2d 371 (1955) ("the law does not favor, but

merely tolerates...common-law marriages...") *Russell v. Russell*, 865 S.W.2d 929, 931 (Tex. 1993).

Despite strong pressure to do so, in 1970 the Texas legislature refused to abolish common law marriages when it enacted Title 1 of the Family Code.

2. CURRENT REQUIREMENTS - The current version of the Texas Family Code addressing informal marriage is Tex. Fam. Code § 2.401(a). A person seeking to prove an informal marriage must prove: a) an agreement to be married, b) living together in Texas as a married couple and c) holding out to others that they were married.

An informal marriage does not begin until all three elements - agreement, cohabitation, and representation--are present.

3. "HOLDING OUT:" COMMUNICATION TO THIRD PARTIES - Inherent in the concept of "holding out" is *behavior intended as a communication to third parties*, not just intimate behavior in general. The expression of affection and companionship is not unique to marriage, but is equally consistent with courtship or a close non-marriage relationship. Expressing affection, sharing activities, and caring for one another in illness are not the kinds of conduct that are "intended as a communication to third parties" and would be legally insufficient to support a finding that the couple represented that they were married. *Greenfield v. Greenfield*, 2014 Tex. App. LEXIS 7632 (Tex. App. Houston 14th Dist., July 15, 2014, no pet.).

4. DEADLINE FOR INSTITUTING PROCEEDING - Unless a judicial or administrative proceeding is commenced before the second anniversary of the date on which the parties separated and ceased living together (or the death of the couple), it is rebuttably presumed that the parties did not enter into an agreement to be married. Tex. Fam. Code § 2.401(b). This just raises a rebuttable presumption, which can be overcome by direct evidence.

5. DOCUMENTATION - An informal marriage may be documented by the execution and recording of a Declaration of Informal Marriage pursuant to Tex. Fam. Code § 2.402. This form has the same efficacy as a marriage license. Tex. Fam. Code § 2.404(d).

The existence of an informal marriage is a fact question, and the party seeking to establish the existence of the marriage must prove the three elements by a preponderance of the evidence. *Summers, Estate of*, 2015 Tex. App. LEXIS 88

(*Tex. App. Houston 14th Dist., January 8, 2015, no pet.*).

E. Voiding Marriage Based on Incapacity Tex. Fam. Code §6.108; Tex. Est. Code §§ 123.101, .102, .104.

1. FAMILY CODE PROCEEDING DURING MARRIAGE: In a situation where one of the players in the guardianship is a “newly-acquired” spouse, consider instituting a proceeding pursuant to Tex. Fam. Code §6.108 which permits a proceeding to be filed to declare a marriage void based on the lack of mental capacity. Even if the party believed to have lacked capacity dies, as long as the Family Code proceeding was pending, the probate court may then declare that marriage void based on a lack of capacity. Tex. Est. Code §§ 123.101, 123.102.

2. ESTATES CODE PROCEEDING AFTER DEATH: If one of the parties in a contested heirship proceeding is a “recently-acquired” spouse and there are capacity issues as to the validity of the marriage, an interested person may file a declaratory judgment action in the probate court requesting that the court void the marriage, provided the marriage was commenced not earlier than three years before the decedent's death. Tex. Est. Code § 123.102(a)(2). Such a proceeding may not be filed after the first anniversary of the date of the decedent's death. Tex. Est. Code § 123.102(c).

F. The Slayer's Rule

1. NO FORFEITURE - Heirs convicted (or in a wrongful death suit - found by a civil court) of “willfully bringing about the death of the Decedent” do not forfeit their right to inherit under Tex. Est. Code § 201.054(a).

2. STATUTORY EXCEPTION - However, under Tex. Est. Code § 201.054(b), if a beneficiary of a life insurance policy or contract is convicted and sentenced as a principal or accomplice in willfully bringing about the death of the insured, the proceeds of the insurance policy or contract shall be paid in the manner provided by the Insurance Code. Tex. Ins. Code § 1103.151 provides: “A beneficiary of a life insurance policy or contract forfeits the beneficiary's interest in the policy or contract if the beneficiary is a principal or an accomplice in willfully bringing about the death of the insured.”

3. CONSTRUCTIVE TRUST - In addition, the courts of Texas have recognized the equitable right of a family member to seek the imposition of a constructive trust against the ownership interest of

one who willfully brings about the death of a family member. *see Branyon, The Slayer's Rule Revisited, 1996 State Bar of Texas Advanced Estate Planning and Probate Course; and Bounds v. Caudle, 560 S.W.2d 925, (Tex. 1977); Crawford v. Coleman 726 S.W.2d 9 (Tex. 1987); Medford v. Medford, 68 S.W.3d 242 (Tex. App. Ft. Worth 2002, no pet.); Mowbray v. Avery 76 S.W.3d 663, Tex. App. Corpus Christi 2002, pet. den.) & Admin. Comm. v. Harris, 217 F. Supp. 2d 759 (E.D. Tex. 2002) (ERISA discussion).*

G. Adoption by Estoppel

1. ELEMENTS - The elements necessary to establish an equitable adoption are (1) the existence of an agreement to adopt and (2) performance by the child. The additional requirement that the child must know of the agreement to adopt and act in reliance upon it appears to have been rejected by two appellate courts recently. *Speirs v. Maples, 970 S.W.2d 166 (Tex. App. Ft. Worth 1998, no writ).*

2. APPLICATION - Adoption by estoppel may be employed to prohibit the adoptive parents and those in privity with them from invalidating the status of an adopted child when either: (1) the parties acted in good faith under an instrument of adoption that failed to comply with the adoption statute; or (2) an agreement to adopt existed between the adoptive parent and either the child or the natural parent. *Johnson v. Chandler, 2004 Tex. App. LEXIS 8095 (Tex. App. - Houston 14th 2004, no pet.).*

3. LIMITED APPLICATION - The Texas Supreme Court has consistently declined, however, to give equitable adoption the same status as legal adoption. That court has expressly held that equitable adoption does not have all of the same legal consequences of a statutory adoption and does not create a legal status of parent and child. *Moran v. Adler, 570 S.W.2d 883, 888 (Tex. 1978); Heien v. Crabtree, 369 S.W.2d 28, 29-30 (Tex. 1963); Asbeck v. Asbeck, 369 S.W.2d 915, 916 (Tex. 1963).*

4. NO PARENT-CHILD RELATIONSHIP - In *Carpenter v. Carpenter, 2011 Tex. App. LEXIS 8587, 10-14 (Tex. App. Fort Worth Oct. 27, 2011, pet. den.)*, the court has expressly rejected the argument that, under section 3(b) and section 40 of the probate code Tex. Prob. Code Ann. § 3(b) (now Tex. Est. Code § 22.004) (defining "child" to include a child adopted "by acts of estoppel"), § 40

(now Tex. Est. Code § 201.054) (allowing for inheritance through an adoptive parent), an equitably adopted child has all of the same rights under the laws of descent and distribution as would a biological child, the *Carpenter* court held that, notwithstanding the language of those sections of the probate code, adoption by estoppel cannot create the legal status of parent and child. *Ibid.*

5. NOT RECOGNIZED AS TO THIRD PARTIES - In *Carpenter*, the court found that, regardless of whether there had, in fact, been an adoption by estoppel, this did not create a parent-child relationship as against third parties, so that the term "descendant" could not be construed to include equitably adopted children as "descendants" to take under a trust upon the death of their "father." *Ibid.*

6. AGREEMENT TO ADOPT – In most cases, the agreement to adopt is the "battleground issue." *Cavanaugh v. Davis*; 235 S.W.2d 972 (Tex. 1951). Somewhat like the requirement of "holding out" in a purported informal marriage, (Tex. Fam. Code §2.401(c)), the mere fact that a child is referred to as the child of the foster parents or the fact that a child lives in the household from infancy, addressing them as "Mommy" and "Daddy" and registering in school under their names is inadequate to prove an adoption by estoppel in the absence of a contract to adopt. *Cavanaugh*, 235 S.W. 2d at 982.

7. INCONSISTENCY - The appellate courts have been inconsistent in their holdings in cases in which no direct evidence is presented and no definite pattern has been established. Some courts will uphold the finding of an adoption by estoppel based solely on circumstantial evidence with no direct evidence of an agreement, and other courts will not. In *Spiers*, 970 S.W.2d at 175, the court found an agreement to adopt the child based on the testimony of the adoptive aunt of an agreement with the birth mother, tax and insurance records and school registrations. However, in *Cavanaugh*, *Ibid.*, similar proof was held not to be evidence of an agreement to adopt.

The standard of proof for the agreement (when shown by circumstantial evidence) has been held to be 'clear, convincing, and unequivocal.' *Estate of Whiting*, 2011 Tex. App. LEXIS 8113 (Tex. App. San Antonio, October 12, 2011, *pet. den.*)

8. BOTTOMLINE - *Sit Litigatorem Cave* ("Let the Litigator beware.") It is rare that a case will

come before the trial judge that fully "matches up" with the extremely high bar set by the supreme court to find adoption by estoppel. Even then, the status will not be recognized outside the narrow area of inheritance.

H. Adult Adoptees - An adopted adult is entitled to inherit from and through the adopted adult's adoptive parents as though the adopted adult were the biological child of the adoptive parents. However, the adopted adult may not inherit from or through the adult's biological parent. Also, a biological parent may not inherit from or through an adopted adult. Tex. Fam. Code § 162.507

I. Deadbeat Parents - Tex. Est. Code § 201.062

1. DISIHERITANCE - The legislature has attempted to block parents from inheriting from deceased minor children where the parent had either abandoned the child, abandoned the pregnant mother, or had been guilty (or even just placed on community supervision, including deferred adjudication community supervision) of a fairly long list of crimes enumerated within the statute.

2. RULED UNCONSTITUTIONAL - The Texas Attorney General has opined that, except in narrow circumstances, these provisions run afoul of Article I, section 21 of the Texas Constitution, which provides that "no conviction shall work corruption of blood or forfeiture of estate." Attorney General Abbott concluded that, unless the parent is also within the provisions of the Slayer's Rule (see *infra*) the new provisions go too far and are unconstitutional. Opinion No. GA-0632 (May 30, 2008).

VII. SMALL ESTATE AFFIDAVITS

The distributees of the estate of a decedent who dies intestate are entitled to the decedent's estate without waiting for the appointment of a personal representative of the estate to the extent the estate assets, excluding homestead and exempt property, exceed the known liabilities of the estate, excluding any liabilities secured by homestead and exempt property. Tex. Est. Code § 205.001.

A. Purpose - The Small Estate Affidavit, once approved by the court, serves as a legal document to identify a decedent's heirs and their respective shares of the decedent's property. The Small Estate Affidavit is most often used for estates with small bank accounts and few debts and perhaps homestead real property.

B. Prerequisites & Process: 205.001

1. HOW SOON? - More than 30 days have elapsed since the date of the decedent's death;
2. NO ADMINISTRATION PENDING, GRANTED, OR NECESSARY. No application for an estate administration has been filed or if one has been filed, the court has not acted upon it;
3. The VALUE of the estate assets, excluding homestead and exempt property, does not exceed \$50,000;

4. CONTENTS AND FILING - The Small Estate Affidavit must:

- A. meet the requirements of Tex. Est. Code § 205.002 and
 - B. be FILED with the clerk of the court that has jurisdiction and venue of the estate;
5. APPROVAL - the judge, after review of the affidavit may approve it. Tex. Est. Code § 205.003; and
6. COMPLIANCE - The distributees furnish certified copies of the affidavit to persons who:
- A. owe money to the estate;
 - B. have custody or possession of estate property; or
 - C. act as a registrar, fiduciary, or transfer agent of or for an evidence of interest, indebtedness, property, or other right belonging to the estate. Tex. Est. Code § 205.004.

C. Contents of the Affidavit - Tex. Est. Code § 205.002:

1. subscribed and sworn to:
 - A. by two disinterested witnesses with personal knowledge of the property, liabilities and family history facts of the Decedent and who have no financial interest in the Decedent's estate;
 - B. by each distributee of the estate with actual knowledge of the facts stated in the affidavit and who has legal capacity. The natural guardian or next of kin may execute the affidavit if the distributee is a minor or the guardian of an incapacitated distributee may execute the affidavit for the incapacitated distributee;
2. show that:
 - A. More than 30 days have elapsed since the date of the decedent's death;
 - B. No application for an estate administration has been filed or if one has been filed, the court has not acted upon it; and
 - C. The value of the estate assets, excluding homestead and exempt property, does not exceed \$50,000. Tex. Est. Code §§ 205.001(1), (2) & (3).
3. include:
 - A. a list of all known estate assets (with an

indication of which assets would be exempt if an administration were granted) and all known estate liabilities (including attorney's fees);

- B. the name and address of each distributee; and
- C. the relevant family history facts concerning heirship that show each distributee's right to receive estate money or other property or to have any evidence of money, property, or other right of the estate as is determined to exist transferred to the distributee as an heir or assignee.

D. Notice - Some courts have chosen to require, at a minimum, poster citation on Small Estate Affidavits to give at least some notice to creditors and the public.

E. Court Action - Tex. Est. Code § 205.003

The judge is to examine the affidavit and may, but is not required to, approve the affidavit if it conforms to the requirements of the Estates Code.

In actual practice, the applicants are often required to file multiple corrections because of multiple errors (often by their attorney).

If there are minor distributees, the better practice is to require the interest distributable to a minor to be paid into the registry of the court. , see note below.

F. Effect of the Order? - The Order Approving the Small Estate Affidavit does not order the transfer of the title to any property. The Order only:

1. finds that the affidavit complies with the provisions of the Texas Estates Code,
2. finds that the affidavit has been filed in the proper court,
3. finds that the estate qualifies as a "small estate" under the Estates Code,
4. finds the affidavit should be approved, and
5. directs the Probate Clerk to record the affidavit and issue copies to all persons entitled to receive them.

Note: A small estate affidavit cannot be used to exclude any heir.

G. Limitations of a Small Estate Affidavit

- Cannot be used if the decedent had a will, unless the will is clearly invalid.
- cannot be used unless all distributees can cooperate in signing the affidavit and subsequently paying the debts and distributing the assets.
- cannot be used if the debts exceed the non-

exempt assets. Instead, an administration will be required to classify and pay creditor claims and to take advantage of family allowance and exempt-property protections.

- Cannot be used when the decedent had assets of unknown value because in that case the distributees cannot swear that the assets are no more than \$50,000.
- Cannot be used to attempt to transfer real property to someone who was not already homesteading with the Decedent.
Cannot be used if any minor heir is entitled to property that cannot be placed in the court registry (requires a dependent administration and heirship determination).

H. Pointers

1. CIVIL CASE INFORMATION SHEET AND SUPPLEMENTARY PROBATE COURT INFORMATION SHEET - These vary from county to county.

2. VENUE Typically, venue is proper in the county of domicile. If decedent was a non-resident of the county where the affidavit is filed, the affidavit must include sufficient facts to support venue in that county. Tex. Est. Code § 33.001

3. MANDATED FORM – It is advisable for the court to mandate the use of a specific form.

note:

2015 amendments to Tex. Govt. Code § 22.020 allow the Texas Supreme Court to promulgate various forms and instructions for use by individuals representing themselves in certain probate matters, including

1. *making wills in certain situations,*
2. *applying to probate a will as a muniment of title in limited circumstances, and*
3. *preparing and filing a small estate affidavit proceeding.*

4. CLARITY

The following should be clear in the affidavit:

- A. The marital status of the decedent;
 - B. The relationship of the informant/filer to the decedent;
 - C. The residence of the decedent;
 - D. The place and cause of death (potential medical bills, wrongful death action)
5. OBITUARY - Access to an obituary, either furnished or online, will be of great assistance.
6. NOTARIZATION - All persons who sign the affidavit (whether heirs or disinterested witnesses) must personally appear before a Notary Public and swear to the contents of the affidavit, subject to

penalties of perjury.

7. ACCESS TO ACCOUNT INFORMATION

Two recent legislative enactments will improve the chances of distributees getting good information about the decedent's financial affairs:

A. Court-Ordered Access to Intestate's Account Information - Tex. Est. Code § 153.003 - An "interested person" (an heir, spouse, creditor, or other person with a property right in or claim against a decedent's estate) may apply to the court for, or the court on its own motion, may issue an order requiring a financial institution to release to the person named in the order information concerning the balance of each account of the named intestate decedent maintained at the financial institution provided:

1. 90 days have elapsed since the date of the decedent's death;
2. no petition for the appointment of a personal representative for the decedent's estate is pending; and
3. no letters testamentary or of administration have been granted with respect to the estate.

Exceptions – Tex. Est. Code § 153.002 - This procedure does not apply to

1. an account with a beneficiary designation;
2. a P.O.D. account;
3. a trust account; or
4. an account that provides for a right of survivorship.

B. Disclosure of Mortgage Information to Surviving Spouse - Tex. Fin. Code §§ 343.103

1. Request for Mortgage Information - A surviving spouse may make a request for information of a mortgage servicer for information regarding the mortgage of a deceased spouse (referred to in the statute as the "Mortgagor").
2. Requirements of Request - Tex. Fin. Code §§ 343.103(c), (d)

A. Documentation - The surviving spouse must provide the following as proof of their status:

1. a death certificate of the mortgagor;
2. an Affidavit of Facts Concerning the Identity of Heirs in the form set forth in Tex. Est. Code § 203.002, executed by a disinterested witnesses including language stating that the surviving spouse was married to the mortgagor at the time of the mortgagor's death; and
3. an affidavit signed by the surviving spouse stating that the surviving spouse is currently residing in the underlying mortgaged property as the primary residence.

B. Notice - The request from the surviving spouse must also include a notice to the mortgage servicer that states in bold-faced, capital, or

underlined letters:

"THIS REQUEST IS MADE PURSUANT TO TEXAS FINANCE CODE SECTION 343.103. SUBSEQUENT DISCLOSURE OF INFORMATION IS NOT IN CONFLICT WITH THE GRAMM-LEACH-BLILEY ACT UNDER 15 U.S.C. SECTION 6802(e)(8)."

C. Response by Mortgage Servicer - Fin. Code § 343.103(b) - Within 30 days of the receipt of the request for the information, accompanied by the required proof and notice, the mortgage servicer is required to provide the surviving spouse with information the mortgagor would have received in a standard monthly statement, including:

1. the current balance information, including the due dates and the amount of any installments;
2. whether the loan is current and any amounts that are delinquent;
3. any loan number; and
4. the amount of any escrow deposit for taxes and insurance purposes.

D. Protection for Mortgage Servicer - Fin. Code § 343.103 (e) A mortgage servicer that provides the information as required under this section is not liable to the estate of the mortgagor or any heir or beneficiary of the mortgagor as a result of providing this information to the surviving spouse.

8. PROPERTY DESCRIPTIONS - Each asset should be described and valued as would be required for an Inventory & Appraisal in an estate administration, with sufficient detail to clearly indicate what property is being referenced and a clear designation of whether the property is community or separate (see "Property Characterization, *infra*). Redaction of sensitive data should be observed: The name of the bank and the last four digits of the account number, make and model of automobiles with the last four digits of the VIN number, etc. Real property must be sufficiently described to be able to locate it, etc. (Taxing Authority property descriptions and street address are usually sufficient.)

9. HOMESTEAD - Only the Decedent's interest in the homestead can be transferred by a Small Estate Affidavit and then only to another person already homesteading with the decedent. Otherwise, the affidavit is invalid to transfer title to any real property (other than the homestead) and cannot affect title to non-homestead property. Tex. Est. Code § 205.009.

10. FAMILY HISTORY -

The affidavit must set out the family history facts as of the Decedent's date of death with the same amount of detail as a formal determination of heirship. It should show the names and current

addresses of all heirs, their relationship to the Decedent and the share (pursuant to the laws of descent and distribution) which each heir will take.

A. All marriages, divorces or deaths of spouses and births and deaths of children must be listed.

B. If any children or descendants of the Decedent are **NOT** also children and descendants of the surviving spouse (i.e. step-children), this fact must be shown.

C. If the Decedent was not survived by children or their descendants, but was survived by family members, such as parents, grandparents, brothers and sisters, half-brothers & half-sisters, or other people, this fact must be shown.

D. No one is the heir of a living person. If a child of the Decedent inherits a share, the children of that child cannot inherit from the Decedent if their parent is living.

NEVER assume the conclusions in the affidavit are correct. Experienced attorneys often get this wrong.

DOUBLE CHECK the distribution calculations based on the listing of family members.

11. CONTACT INFORMATION - The Affidavit is required by statute to include the name and address of every distributee of decedent's estate. Tex. Est. Code § 205.002(a)(3)(B).

12. PROPERTY CHARACTERIZATION

A. The probate court cannot adjudicate the nature of that property in its order approving the SEA. Characterization of property as community or separate can result only from a declaratory judgment proceeding (coupled with an heirship proceeding under Estates Code Chapter 202 when decedent died without a will). If decedent was single at the date of death, there is no community property.

B. The separate or community nature of the property can be determined by those holding decedent's property - and can be confirmed by the court - if the distributees:

1. describe the source of funds or property listed in the affidavit,
2. indicate when each asset was acquired, and
3. provide the dates of any marriages or divorces.

C. Examples:

1. Community homestead: "purchased 7/7/83 with community funds during the marriage of decedent and surviving spouse."
2. Community bank account: identify the source of funds in a bank account as derived from decedent's salary during marriage.
3. Separate, inherited property: "as devised to decedent by will of John Doe, admitted to

probate in Cause No. 2014-PR01234, Probate Court No. One of Tarrant County, Texas."

D. If decedent was married at death, the affidavit must state the shares of each distributee as to: separate personal property, separate real property, and the decedent's share of the community property. (The surviving spouse always retains his or her own share of the community property.) It is not sufficient to say that there was no separate property or no separate real property.

13. TAX APPRAISAL DISTRICT RECORDS should be checked.

14. MEDICAID? – The listing of liabilities must include whether the decedent applied for and received Medicaid benefits on or after March 1, 2005. If so, the applicant must either: 1. list the amount owed to Medicaid as a liability, 2. obtain and file a Medicaid Estate Recovery Program (MERP) certification that decedent's estate is not subject to a MERP claim, or 3. include sufficient information proving that a MERP claim will not be filed. For more information, see www.dads.state.tx.us/services/estate_recovery/index.html.

15. DEATH CERTIFICATE - A readable copy of a death certificate should be required. Social security numbers should be redacted.

16. ATTORNEY'S FEES? - Some courts mandate that the attorney's fees charged for the preparation of the affidavit be listed as an estate liability. The court might consider limiting liability for the fees to less than all of the distributees if they appear unreasonably high.

17. EXEMPT PROPERTY - Exempt property is that property which is exempt by law from forced execution, including home furnishings, farm animals, and other property in the possession of the decedent at death, as well as decedent's pension benefits, IRAs, and insurance benefits. The survivor's must be either the decedent's surviving spouse, minor children, or unmarried adult children who lived with the decedent. The list of estate assets must indicate which assets the applicants claim are exempt.

Exempt property is not included in the \$50,000 limit, so courts should check that assets listed as exempt meet the requirements - including, of course, the requirement that decedent is survived by someone who could have the property set aside. Exempt property cannot be used to make the estate solvent. See Tex. Est. Code §§ 353.051- 353.056, Tex. Prop. Code §42.001 et seq., and Tex. Ins. Code § 1108.051.

18. LIABILITIES - The affidavit must include all of decedent's debts and other liabilities (utility bills, credit card balances, doctor's bills, etc.) -

anything owed by decedent and not paid off. As referenced above, it is advisable to consider requiring the affidavit to include attorney's fees paid or to be paid for preparation of the affidavit. (see above).

DETAIL - each debt or other liability is to be described with enough detail to allow a distributee seeking to pay off the debt to do so based on the information provided. The identity and address of the creditor should be provided, along with a redacted account number, if known.

19. SOLVENT ESTATE? - The affidavit must be denied if the total of the assets (not including homestead and exempt property) do not exceed the total of the known liabilities (not including liabilities secured by homestead and exempt property). Distributees can pay off enough of the debts so that the assets exceed the remaining liabilities.

20. ADOPTIONS/ TERMINATION OF PARENTAL RIGHTS? - If decedent gave up a child for adoption, the court needs to review the Decree of Adoption to see if the right to inherit was terminated.

21. EXECUTION OF THE AFFIDAVIT

A. Complete? - Are there signatures of all listed Distributees? Also, if there are missing or non-cooperating heir(s) – save your money: the affidavit should not be filed.

B. Signing for Another? - If someone is signing for a distributee, the relationship permitting this must be clear: (e.g.: "Jane Doe, as natural guardian of minor distributee John Doe.")

1. Parents (“natural guardians”) can sign for minor heirs.

2. Guardians can sign for incapacitated heirs. Tex, Est, Code § 205.002(1)(C). Letters of guardianship should be furnished.

3. Post-deceased heir(s)? If an heir survived the decedent, but subsequently died, the appointed personal representative of that deceased heir can sign on behalf of the deceased heir's estate. Letters testamentary or letters of administration should be required. If no personal representative has been appointed for a now-deceased heir, the affidavit cannot be approved.

22. Disinterested Witnesses - Disinterested witnesses are witnesses who are not decedent's heirs and thus have no financial interest in decedent's estate (e.g.: the spouse of an heir).

These witnesses are swearing to all of the facts included in the affidavit, not only the family history facts. Disinterested witnesses, as well as distributees, are liable for any damage or loss to

any person arising from a payment, delivery, transfer, or issuance made in reliance on the affidavit.

23. LIABILITY OF SIGNERS AND WITNESSES - "Each person who executed the affidavit is liable for any damage or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the affidavit." Tex. Est. Code § 205.007(c).

It is advisable to include the quoted language on every signature page of the affidavit as a disclosure to everyone signing the affidavit, both distributees and disinterested witnesses, of the potential liability for furnishing inaccurate information.

24. UNSWORN DECLARATIONS can be accepted if appropriately done. Tex. Civ. Prac. & Rem. Code § 132.001.

25. HEARING? - The statute does not require a hearing on the affidavit, however letting applicants know a hearing might be required in some circumstances might help resolve some matters.

26. THE ORDER - It is advisable for the courts to have their own required form of order approving or denying the affidavit. This guards against a tendered order which might go too far (i.e.: characterization of property). (Appendix 14)

27. MINOR DISTRIBUTEES - If there is a minor distributee, all of his or her distributable assets should be placed in the registry of the Court until age 18 - whether cash or small personal property items (coins or jewelry). The clerk should be furnished with an IRS Form W-9 and the minor's birth date.

28. AMENDMENTS AND SUPPLEMENTS - Often, the affidavit as filed needs to be modified in some way. If an amended affidavit is filed, it must be a complete Affidavit, with all necessary information and all necessary signatures included. There is no cost for filing an amended SEA.

Sometimes, the affidavit may simply be supplemented if the change does not change the identity and relationship or number of distributees or include or eliminate the property or liabilities listed. e.g.: correcting details of property descriptions, signatures). It is important that the order signed approves the affidavit as supplemented.

29. DEALING WITH THE AFTERMATH

A. DISTRIBUTION OF COPIES - The distributees shall furnish certified copies of the affidavit to persons who:

1. owe money to the estate;
2. have custody or possession of estate property; or
3. act as a registrar, fiduciary, or transfer agent of

or for an evidence of interest, indebtedness, property, or other right belonging to the estate. Tex. Est. Code § 205.004.

B. DEALING WITH CREDITORS - The distributees listed are entitled to estate assets only to the extent the non-exempt assets exceed the liabilities. Tex. Est. Code § 205.001. Failure to pay creditors could result in creditor lawsuits against the individual distributees receiving estate property as well as the disinterested witnesses who swore to the facts in the affidavit. Tex. Est. Code § 205.007.

C. OPTIONS FOR ENTITIES HOLDING ASSETS - A bank or other entity or person holding funds of the decedent would be prudent to release funds to the distributees only in an amount sufficient to pay the debts, releasing the remainder upon proof of payment of those debts. Alternatively, a prudent transferor might issue checks directly to the creditors named in the affidavit, releasing the remainder of the funds to the distributees.

Possible options of transferors after the approval of the affidavit might include:

1. Paying the listed creditors the amounts listed in the affidavit and remitting the balance to the distributees in the shares listed.
2. Paying the listed distributees an amount sufficient to pay the listed debts and then releasing the balance upon receiving receipts from the creditors.
3. Paying all assets to the listed distributees and depending (hoping?) on them to appropriately pay the creditors.

VIII. ORDER OF NO ADMINISTRATION

A. Defined TEX. EST. CODE §§ 451.001ff - An Order of No Administration (not to be confused with a "finding of no necessity for administration" in a muniment of title proceeding (Tex. Est. Code § 257.001) or a proceeding to determine heirship (Tex. Est. Code § 202.005) is a somewhat archaic, but nonetheless formal, ancillary probate procedure established to provide basic support for a surviving spouse and minor children for the first year following the death of the decedent.

B. Applicability - Tex. Est. Code § 451.001 - This alternative is available only in a limited set of circumstances:

1. CONSTITUENT SURVIVORS - The decedent must be survived by a spouse or minor child or adult incapacitated children (those entitled to a family allowance under Tex. Est. Code § 353.101), Tex. Est. Code § 451.001(a). This does not mean that there

cannot be other heirs (*Pace v. Eoff*, 48 S.W.2d 956 (Tex. Comm. App 1932 op. adopted) only that either a surviving spouse or minor heirs must be a part of the equation.

2. **LIMITATION ON SIZE OF ESTATE** - The value of the estate, (not including homestead and exempt property) cannot exceed the amount of the family allowance. Tex. Est. Code § 451.
3. **CLASS ONE EXPENSES PAID** – That the expenses of last illness, funeral charges, and expenses of the proceeding have been paid or secured (Tex. Est. Code §451.002(b)).

C. Application – The application for an Order of No Administration must include:

1. **NAMES OF HEIRS OR DEVISEES** state the names of the heirs or devisees. Tex. Est. Code § 451.001(c)(1). This should include all of the heirs or those who take under the decedent’s will;
2. **CREDITORS** - list, to the extent known, estate creditors together with the amounts of the claims Tex. Est. Code § 451.001(c)(2); and
3. **MINI-INVENTORY** - describe all property belonging to the estate, together with:
 - A. the estimated value of the property according to the best knowledge and information of the applicant;
 - B. the liens and encumbrances on the property. (Tex. Est. Code § 451.001c)(3)(A) & (B); and
4. **SET-ASIDES** - The application must also include a prayer that the court make a family allowance and that, if the family allowance exhausts the entire assets of the estate, excluding homestead and exempt property, the entire assets of the estate be set aside to the surviving spouse, minor children, and adult incapacitated children, as with other family allowances provided for by Subchapter C, Chapter 353. Tex. Est. Code §451.001(d).

D. Hearing and Order

1. **NOTICE** - The application may be heard with or without notice, in the court’s discretion. Tex. Est. Code §§ 51.001(b), 451.002.
2. **EXCLUSION OF OTHER HEIRS** - If the court finds all the requirements above-referenced have been met, the court shall order the family allowance. Tex. Est. Code § 451.002(b)(1). This order has the effect of excluding any such property from other heirs who are not either the surviving spouse or a minor. (*Pace, supra at 960*).

3. **TRANSFER** - Also, if the granting of the family allowance results in exhausting the entire assets of the estate (not including the homestead and exempt property, if any) the court is to additionally order that no administration be had of the estate and assign to the surviving spouse and minor children the entire estate. Tex. Est. Code § 451.002(b)(2).

E. Effect of Order - Tex. Est. Code § 451.003 - The Order of No Administration then acts like the ‘facilitation of payment’ language in a muniment of title order (Tex. Est. Code § 257.102) in that the Order of No Administration “constitutes sufficient legal authority to all persons owing money, having custody of property, or acting as registrar or transfer agent of any estate property, and to persons purchasing from or otherwise dealing; with the estate, for payment or transfer to persons described in the order as entitled to receive the estate without administration.” Tex. Est. Code § 451.003.

F. Lookback for One Year - Tex. Est. Code § 451.004 - If, within one year of the entry of an Order of No Administration, an interested person can prove to the court either that:

1. **OTHER PROPERTY** has been discovered,
2. **OMISSION** - property belonging to the estate was not included in the application for no administration, or
3. **VALUATION** - the property included in the application was incorrectly valued so that the total value of the estate would, in fact, exceed the amount granted as a family allowance, leaving property subject to administration, the court is required to revoke the order of no administration.

G. Pointers on Dealing with an Application for Order of No Administration

1. **DELAY?** - How long has the surviving spouse waited to apply for the order?
2. **DWOP?** - Is the application subject to dismissal for want of prosecution? *Williams v. Barnett*, 2011 Tex. App. LEXIS 4565 (Tex. App. Houston 1st Dist., 2011, pet den.).
3. **REASONABLE** - Is amount sought by the surviving spouse reasonable or extravagant? *Churchill v. Churchill*, 780 S.W.2d 913, 1989 Tex. App. LEXIS 3057 (Tex. App. Fort Worth 1989, no pet.). The purpose of the proceeding is to provide a **baseline** of support (originally “one year’s supply of provisions” – *Pace, supra at 960*). It is to be made by the court in

consideration of the whole condition of the estate during the first year after the spouse's death, and to the *necessities* of the surviving spouse and the circumstances to which he or she has been accustomed. *Pace, supra*;

Kennedy v. Draper, 575 S.W.2d 627 (Tex.Civ.App.--Waco 1978, no writ); *Ward v. Braun*, 417 S.W.2d 888, 893 (Tex.Civ.App. -- Corpus Christi 1967, no writ); *Churchill v. Churchill, supra*.

Appendix 1
ESTATE OF

No. _____

PROBATE COURT

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NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

APPLICATION TO DETERMINE HEIRSHIP

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, _____ ("Applicant"), who resides at _____, and furnishes the following information to the Court:

1. _____ ("Decedent") died on or about _____, in _____ County, Texas at the age of _____ years. No administration is pending upon Decedent's Estate and none appears necessary, and it is necessary and in the best interest of the Estate for the Court to determine who are the heirs and only heirs of Decedent.
2. This Court has jurisdiction and venue because, at the time of Decedent's death, Decedent resided in and had a fixed place of residence or domicile in _____ County, Texas.
3. Decedent owned real and personal property described generally as [home, cash, automobile, securities, household goods, and personal effects] of a probable value in excess of \$ _____.
4. Decedent was never married.
5. No children were born to or adopted by Decedent during his her lifetime.
6. To the best of Applicants' knowledge, Decedent died intestate.
7. The name, address, true interest in Decedent's property and relationship of each known heir to the Decedent are as follows:

	Name and Address	Relationship	True Interest
--	------------------	--------------	---------------
8. This Application does not omit any information required by Tex. Est. Code § 202.005.

WHEREFORE, PREMISES CONSIDERED, Applicant prays as follows:

1. That citation be issued to all parties in these proceedings as required by the Texas Estates Code unless waived;
2. That, on final hearing hereof, this Court determine and declare who are the heirs of Decedent and their respective shares and interests of such heirs in the Estate of Decedent under the laws of descent and distribution of the State of Texas;
3. That an attorney ad litem be appointed to represent the interests of any heirs whose names and whereabouts are unknown or who are suffering from a legal disability;
4. That this Court issue its Order for such other and further relief to which Applicant may show himself herself justly entitled and as to the Court may seem necessary and proper.

Respectfully submitted,
(Attorney Block)

THE STATE OF TEXAS §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, and after being duly sworn, stated that insofar as is known to me, all the allegations of the foregoing Application to Determine Heirship are true in substance and in fact and that no material fact or circumstance has, within my knowledge, been omitted from such Application.

Applicant
SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, by _____ on _____, to certify which witness my hand and seal of office.

(seal)

Notary Public, State of Texas

Appendix 2
ESTATE OF

No. _____

PROBATE COURT

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NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

WAIVER OF CITATION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes _____, who, after being duly sworn, deposes and says that:

1. "I have read the Application to Determine Heirship and acknowledge receipt of a file-marked copy of same;
2. "I am one of the heirs of Decedent and am listed in the Application;
3. "I agree with the allegations in the Application and that there is no need for administration in this case;
4. "I hereby waive the issuance and return of service upon me in this cause, and accept service herein; and
5. "I enter an appearance in this cause and agree that the Application may be considered by the Court at any time hereafter without further notice to me."

Signature: _____
 Printed Name: _____
 Address: _____

STATE OF TEXAS §
 COUNTY OF _____ §

This instrument was acknowledged before me by _____ on _____.

 Notary Public, State of Texas
 Identifying Number: _____

Appendix 3
ESTATE OF

No. _____

PROBATE COURT

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NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

AFFIDAVIT OF NOTICE BY APPLICANT
IN PROCEEDING TO DETERMINE HEIRSHIP
(PURSUANT TO TEXAS ESTATES CODE § 202.057)

THE STATE OF TEXAS }
COUNTY OF TARRANT }

_____, having been duly sworn, hereby state that, pursuant to Texas Estates Code § 202.057, the following information is true and correct:

1. I am the Applicant in the above styled and numbered estate.
2. Citation in this proceeding was served as required by Texas Estates Code, Chapter 202, Subchapter B.
3. The name of each person upon whom citation was served is:
 - a.
 - b.
4. The name of each person who waived citation under Texas Estates Code § 202.056 is:
 - a.
 - b.
5. Copies of all citations served, proof of delivery of service of the citations, and waivers of citation received are attached hereto.

Signed _____

Affiant

SUBSCRIBED AND SWORN TO BEFORE ME by _____, as Applicant in the above styled and numbered proceeding on _____.

Notary Public, State of Texas
Identifying Number: _____

Appendix 4
ESTATE OF

No. _____

PROBATE COURT

_____ ,

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NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

ATTORNEY'S CERTIFICATE OF NOTICE
IN PROCEEDING TO DETERMINE HEIRSHIP
(PURSUANT TO TEXAS ESTATES CODE § 202.057)

I hereby certify that, pursuant to Texas Estates Code § 202.057, the following information is true and correct:

1. I am counsel for the Applicant in the above styled and numbered estate.
2. Citation in this proceeding was served as required by Texas Estates Code, Chapter 202, Subchapter B.
3. The name of each person upon whom citation was served is:
 - a.
 - b.
4. The name of each person who waived citation under Texas Estates Code § 202.056 is:
 - a.
 - b.
5. Copies of all citations served, proof of delivery of service of the citations, and waivers of citation received are attached hereto.

Signed _____

PRINTED NAME: _____

State Bar No. _____
Address: _____

Telephone: _____

Fax: _____

email: _____

COUNSEL FOR PERSONAL REPRESENTATIVE

Appendix 5
ESTATE OF

No. _____

PROBATE COURT

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NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

ORDER APPOINTING ATTORNEY AD LITEM
Pursuant to Tex. Est. Code § 202.009 (Heirship)

On this day, the Court finds it necessary to appoint an Attorney Ad Litem to represent and protect the interests of the heirs of the Decedent herein whose names and/or whereabouts are unknown or who are suffering legal disability pursuant to § 202.009 of the Texas Estates Code.

IT IS THEREFORE ORDERED that _____, Ph # _____, e-Mail _____, who is an Attorney licensed to practice law in the State of Texas, is appointed as Attorney Ad Litem to represent and protect the interests of the heirs of the Decedent herein whose names and/or whereabouts are unknown or who are suffering legal disability, pursuant to § 202.009 of the Texas Estates Code and to perform with due diligence the following duties:

1. obtain and review all relevant pleadings & documents;
2. file an answer on behalf of the clients;
3. contact the attorney for the applicant to obtain:
 - A. copies of the pleadings and any other documentation affecting descent and distribution;
 - B. the names and contact information of family members and disinterested witnesses;
4. personally interview the applicant, other knowledgeable witnesses, including disinterested witnesses, to verify the heirship facts.
5. make an independent determination of whether the information provided is sufficient, whether anyone has been omitted, of if any heirs may be minors or otherwise incapacitated or whose identity or whereabouts may be unknown.
6. prepare and file a written report upon completion of the investigation, detailing:
 - A. a statement of whether the ad litem agrees or disagrees with the application for determination of heirship;
 - B. a distribution chart, fully showing how all interests devolve upon the heirs;
 - C. a skeletal recitation of the documents reviewed and persons consulted;
7. attend and participate in the hearing; and
8. prepare and file a fee application and order of discharge.

SIGNED _____

JUDGE PRESIDING

Appendix 6:
ESTATE OF

No. _____

PROBATE COURT

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NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

Answer of Attorney Ad Litem in Heirship Proceeding

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes _____, appointed by this Court as Attorney Ad Litem for the unknown heirs of the above-referenced Decedent, pursuant to § 202.009 of the Texas Estates Code and makes this Answer as follows:

1. Your Attorney Ad Litem asserts a General Denial and respectfully requests that the Court require the Applicant to prove all claims, charges and allegations by a preponderance of the evidence as required by the Constitution and Laws of the State of Texas.
2. Your Attorney Ad Litem reserves the right to amend and answer further in this proceeding in the manner authorized by the Texas Rules of Civil Procedure.

WHEREFORE, PREMISES CONSIDERED, your Attorney Ad Litem prays that the Applicant take nothing, that costs be adjudged against the Applicant; and that he go hence without day.

Dated: _____

Respectfully submitted,

Attorney Ad Litem
<Attorney Data>

(Certificate of Service)

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this _____.

Name e-mail Address
(Repeat as Necessary)

[Attorney Name]

Appendix 7:
ESTATE OF

No. _____

PROBATE COURT

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NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

Report of Attorney Ad Litem in Heirship Proceeding

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes _____, appointed by this Court as Attorney Ad Litem for the unknown heirs of the above-referenced Decedent, pursuant to § 202.009 of the Texas Estates Code and makes this report as follows:

- 1. I am of the opinion that the listing of the heirs of the Decedent, as shown in the Application, is true, correct and complete.
- I am of the opinion that the listing of the heirs of the Decedent, as shown in the Application, is **NOT** true, correct and complete.
- 2. Below is, in my opinion, the correct distribution of the shares of the Estate of the Decedent.

Pearle Harbour Kent (Decedent)

Born December 7, 1941, Honolulu, HI to Safe Harbour and Tokyo Rose Lee

Died February 23, 2015, Fort Worth, Tarrant County, Texas

Married

1. ~~John Wayne~~ (*predeceased*)

Community
Property

Separate
Personal Prop

Separate
Real Prop

A. ~~Bruce Wayne~~ (*predeceased*) (1/5)

1. Wayne Wayne (Grandchild)

1/2

1/2 of 2/3

1/2 of 2/3 plus a
plus a remainder
in 1/2 of 1/3, subject to
the life estate of the
surviving spouse

2. Jane Wayne (Grandchild)

1/2

1/2 of 2/3

1/2 of 2/3 plus a
plus a remainder
in 1/2 of 1/3, subject to
the life estate of the
surviving spouse

2. Clark Kent

0
100%

1/3
100%

1/3 life est
100%

- 3. I reviewed the Application for Determination of Heirship (*or as appropriate*), together with all other documents on file in this matter and met with the attorney for the Applicant herein.
- 4. I filed my Answer on behalf of the unknown heirs on _____.
- 5. I contacted the following persons to obtain or verify the Decedent's personal history and family background and to determine the existence and location, as applicable, of any unknown heirs of the Decedent.

A. _____ (relation to Decedent)

B. _____ (relation to Decedent, if any) Etc.

Dated: _____

Respectfully submitted,
Attorney Ad Litem Data

(Certificate of Service)

Appendix 8:
ESTATE OF

No. _____

PROBATE COURT

_____ ,

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NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

SWORN STATEMENT OF SERVICES AND EXPENSES BY ATTORNEY AD LITEM
IN HEIRSHIP PROCEEDING

On this day personally appeared _____,
("Attorney Ad Litem") known to me, who first being duly sworn upon oath to tell the truth, deposed
and stated:

*I am an attorney licensed to practice law in the State of Texas and appointed by the Court
in this cause to represent unknown heirs. I have performed all of the services required under
the due diligence policy promulgated by the Probate Courts of this county.*

I therefore request the following fees and expenses for my representation:

Attorney Ad Litem fee \$ 400.00

Expenses and reimbursement requested. (Attach proof and explanation) \$ _____

Total of Attorney's Fees and Expenses Requested: \$ _____

Signature : _____ Bar Card #: _____
Address: _____ Phone Number: _____
_____ e-Mail: _____

Subscribed and Sworn to before me on _____.

(seal)

Notary Public, State of Texas
Identifying Number _____

ORDER

On this day, the Court heard and considered the foregoing, and the Court finds that said
Attorney Ad Litem has rendered necessary services on behalf of the unknown heirs of Decedent,
that such Attorney's fees and expenses are reasonable and just, and should be paid.

It is therefore ORDERED, ADJUDGED, AND DECREED that said Attorney be paid the
total sum of \$ _____ to be taxed as costs against the Applicant herein and to be immediately
paid from funds held in the registry of this Court for such purpose, with any balance due to be paid
by the Applicant herein within thirty (30) days of the date hereof.

It is further ORDERED, ADJUDGED, AND DECREED that this appointment is
terminated and that the Attorney named herein is hereby discharged as Ad Litem in this cause.

Signed this _____.

Judge Presiding

Appendix 9 No. _____
ESTATE OF _____,
DECEASED

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PROBATE COURT
NUMBER ____ OF
_____ COUNTY, TEXAS

Motion for Genetic Testing
in Proceeding to Determine Heirship
(Tex. Est. Code § 204.051)

COMES NOW, _____, Movant herein, and files this, his/her Motion for Genetic Testing pursuant to Tex. Est. Code § 204.051, and in support thereof would show the Court the following:

1. Movant _____ claims to be the child of Decedent, _____. Movant filed an Application to Determine Heirship and an Application to Establish Parentage on _____, requesting that she be declared a child of Decedent and an heir of his estate. Movant has no presumed, acknowledged or adjudicated father as those terms are defined by Tex. Fam. Code § 160.102(13).

2. Although Movant has evidence to establish that Decedent was her biological father, genetic testing would conclusively prove Movant's claims. No blood, body fluid or tissue samples of Decedent are available for testing. However, family reconstruction testing may reliably be performed by a laboratory accredited pursuant to Texas Family Code § 160.503, which would provide clear and convincing evidence that Decedent was Movant's biological father.

3. Movant requests that the Court, as soon as practicable, order the mother and father of the Decedent, as well as Movant and the mother of Movant to submit to genetic testing by _____, a testing laboratory accredited pursuant to Texas Family Code § 160.503, that the persons named above remain at _____ at their scheduled appointment until the genetic testing is complete and permit _____ or its agents or employees, to take blood, body fluid, or tissue samples sufficient for genetic testing.

4. The need for genetic testing outweighs the legitimate interests of the individuals sought to be tested.

5. Movant requests that the payment for these services provided by _____ be taxed as costs. Movant will advance the costs of testing.

6. In the event that paternity is established, Movant requests the Court order reimbursement of her attorneys' fees and the costs of the genetic testing from the assets of the estate.

WHEREFORE, PREMISES CONSIDERED, Movant _____ requests that the Court make the orders requested herein in order to establish with reasonable certainty that Decedent is the father of Movant. Movant requests her attorneys' fees and costs. Movant prays for general relief.

Respectfully submitted,
(Attorney Block)

Certificate of Service

Certificate of Conference

ESTATE OF

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PROBATE COURT

NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

ORDER FOR GENETIC TESTING

On this day, the Court considered the Motion for Genetic Testing filed herein by _____, and the Court, after having considered the motion and the applicable law and having heard the evidence and arguments of counsel, is of the opinion and finds that:

1. it is medically practical to take blood, body fluid, or tissue samples for genetic testing to determine the issue of parentage herein;
2. the need for genetic testing outweighs the legitimate interests of the individuals sought to be tested;
3. good cause has been shown for the granting of such motion;
4. the court considers the circumstances to be just; and
5. genetic testing is authorized by Tex. Est. Code § 204.051.

IT IS THEREFORE ORDERED that the following named persons present themselves, each with appropriate photographic identification, within 30 days of the date of this Order, at a time, date and place scheduled by _____, the testing laboratory, to submit to scientifically accepted genetic tests by the following qualified expert in an accredited testing laboratory:

Father of the Decedent: _____

Mother of the Decedent: _____

Mother of Movant: _____

Movant: _____

Testing Laboratory: _____

Contact Person: _____

Location: _____

Telephone: _____

IT IS FURTHER ORDERED THAT all persons named above shall remain at the named testing laboratory at their scheduled appointment until the genetic testing is complete and shall permit the testing laboratory or its agents or employees, to take blood, body fluid, or tissue samples sufficient for genetic testing. The named testing laboratory shall perform testing to ascertain the possibility or probability of the alleged father's parentage of Decedent.

IT IS FURTHER ORDERED THAT the costs and expenses of the testing shall be advanced by Movant, that the costs of testing will be taxed as costs with the amount to be assessed by the Court at the trial of this cause; and that amounts of attorneys' fees and expenses will be assessed by the Court at the trial of this cause.

SIGNED _____

JUDGE PRESIDING

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DECEASED

PROOF OF HEIRSHIP FACTS

On this day, the undersigned Affiant, ("Affiant"), personally appeared in open court, and after being duly sworn, deposes and says that:

1. My name and residence address are as follows: _____

2. I was personally acquainted with _____, ("Decedent"), who died on _____ in _____ County, Texas, at the age of _____ years. I have do not have an interest in the estate of Decedent and am am not related to Decedent under Texas laws of descent and distribution.

3. The following constitutes the family history of Decedent: (attach additional sheets as necessary)

A. Decedent was born to _____ and _____ on or about _____.

B. On the date of Decedent's death, Decedent was:

a single person (or)

married _____ times

1. To _____ on _____ which marriage ended _____ because of _____.

The children of this marriage were:

a. _____, born _____, address, if living: _____.

b. _____, born _____, address, if living: _____.

(if any children survived Decedent, but have since died leaving descendants, attach sheets as necessary)

2. To _____ on _____ which marriage ended _____ because of _____.

The children of this marriage were:

a. _____, born _____, address, if living: _____.

b. _____, born _____, address, if living: _____.

(if any children survived Decedent, but have since died leaving descendants, attach sheets as necessary)

C. Decedent adopted the following child or children:

a. _____, born _____, address, if living: _____.

b. _____, born _____, address, if living: _____.

(if any children survived Decedent, but have since died leaving descendants, attach sheets as necessary)

D. Decedent was never married nor had any children, nor did he ever adopt any child or children. The listing of individuals on the attached sheet(s) constitute all of the heirs of said Decedent and there are no other distributees of the estate.

SIGNED on _____.

Affiant

Sworn to and subscribed before me by the Affiant identified above on _____.

**PROCEDURE FOR PROOF BY
DEPOSITION ON WRITTEN QUESTIONS**
_____ County Probate Courts

A party planning to offer testimony by Deposition on Written Questions must follow the procedures set forth in Texas Estates Code §51.203 (decedent's estates) or §1051.253 (guardianships). This specific statutory procedure controls over the general procedural method of taking depositions on written questions set forth in Texas Rules of Civil Procedure 2.1 (1999).

This procedure applies for: (all references are to the Texas Estates Code)

- A. proving up proper execution of a will (§256.153),
- B. proof of the Testator's handwriting (§256.154) or
- C. other proof required for an uncontested hearing, (including, without limitation: §§301.155, 112.103, 202.151, 355.062).

The Written Questions should include a space for the answers on the same page. A recommended form is attached.

Should the Court or the Attorney Ad Litem wish to pose Cross-Questions, these may be transmitted with the Written Questions, to be returned to the County Clerk by the Deposition Official*.

The procedures to be followed for taking a Deposition on Written Questions are:

1. The Attorney shall coordinate with the Deposition Official in the foreign location in which the witness is located to propound written questions to the witness. The Attorney shall also determine the date and time within which the questions are to be propounded, answered and the answers returned.
2. The Attorney shall complete any required cover sheets or information forms for the Clerk.
3. The Attorney shall file a) the Deposition on Written Questions, b) a "Notice of Intent to Take Deposition on Written Questions" and c) any cover sheet of information filing form with the County Clerk.
4. The Clerk posts a "Notice of Intent to Take Deposition on Written Questions."
5. After the posting period (10 days), the Clerk shall furnish a Package Envelope for transmission to the Deposition Official for the return of the completed deposition directly to the Clerk. The Clerk shall also make a certified copy of any document in question and attach the same to a certified copy of the Deposition on Written Questions.
6. The attorney shall then transmit certified copies of the Deposition on Written Questions (with any other document attached) and the Package Envelope to the Deposition Official with a prepaid return envelope, addressed to the Clerk.
7. The prepaid return envelope shall be one of the following: a) Federal Express Airbill, b) UPS Airbill or, c) USPS with Delivery Confirmation.
8. The Deposition Official shall:
 - a) place the witness under oath,
 - b) supervise the answering of the written questions,
 - c) complete the jurat on the Deposition on Written Questions,
 - d) place all of the materials in the Package Envelope,
 - e) seal and sign his or her name over the seal, then
 - f) return the Package Envelope directly to the Clerk in the prepaid Airbill Envelope.
9. At the hearing, the attorney shall request the Court to take judicial notice of the answers to the Written Questions.

* A "Deposition Official" includes the Clerk of a District Court, Judge or Clerk of a County Court, or any official Court Reporter, or any Notary Public of the County and State in which the witness is located.

ESTATE OF	No. _____	PROBATE COURT
_____ ,	§	NUMBER ____ OF
DECEASED	§	_____ COUNTY, TEXAS
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NOTICE OF INTENT TO TAKE DEPOSITION ON WRITTEN QUESTIONS

To the Clerk of Said Court:

NOW COMES _____, Applicant for Determination of the Heirship of _____, Deceased in the above styled and numbered cause, by and through his undersigned attorney of record, and hereby gives notice that the Undersigned intends to take the Deposition on Written Questions of:

Name:	_____
Address	_____
City	_____
County	_____
State	_____

before a person authorized to take oaths in and for said County and State, to be used for the determination of the heirship of Decedent in said cause.

Dated: _____

Respectfully submitted,

[Attorney Block]

ESTATE OF _____ No. _____ §
 _____ §
 DECEASED _____ §
 _____ §
 _____ §
 _____ §
 _____ COUNTY, TEXAS

PROBATE COURT
 NUMBER ____ OF
 _____ COUNTY, TEXAS

WRITTEN QUESTIONS FOR WITNESS
(Heirship)

1. State your name and residence address. ANSWER: _____

2. Were you personally acquainted with _____, ANSWER: _____
 ("Decedent") who died on _____ in _____,
 _____ County, Texas, at the age of _____ years.
3. Do have an interest in the estate of Decedent? ANSWER: _____
4. Are you related to Decedent under Texas laws of descent and distribution? ANSWER: _____
5. Was Decedent was born to _____ and ANSWER: _____
 _____ on or about _____?
6. How Many times was Decedent married? ANSWER: _____
 A-1. Was Decedent married to _____
 on or about _____? ANSWER: _____
 A-2. Did that marriage end on _____
 because of _____? ANSWER: _____
 A-3. How many children were born of that marriage? ANSWER: _____
 A-4. Were the following children born of that marriage? ANSWER: _____
 a. _____, born _____,
 address, if living: _____
 b. _____, born _____,
 address, if living: _____
7. Did Decedent ever adopt any child or children? ANSWER: _____
8. Do the following constitute all of the heirs of the Decedent? ANSWER: _____

STATE OF _____ }
 COUNTY OF _____ }

Signed: _____

 Typed Name of Witness

Before me, the undersigned Official, on this day personally appeared _____,
 who, being by me duly sworn on oath deposed and stated that he or she was personally acquainted with _____,
 Decedent herein and familiar with his or her family history, that he or she has read the above and foregoing Answers to Written
 Questions and every statement contained in said Answers is within his or her personal knowledge and is true and correct.

_____ Affiant
 SUBSCRIBED AND SWORN TO BEFORE ME on this the _____, to certify which witness my hand and official seal.

Notary Pubic, State of _____
 Identifying Number _____

DON'T DO THIS: *"If I asked you the same questions that you were just asked, would your answers be any different?"*

If you are directly examining a corroborative (second) witness, then it saves time to ask:

"You have just heard the questions that were asked of the other witness. If I asked you the same questions that I just asked the first witness, would your answers be the same?"

Unless you are doing a comedy routine (see Abbott & Costello, "Who's on First?" www.baseball-almanac.com/humor4.shtml), it makes *little or no sense* to listen to a direct examination by another attorney and then attempt to cross-examine the witness if they could manage to answer the same questions the same way a second time.

Appropriate Topics:

1. Do you remember when I spoke with you about this heirship proceeding for _____?
2. Are you aware of any relationships the Deceased had for more than one year?
3. Do you know if any of these relationships resulted in the birth of a child?
4. Are you aware of any claims of paternity or paternity actions brought in court against the Deceased?
5. Are you aware of any legitimation claims / court proceedings for legitimation brought against the Deceased?
6. Do you have any direct knowledge of paternity / of marriage / of children?
7. Do you recall any discussions/ have any direct knowledge regarding deceased siblings / nieces / nephews?
8. Do you recall any discussions/ have any direct knowledge of the Deceased admitting to being the father of _____
9. Since we last spoke, is there anything that you recall regarding the Decedent that you did not tell me at that time?

ESTATE OF

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PROBATE COURT

NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

Judgment Determining Heirship

On this day the Court heard the sworn Application to Determine Heirship of the Estate of _____, Deceased, ("Decedent"), wherein _____ is the Applicant and Decedent's living heirs whose names and/or whereabouts are unknown and heirs suffering legal disability are Defendants, and it appears to the Court, and the Court so finds that:

1. All parties interested in the Estate of Decedent have been duly and legally served with citation as required by law;
2. This Court has jurisdiction over the subject matter and all persons and parties;
3. The evidence presented and admitted fully and satisfactorily proves each and every issue presented to the Court;
4. The Decedent died intestate;
5. The heirship of Decedent has been fully and satisfactorily proven as well as the identity of the nature of Decedent's property as separate or community and the interest and shares of each of the heirs herein.
6. There is no necessity for administration.

The Court finds and IT IS ORDERED, ADJUDGED AND DECREED that the names and places of residence of the heirs of Decedent and their respective shares and interests in the property of Decedent are as follows:

Names	Relationship	True Interest
_____	Spouse	1/3 Separate Personal Property Life Estate in 1/3 of Separate Real Property
_____	Child	1/2 of Decedent's Community Property 1/2 of 2/3 of Separate Personal Property 1/2 of 2/3 of Separate Real Property and 1/2 of 1/3 Remainder Interest in Separate Real Property (subject to Life Estate of Surviving Spouse)
_____	Child	1/2 of Decedent's Community Property 1/2 of 2/3 of Separate Personal Property 1/2 of 2/3 of Separate Real Property and 1/2 of 1/3 Remainder Interest in Separate Real Property (subject to Life Estate of Surviving Spouse)

SIGNED _____.

JUDGE PRESIDING

Appendix 14
ESTATE OF

No. _____

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PROBATE COURT
NUMBER ____ OF
_____ COUNTY, TEXAS

_____,
DECEASED

ORDER ADMITTING WILL TO PROBATE AS MUNIMENT OF TITLE,
DETERMINING THE TAKERS OF THE RESIDUARY ESTATE AND
APPROVING THE FAMILY SETTLEMENT AGREEMENT

On this day, came on to be heard the application filed herein by _____ for the probate of the Will of _____, hereinafter called Decedent, as a Muniment of Title, Action for Declaratory Relief to Determining the Takers of the Residuary Estate and Approving a Family Settlement Agreement

The Court, after having heard and considered the evidence and the Will of Decedent, finds:

1. 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 this Court has jurisdiction and venue of the Decedent's Estate;
2. Decedent left a Will dated _____, 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 such Will was not revoked by Decedent, and that no objection to or contest of the probate of such Will has been filed;
3. All of the necessary proof required for the probate of the Will has been made; that such Will is entitled to probate; that there are no unpaid debts owing by the Estate of Decedent other than those secured by liens on real estate; that the Decedent did not apply for and receive Medicaid benefits on or after March 1, 2005;
4. Four years have not elapsed since the date of Decedent's death and the date the application was filed; and
5. No necessity exists for the administration of this Estate.

IT IS THEREFORE ORDERED AND DECREED by the Court that:

1. the Will of _____ is hereby proved, established and admitted to probate as a Muniment of Title only;
2. the clerk of this Court is ORDERED to record the Will, together with the testimony and the application, in the Judge's Probate Docket of this Court;
3. this Order shall constitute sufficient legal authority to all persons owing money to Decedent or Decedent's Estate, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the Estate of Decedent, and to persons purchasing from or otherwise dealing with the Estate of Decedent, for payment or transfer without administration the applicable asset without liability to the person or persons described in said Will as entitled to receive the asset. Further, the person or persons entitled to receive a property under the Will shall be entitled to deal with and treat the properties to which they are so entitled in the same manner as if the record title thereto were vested in their names; and
4. the requirement of filing an Affidavit of Compliance pursuant to Texas Estates Code § 257.103 is hereby WAIVED.

DETERMINATION OF THE TAKERS OF THE RESIDUARY ESTATE AND
APPROVAL OF THE FAMILY SETTLEMENT AGREEMENT

The Court hereby grants declaratory relief pursuant to § 37.001 *et seq.*, Texas Civil Practice and Remedies Code (hereinafter “the Code”), and specifically pursuant to Code § 37.004, Subject Matter of Relief, and Code § 37.005, Declarations Relating to Trust or Estate, for Construction of Decedent’s Will, as follows:

The Court further finds:

1. Decedent’s Will creates a partial intestacy in that it failed to identify the takers of the residuary estate;
2. the heirship history of Decedent is as follows:
 - a. Decedent died on _____ at the age of ___ years.
 - b. Decedent was married two times:
 1. to _____ prior to ____, from whom he was divorced in ____ and to that marriage, the following child was born who survived Decedent:

 2. to _____ in _____, from whom he was divorced in ____ and to that marriage, the following children were born who survived Decedent:

3. the names and places of residence of the heirs of Decedent and their respective shares and interests in real and personal property of the estate of Decedent are as follows:

_____	Son	One-fourth
_____	Son	One-fourth
_____	Son	One-fourth
_____	Daughter	One-fourth
4. the parties have entered into a Family Settlement Agreement dated _____, providing for a resolution of any disputes between them and for administration and distribution of the assets of the estate of Decedent and said agreement should be approved.
5. all persons having or claiming any interest in Decedent’s estate under the terms of Decedent’s Will that would be affected by the request for declaratory relief as set forth in the Application for Probate of Will as Muniment of Title and for Declaratory Relief filed in this estate matter are the following:
 - a. _____ Son
 - b. _____ Son
 - c. _____ Son
 - d. _____ Daughter
6. all persons listed in the preceding paragraph have executed a Waiver of Service of Citation on file herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED and the affirmative declaration of this Court that

1. The Family Settlement Agreement effective _____ is hereby APPROVED.
2. Those persons named in paragraph 5 above shall be entitled to deal with and treat the property of the estate of the Decedent pursuant to the terms of the Family Settlement Agreement in the same manner as if the record title thereto were vested in their names; and shall have the power to sell, transfer, or encumber, and execute any legal documents necessary to effect any sale, transfer, or encumbrance of the said property and all improvements located thereon.

SIGNED _____.

JUDGE PRESIDING

ESTATE OF

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PROBATE COURT

NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

Small Estate Affidavit

On the day or days below written, personally appeared all of the distributees of this Estate and two disinterested witnesses, who, on their oaths, did swear or affirm to the following facts pursuant to Chapter 205, Texas Estates Code:

1. Decedent, _____, died on _____ in _____ County, _____ without leaving a valid Last Will and Testament;
2. A redacted copy of Decedent's death certificate will be filed in this cause number at the time this affidavit is filed;
3. Decedent was a resident of and domiciled in _____ County, Texas at the time of Decedent's death;
4. No administration is pending or has been granted in Decedent's estate and none appears necessary;
5. More than thirty (30) days have elapsed since the death of Decedent;
6. The value of the entire assets of the estate of Decedent as of the date of death, exclusive of homestead and exempt property, does not exceed \$50,000.00;
7. The value of the entire assets of the estate of Decedent as of the date of death, exclusive of homestead and exempt property, exceed the known liabilities;
8. Medicaid:
 - The Decedent did not apply for and receive Medicaid benefits on or after March 1, 2005 (or)
 - Decedent did apply for and receive Medicaid benefits on or after March 1,2005, and the Medicaid Estate Recovery Program claim is listed as a liability in paragraph 10 below (or)
 - The Decedent did apply for and receive Medicaid benefits on or after March 1,2005, but there is no Medicaid claim against the estate.

[If this box is checked, applicants) must either (1) file a Medicaid Estate Recovery Program (MERP) certification that decedent's estate is not subject to a MERP claim or (2) include additional information proving that a MERP claim will not be filed.]
9. All of the assets of Decedent's estate and their value are as follows: (use additional pages as necessary)

<u>Description of Assets</u>	<u>Value</u>	<u>Additional Information</u>
Provide sufficient detail to identify property. Provide name & last four digits of account Number; Address & legal description of Real Property.		Indicate whether each asset is community or separate property. Provide facts to explain why asset was community or separate. If Decedent was survived by a spouse, minor Children or unmarried adult children who lived with Decedent, any exempt assets must be identified.
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
Total	_____	_____

10. All liabilities/debts of the Decedent's estate and their values are as follows:
The affidavit must list all of Decedent's debts and other liabilities including all credit card balances, doctor and hospital bills, utility bills, etc. - everything owed by Decedent or Decedent's estate and not paid off. If none, write "none." If funeral debts or attorney's fees and expenses will be paid from estate assets, list them here.

Description of Liabilities	Balance Due
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
TOTAL	_____

If attorney's fees were not listed above as a liability, above but one or more distributees have paid or will pay attorney's fees for preparation and/or advice regarding this small estate affidavit, indicate the amount of those fees here: \$ _____
 Indicate who has paid or will pay the fees: _____

11. The following facts regarding Decedent's family history show those who are entitled to the Decedent's assets and their respective shares to the extent that, exclusive of homestead and exempt property, the Decedent's assets exceed the liabilities of Decedent's estate (*complete all that apply*).

A. Marriage:

On the date of Decedent's death, Decedent was:

- a single person (*or*)
 married to _____ ("Surviving Spouse") on _____ (date).

B. Children:

- Decedent had no children by birth or adoption who survived the Decedent and Decedent did not take any children into Decedent's home to raise as a child who survived the Decedent. (*or*)
 The following children were born to or adopted by Decedent. List all children, whether or not the child is still alive and whether or not parental rights were later terminated. If parental rights were terminated for any child, give details on separate page(s).

Name of Child	Date of Birth	Name of Child's Other Parent
_____	_____	_____
_____	_____	_____
_____	_____	_____

- all of the Decedent's children were alive when the Decedent died. (*or*)
 the following of Decedent's children died before the Decedent and were survived by children (or grandchildren, etc.)

<u>Name of Deceased Child</u>	<u>Date Child Died</u>	<u>Names of Children of Deceased Child</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

the following of Decedent's children died before the Decedent and were not survived by children (or grandchildren, etc.)

<u>Name of Deceased Child</u>	<u>Date Child Died</u>
_____	_____
_____	_____
_____	_____
_____	_____

If Decedent was survived by any children or their descendants, you do not need to answer "C. Parents" or "D. Siblings" below and may skip to "E. Chart of Distributees."

C. Parents:

- Decedent was survived by both parents: _____ and _____.
- Decedent was survived by one parent: _____.
Decedent's other parent, _____, died on _____.
- Both of Decedent's parents pre-deceased the Decedent.

D. Siblings:

Decedent was survived by the following brothers and sisters who were alive on the date of Decedent's death:

<u>Name of Sibling</u>	<u>Birthdate</u>	<u>Full or Half Sibling</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

The following brothers and sisters died before the date of Decedent's death:

<u>Name of Brother or Sister</u>	<u>Full or Half Sibling</u>	<u>Children of Deceased Sibling & Birthdate</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Decedent was survived by neither of his parents nor brothers nor sisters, nor nephews nor nieces, but was survived by the individuals listed on the attached sheet showing the names and relationship to the Decedent, including birth and death dates and Decedent's family history with respect to such survivors.

12. Chart of Distributees: Based on the family history given in this affidavit, the following chart lists the name, address, telephone number and e-mail address of each of the Decedent's heirs, together with their fractional interests in Decedent's estate:

<u>Name/Address/ Telephone/E-mail</u>	<u>Relationship</u>	<u>Share of separate Personal Property</u>	<u>Share of Separate Real Property</u>	<u>Share of Decedent's Community Property</u>
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Affidavit are true and complete to the best of my knowledge.

Distributee's printed name

Distributee's signature

SWORN TO AND SUBSCRIBED before me by _____, a
Distributee, on _____.

(Seal)

Notary Public, State of _____
Identification Number: _____

STATE OF _____ §
COUNTY OF _____ §

I am a Distributee of the Estate of _____, Deceased. I swear or affirm
that I have personal knowledge of the facts stated in the foregoing Affidavit and that the facts contained in the
Affidavit are true and complete to the best of my knowledge.

Distributee's printed name

Distributee's signature

SWORN TO AND SUBSCRIBED before me by _____, a
Distributee, on _____.

(Seal)

Notary Public, State of _____
Identification Number: _____

STATE OF _____ §
COUNTY OF _____ §

I am a Distributee of the Estate of _____, Deceased. I swear or affirm
that I have personal knowledge of the facts stated in the foregoing Affidavit and that the facts contained in the
Affidavit are true and complete to the best of my knowledge.

Distributee's printed name

Distributee's signature

SWORN TO AND SUBSCRIBED before me by _____, a
Distributee, on _____.

(Seal)

Notary Public, State of _____
Identification Number: _____

STATE OF _____ §
COUNTY OF _____ §

I am a Distributee of the Estate of _____, Deceased. I swear or affirm
that I have personal knowledge of the facts stated in the foregoing Affidavit and that the facts contained in the
Affidavit are true and complete to the best of my knowledge.

Distributee's printed name

Distributee's signature

SWORN TO AND SUBSCRIBED before me by _____, a
Distributee, on _____.

(Seal)

Notary Public, State of _____
Identification Number: _____

STATE OF _____ §
COUNTY OF _____ §

I am a Distributee of the Estate of _____, Deceased. I swear or affirm
that I have personal knowledge of the facts stated in the foregoing Affidavit and that the facts contained in the

Affidavit are true and complete to the best of my knowledge.

Distributee's printed name

Distributee's signature

SWORN TO AND SUBSCRIBED before me by _____, a
Distributee, on _____.

(Seal)

Notary Public, State of _____
Identification Number: _____

DISINTERESTED WITNESSES:

STATE OF _____ §

COUNTY OF _____ §

I swear or affirm that: I have no interest in the estate of the Decedent herein; I am not related to the Decedent under the laws of descent and distribution of the State of Texas; I have personal knowledge of the facts stated in the foregoing Affidavit and that the facts contained in the Affidavit regarding family history, assets, and liabilities are true and complete to the best of my knowledge.

I understand that Tex. Est. Code § 205.007(c) provides that each person who executes this affidavit is liable for any damage or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the affidavit.

Disinterested Witness's printed name

Disinterested Witness's signature

SWORN TO AND SUBSCRIBED before me by _____, a disinterested
witness, on _____.

(Seal)

Notary Public, State of _____
Identification Number: _____

STATE OF _____ §

COUNTY OF _____ §

I swear or affirm that: I have no interest in the estate of the Decedent herein; I am not related to the Decedent under the laws of descent and distribution of the State of Texas; I have personal knowledge of the facts stated in the foregoing Affidavit and that the facts contained in the Affidavit regarding family history, assets, and liabilities are true and complete to the best of my knowledge.

I understand that Tex. Est. Code § 205.007(c) provides that each person who executes this affidavit is liable for any damage or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the affidavit.

Disinterested Witness's printed name

Disinterested Witness's signature

SWORN TO AND SUBSCRIBED before me by _____, a disinterested
witness, on _____.

(Seal)

Notary Public, State of _____
Identification Number: _____

Prepared in the Law Office of:

No. _____

ESTATE OF

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PROBATE COURT

NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

ORDER

On this day, the Court considered the above Small Estate Affidavit and the Court finds that

1. this court has jurisdiction and venue;
2. the Affidavit conforms to the terms and provisions of Tex. Est. Code Chap. 205;
3. based on the affidavit, this Estate qualifies under the provisions of the Texas Estates Code as a Small Estate, pursuant to Tex. Est. Code § 205.001;
4. the Distributees named in the Affidavit are entitled to receive the property of the Decedent set forth in the Affidavit only to the extent that the assets of the Estate (exclusive of homestead and exempt property) exceed the known liabilities of the Estate (exclusive of liabilities secured by homestead or exempt property); and
5. that the Affidavit should be approved.

Nothing in this Order:

1. affects the disposition of property under a will or other testamentary instrument;
2. transfers title to real estate, except as provided in § 205.006 of the Texas Estates Code;
3. transfers title to any property of the Decedent not listed in the Affidavit;
4. deprives any creditor, whether disclosed or not, of any rights in any real or personal property transferred;
5. deprives any heir, whether disclosed or not, of any ownership interest in any real or personal property transferred;
6. establishes the separate or community nature of any property described in the Affidavit;
7. constitutes a judicial determination of the legal heirs of the Decedent; or
8. limits the personal liability of the Distributees and Disinterested Witnesses to any person (including but not limited to undisclosed heirs and any person having a prior right to property of the Estate) for any damage or loss arising from any payment, delivery, transfer or issuance made in reliance on the Affidavit.

It is therefore ORDERED, ADJUDGED and DECREED that the foregoing Affidavit be and the same is hereby APPROVED, and shall forthwith be recorded in the records of the County Clerk, and the Clerk of this Court shall issue certified copies thereof to all persons entitled thereto.

SIGNED _____

JUDGE PRESIDING

Revised October 25, 2015

Appendix 16

ESTATE OF

DECEASED

No. _____

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PROBATE COURT

NUMBER ____ OF

_____ COUNTY, TEXAS

APPLICATION FOR FAMILY ALLOWANCE AND
ORDER OF NO ADMINISTRATION
(Pursuant to Tex. Est. Code Ch. 451)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Applicant _____ ("Applicant") and furnishes the following information to the Court for a Family Allowance and Order of No Administration Pursuant to Tex. Est. Code Ch. 451:

1. Applicant is the surviving spouse of Decedent/is filing this application on behalf of the surviving spouse and minor children of the Decedent, domiciled in and residing at _____, _____, _____ County, Texas _____.
2. Decedent died on _____ in _____, _____ County, Texas at the age of _____ years.
3. This Court has jurisdiction and venue because Decedent was domiciled and had a fixed place of residence in _____ County, Texas on the date of his/her death.
4. Decedent owned real and personal property subject to any liens and encumbrances as set forth below of a probable value according to the best knowledge and information of the Applicant of \$ _____: (Describe property, value and liens and encumbrances attached thereto.)
5. Decedent died intestate, survived by (names of Decedent's survivor and the ages of any minor children).
6. Pursuant to the Tex. Est. Code Ch. 353, Decedent's surviving wife and minor children are entitled to a family allowance since they do not have separate property adequate for their support and maintenance.
7. Because the value of the entire assets of the estate, not including 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, no necessity exists for the administration of this Estate.
8. The following constitute all of the heirs of the estate: *(list)*
9. The following are all of the creditors and the amounts of their claims so far as same are known: *(List names and addresses of creditors, nature of debt, amounts due and unpaid.)*
10. Applicant would show that the following debts, comprising the expenses of last illness, funeral charges, and expenses of this proceeding, have been paid: *(list)*
11. Applicant requests the Court to set a family allowance based on the circumstances now existing and those anticipated to exist during the first year after decedent's death. Applicant prays for an allowance in the amount of \$ _____ payable in (describe proposed method of payment, such as lump sum or monthly installments).
12. Applicant would show that the Family Allowance should be based upon the following: (Specify how amount was determined.)

Applicant prays that citation be issued as required by law to all persons interested in this Estate; that the Court enter an order to set a Family Allowance and identify the property or monies from which the allowance shall be paid and that, if the entire assets of the estate, not including the homestead and exempt property are thereby exhausted, the same be set aside to the surviving spouse and minor children.

Dated: _____

Respectfully submitted,
[Attorney Block]

No. _____

ESTATE OF

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PROBATE COURT

_____ ,

NUMBER ____ OF

DECEASED

_____ COUNTY, TEXAS

ORDER SETTING FAMILY ALLOWANCE AND
ORDER OF NO ADMINISTRATION

On this day, the court considered The Application for Family Allowance and Order of No Administration filed herein by _____, and after having reviewed the Application and the evidence and arguments offered in support of the Application, that court finds that it has jurisdiction of this matter and that a fair and reasonable allowance should be paid for the support of the Decedent's surviving (indentify survivors, such as spouse and minor children) and that the surviving spouse and minor children do not have separate property adequate for their maintenance and support and it is

ORDERED, ADJUDGED AND DECREED that based on the facts now exiting and expected to exist during the first year after the date the Decedent died, the sum of \$ _____ is adequate for the support of Decedent's surviving spouse and minor children.

It is therefore ORDERED, ADJUDGED and DECREED that a family allowance of \$ _____ payable in a (establish method of payment, such as lump sum or monthly installments) shall be paid to Decedent's surviving spouse, _____ and minor children, and that the allowance shall be paid from funds and/or property belonging to the estate of _____, Decedent.

It is FURTHER ORDERED, ADJUDGED and DECREED that, as the entire assets of the estate, not including the homestead and exempt property are thereby exhausted, the same be set aside to the surviving spouse and minor children.

Signed _____

JUDGE PRESIDING