# JUST A WILL WON'T CUT IT: PLANNING FOR THE TRANSFER OF NON-PROBATE ASSETS AT DEATH

**ARIELLE M. PRANGNER**
Davis & Willms, PLLC
3555 Timmons Lane, Suite 1250
Houston, Texas 77027
(281) 786-4500
arielle@daviswillms.com

**Estate Planning Council of Central Texas**
**October 19, 2021**

**© 2021, Arielle M. Prangner, All Rights Reserved.**

# ARIELLE M. PRANGNER

**Davis & Willms, PLLC**

**Board Certified - Estate Planning and Probate Law**
**Texas Board of Legal Specialization**

**3555 Timmons Lane, Suite 1250**
**Houston, Texas 77027**

**Phone (281) 786-4500**
**Fax (281) 742-2600**
**arielle@daviswillms.com**


**EDUCATION**:

- J.D., University of Texas School of Law, 2008, *with honors*
- B.S., Special Education, Texas A&M University, 2005, *summa cum laude*

**OTHER QUALIFICATIONS**:

- Admitted to Practice: State Bar of Texas; United States Tax Court
- Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
- Texas Rising Star, Estate Planning & Probate (2017-2021), Up-and-Coming 50 Women (2020-2021); *Texas Monthly* and *Texas Super Lawyers Magazine*

**PROFESSIONAL ACTIVITIES**:

- Probate Forms Task Force, appointment by the Supreme Court of Texas (2016-present)
- Real Estate, Probate and Trust Law Section, State Bar of Texas (Council Member, 2020-present; Decedents' Estates Committee Co-Chair, 2021)
- Real Estate, Probate and Trust Law Section, State Bar of Texas (Council Member, 2020-present)
- Tax Section, State Bar of Texas
- College of the State Bar of Texas

**SPEECHES AND PUBLICATIONS**:

- Speaker/Author: *Just a Will Won't Cut It: Planning for the Transfer of Non-probate Assets at Death*, State Bar of Texas 45th Annual Advanced Estate Planning & Probate Course, 2021
- Panelist/Author: *Forms from Around the State*, State Bar of Texas 31st Annual Estate Planning & Probate Drafting Course, 2020
- Speaker/Author: *Implications of Termination of Grantor Trust Status*, State Bar of Texas 44th Annual Advanced Estate Planning & Probate Course, 2020
- Speaker: *Ten Things Every Estate Planner Needs to Know about Subchapter J*, State Bar of Texas Tax Section Tax Law in a Day, 2020
- Speaker/Author: *Getting to the Series Finale: Distributions of Estate Assets and Funding Testamentary Trusts,* State Bar of Texas 43rd Annual Advanced Estate Planning & Probate Course, 2019
- Speaker/Author: *Lighting the Way to the Exit: Drafting to Facilitate Terminating Distributions by Fiduciaries*, State Bar of Texas 27th Annual Estate Planning & Probate Drafting Course, 2016; Disability and Elder Law Attorneys Association (DELAA), 2016; 65th Annual Taxation Conference and 2017 Stanley M. Johanson Estate Planning Workshop, 2017; State Bar of Texas 30th Annual Estate Planning & Probate Drafting Course, 2019
- Panelist: *Estate Planning 101 for Gift Planners- Everything you want to know but are afraid to ask*; Charitable Gift Planners of Houston, 2018
- Speaker: *Death and Probate: Selected End-of-Life Issues*, Texas Bar College 19th Annual Summer School, 2017
- Panelist: *Mediating Contested Probate and Trust Disputes*, State Bar of Texas 41st Annual Advanced Estate Planning & Probate Course, 2017
- Speaker: *Estate Planning and Probate Basics*, Texas Bar College 18th Annual Sumer School, 2016

  Speaker/Author: *Don't Let the Door Hit You on the Way Out: Funding Agreements, Receipts and Releases, and All That Jazz*, State Bar of Texas 26th Annual Estate Planning & Probate Drafting Course, 2015; Attorneys in Tax and Probate, 2015; Austin Bar Association's Estate and Probate Section, 2016; Houston Bar Association's Probate, Trusts and Estates Section, 2016
- Speaker/Author: *Nuts and Bolts: Planning for the Transfer of Non-Probate Assets at Death*, South Texas College of Law 29th Annual Wills and Probate Institute, 2014; University of Texas 16th Annual Estate Planning, Guardianship, and Elder Law Conference, 2014
- Speaker: *The Brave New World of Estate Planning*, Houston CPA Society 2014 Spring Accounting Expo, 2014
- Speaker: *Where to Begin? – An Overview of Trusts and Business Structure Choice and Conversion*, National Business Institute, Estate Planning from A to Z, 2013
- Co-Author/Speaker: *An Overview of the Probate Process*, National Business Institute, The Probate Process from Start to Finish, 2010, 2013
- Speaker: *Estate Planning Basics*, Houston Bar Association, 2013
- Co-Author/Panelist: *Irrevocable Life Insurance Trusts*, State Bar of Texas Intermediate Estate Planning and Probate Course, 2012

- Author/Speaker: *Where to Begin? An Overview of Trusts*, National Business Institute, Trusts 101, 2011
- Author/Speaker: *Life Insurance Trusts*, National Business Institute, Trusts 101, 2011

- Panelist*: Twilight Planning: Using Advanced Techniques to Plan for Incapacity*, Houston Bar Association's Probate, Trusts and Estates Section, 2011
- Author/Speaker: *Life Insurance Trusts*, Texas Bankers Association, Texas Trust Administration Forum, 2010 and 2011
- Author/Panelist: *Taking Stock- A Guide to Probate and Guardianship Inventories*, South Texas College of Law Wills & Probate Institute, 2009

## JUST A WILL WON'T CUT IT: PLANNING FOR THE TRANSFER OF NON-PROBATE ASSETS AT DEATH

I. INTRODUCTION ..... 2
II. CONSIDERATIONS INFLUENCING THE BEST DISPOSITION OF NON-PROBATE ASSETS ..... 2
A. Minor Children. ..... 2
B. Beneficiaries with Special Needs. ..... 2
C. Providing for Surviving Spouse and Children in Succession ..... 2
D. Payment of Debts, Expenses, and Taxes. ..... 3
E. Tax Savings. ..... 3
1. Estate Tax.. ..... 3
2. Income Tax ..... 3
F. Creditor Protection. ..... 4
1. Creditors of the Beneficiary ..... 4
2. Creditors of the Decedent ..... 4
3. Creditor Exposure and Protection for Some Non-Probate Assets ..... 4
G. Probate Avoidance ..... 5
III. SPECIAL CONSIDERATIONS FOR A CLIENT WHO IS OR HAS BEEN MARRIED ..... 6
A. Marriage ..... 6
1. Spouse's Community Property Interest.. ..... 6
2. Spouse's Rights in Plans Governed by Federal Law. ..... 6
B. Divorce. ..... 6
1. "Divorce Revokes" Statutes ..... 6
2. Proper Form of Waiver by Spouse. ..... 8
3. Divorce Decree or Agreement Requiring Beneficiary Designation ..... 8
IV. IDENTIFYING AND COORDINATING NON-PROBATE ASSETS ..... 8
A. Multi-Party Accounts. ..... 8
1. Accounts with Survivorship Features. ..... 9
2. Default Estate Planning by Financial Institutions. ..... 10
3. Changing Multi-Party Accounts to Remove Survivorship Features. ..... 11
4. Alternative to Accounts with Survivorship Features. ..... 12
B. Securities and Contracts Other than Deposits of Funds ..... 12
1. Absence of Beneficiary Designation ..... 12
2. Naming Contingent Beneficiaries. ..... 12
3. Problems that Sometimes Arise when Trusts are named as Beneficiaries. ..... 11
4. Delivering Beneficiary Designations. ..... 14
5. Following Up. ..... 14
C. Real Property Held with Survivorship Features.. ..... 14
1. Tenancy by the Entirety. ..... 16
2. Evaluating and Removing Real Property Survivorship Features. ..... 16
V. THE ATTORNEY'S ROLE ..... 18
A. Gathering Information ..... 23
B. Educating the Client about Non-Probate Assets ..... 24
C. Participation in Coordination of Non-Probate Assets ..... 24
D. Providing Clients with Tools to Coordinate Non-Probate Assets. ..... 24
VI. POST-MORTEM REMEDIES IF NON-PROBATE ASSETS ARE NOT CORRECTLY COORDINATED ..... 25
A. Scrutinize Account Agreements. ..... 25
B. Consider Disclaimers. ..... 25
C. Equalization By Beneficiaries. ..... 26
VII. CONCLUSION ..... 27

**JUST A WILL WON'T CUT IT: PLANNING FOR THE TRANSFER OF NON-PROBATE ASSETS AT DEATH**

# I. INTRODUCTION

When crafting a comprehensive estate plan for clients, planning for and coordination of assets that pass outside of probate is an imperative part of the process. Most clients' estates include non-probate assets; and more and more, the proportion of these non-probate assets in relation to the overall value of the client's estate is quite significant. It is not uncommon for life insurance and retirement plans alone to make up the majority of the value of a client's gross estate. Accordingly, attorneys must advise clients to incorporate these assets into the estate plan, and not just as an afterthought.

Obviously, attorneys must ascertain each client's personal goals with respect to the overall estate plan in order to make a determination regarding the ultimate disposition of the client's non-probate assets. The attorney must then identify and analyze each non-probate asset and educate the client regarding how each asset should be distributed at the client's death. The paperwork involved in directing the disposition of non-probate assets can sometimes be daunting. The forms required are as varied as the financial institutions, life insurance companies, plan administrators, and plan custodians involved.

This outline is not intended to address every issue associated with the coordination of non-probate assets with the rest of the estate plan. In particular, the nuances of the income tax and distribution considerations involved in the disposition of retirement plans are not addressed. Rather, the goals of this outline are to highlight issues that may influence the suggested disposition of non-probate assets, to assist in the identification of non-probate assets that may not be easily recognizable, and to provide guidance about how to manage some of the paperwork involved.

# II. CONSIDERATIONS INFLUENCING THE BEST DISPOSITION OF NON-PROBATE ASSETS

The attorney must take the time to listen to the goals and concerns of each client and use the information gathered during these discussions to shape the plan for disposition of non-probate assets in a way that accomplishes the client's objectives and coordinates with the overall estate plan. Although the general considerations of our clients are usually similar, each client's personality and situation is unique and clients will inevitably place different emphasis on each of the considerations. In addition to the critical goal of providing for a particular person or class of persons, clients' goals may include tax savings, creditor protection, and probate avoidance. It is important to evaluate each of these goals when advising a client.

Most of our clients can identify exactly who they would like to receive their property at their death. While the client's ultimate goal may sound simple (e.g., "I want to take care of my spouse for her lifetime, and then I want to provide for my kids"), consideration must be given to a host of factors in order to determine how that simple sounding objective can best be accomplished.

**A. Minor Children**. If minor children are involved in the estate plan, it is important to ensure that property will not pass to those children outright. In Texas, children under the age of 18 are minors and deemed to be under a legal incapacity.[1] Accordingly, if a minor child inherits property outright, a court will have to prescribe a management vehicle for the property, which may range from appointing a guardian of the child's estate, to ordering that the funds be held in the court's registry, to creating a management trust for the property. To avoid a costly and time consuming legal proceeding to determine how to collect and hold funds for a minor, the client may elect to employ trust planning in his or her Will. Non-probate assets, therefore, should be structured to avoid passing to minor children outright.

**B. Beneficiaries with Special Needs.** If the client wishes to benefit a person who may be accepting or eligible to accept governmental benefits, consideration needs to be given to whether the assistance received by the beneficiary has an effect on qualification. If so, receipt of inherited assets by the beneficiary (whether outright or in trust) may disqualify him or her from acceptance of those benefits. Careful consideration and planning is required if a client knows or anticipates that one of his or her intended beneficiaries may qualify for governmental benefits. A supplemental needs trust (sometimes also called a special needs trust) may need to be created to hold funds for a beneficiary receiving governmental assistance that will allow the beneficiary to continue to qualify for the assistance. If such a trust is necessary, leaving non-probate assets outright to the beneficiary may thwart the purposes of the trust and may disqualify the beneficiary from receipt of governmental assistance.

**C. Providing for Surviving Spouse and Children in Succession**. If a client's goal is to provide for his or her spouse for the surviving spouse's lifetime

[1] TEX. ESTS. CODE § 22.016.

and then provide for the client's children, leaving assets outright to a spouse may not accomplish these objectives. If a spouse receives property outright, whether through a bequest in the client's Will or through designation of the spouse as beneficiary of a non-probate asset, there is no guarantee that at the surviving spouse's later death he or she will leave that asset to the first spouse's children. This tends to be a more pressing concern when working with married couples who have children from prior relationships. Many couples employ trust planning to achieve ultimate disposition to a second generation at the death of the second spouse. Non-probate assets should be evaluated to determine if they should pass to the trustee of such a trust instead of outright to the surviving spouse.[2]

**D. Payment of Debts, Expenses, and Taxes.** Some clients have earmarked certain assets for particular beneficiaries (e.g., a life insurance policy for Child A and the family business for Child B). Likewise, some clients, intending to provide equally for two parties, leave all of the probate estate to one beneficiary and leave a non-probate asset of equivalent value to another beneficiary. In these types of situations, the client must be made aware of disparities that may arise between the beneficiaries as a result of the necessary payment of debts, expenses, and taxes.

For example, if a client has a probate estate of approximately $3,000,000 which he leaves to Child A, and a life insurance policy with a death benefit of equivalent value of which Child B is the named beneficiary, Child B could end up being much better off. This is because the estate's creditors will first look to the probate assets for satisfaction of their debts. Additionally, although a different result through drafting is possible, it is common for a Will's apportionment clause to direct that all administration expenses and taxes be paid from the client's residuary estate. In that case, Child A's portion may be greatly depleted while Child B's portion would be left untouched. Even if Child B would like to do the right thing and pay for half of any debts, expenses, and administration expenses, there may be gift tax consequences to Child B.

Accordingly, if a client expresses a desire to provide for beneficiaries in such a manner, these issues should be discussed and the apportionment clauses in the client's Will or revocable trust should be scrutinized and modified if necessary to accomplish the client's objectives.

**E. Tax Savings**. I've yet to encounter a client whose goals do not include saving tax. The considerations involved in tax savings, whether in relation to estate tax or income tax, are complicated. Nonetheless, the client should be made aware of tax issues involved in the disposition of non-probate assets.

1. Estate Tax. If traditional marital tax planning is employed in the client's Will or revocable trust, it may be important for non-probate assets to be available to fund the tax-planned trusts created in the Will. Otherwise, these trusts can end up being unfunded or underfunded. The relatively new availability of "portability" of a deceased spouse's unused federal estate tax exemption amount may negate or minimize the underfunding problem in some circumstances. However, to take advantage of portability, a federal estate tax return must be filed for the deceased spouse within 9 months of his or her date of death (or within 15 months with a timely filed extension request).[3] For married clients who may have estate tax exposure, it is important to discuss the various methods of estate tax planning and coordinate non-probate assets accordingly.

2. Income Tax. Clients should be made aware of income tax implications of naming beneficiaries on certain non-probate assets. If the non-probate asset involved is a "qualified" retirement plan (IRA, 401(k), pension, thrift, profit-sharing, KEOGH, etc.) or tax-deferred annuity, the best income tax result (i.e., longest deferral period) is generally achieved only if the beneficiary meets the requirements to be treated as a "designated beneficiary" under the Internal Revenue Code and Treasury Regulations.[4]

If a client has charitable inclinations, naming a charity as a beneficiary of such qualified retirement plan may

[2] Of course, if the spouse is named as the trustee and distributes or ends up needing all of the assets in the trust, the assets won't be available to pass to children or other descendants at the spouse's later death.

[3] I.R.C. § 2010(c)(5). However, if an estate tax return is being filed purely for portability purposes and would not otherwise have to be filed, then the executor has 2 years from the decedent's date of death to file the return. Rev. Proc. 2017-34, 2017-1 C.B. 1282.

[4] I.R.C. § 401(a)(9). Note that the passage of the "Setting Every Community Up for Retirement Enhancement Act" (the "SECURE Act"), which became effective January 1, 2020, significantly changed the rules for inherited retirement accounts. For a thorough discussion of planning for retirement plans in light of the SECURE Act, see Gerstner, *Estate Planning for Retirement Plans in View of the Secure Act*, State Bar of Texas 44th Annual Advanced Estate Planning and Probate, 2020.

be the most tax efficient way to accomplish charitable goals. Although a charity cannot be a "designated beneficiary," when benefits are distributed to a charity, the charity will receive the benefits free of income tax, as opposed to individuals or trusts who would have to pay income tax on the distributions received from such retirement plans.[5]

While a complete discussion of the nuances involved in such a determination are outside the scope of this article, income tax implications should be considered when planning for these qualified non-probate assets.[6]

**F. Creditor Protection**. If a client has concerns about the creditors of a beneficiary or his or her own creditors, the rules relating to creditor exposure should be carefully considered when directing the disposition of non-probate assets.

1. Creditors of the Beneficiary. A client may have specific reasons for seeking creditor protection for a beneficiary. For example, the client's spouse may work in a high risk profession (e.g., the medical field), or a client's child may be bad at managing money. However, many clients just like the idea that their beneficiaries' inheritance may be protected from general creditors and potential claims in a divorce. To this end, a client may desire that any inheritance (including non-probate assets not otherwise protected from creditors as discussed below) pass to the trustee of a testamentary spendthrift trust for the benefit of the beneficiary rather than to the beneficiary outright.

2. Creditors of the Decedent. Additionally, the client may be concerned about his or her own creditors. At the client's death, his or her personal creditors will become creditors of the client's estate. Most assets that are administered as part of the estate will be exposed to claims of creditors of the estate. Accordingly, the knee-jerk reaction may be to structure assets so that they are non-probate assets and avoid naming the "Estate" as the beneficiary of non-probate assets that require a beneficiary designation. However, those actions may not be necessary or may not have the desired effect of creditor protection.

3. Creditor Exposure and Protection for Some Non-Probate Assets. The discussion below highlights a few notable creditor issues for select non-probate assets.

a. Life Insurance and Annuities. Estate planners used to caution against naming the client's "Estate" as a beneficiary on a life insurance or annuity contract. The Texas Insurance Code provides that benefits under life insurance and certain annuity contracts are exempt from garnishment, attachment, execution, or other seizure by creditors.[7] For many years, it was believed that if an estate was the recipient beneficiary, these protections did not apply. Texas Insurance Code Section 1104.023 makes it clear that that if a trustee of an inter vivos or testamentary trust is named as the beneficiary of a life insurance policy, the policy proceeds received by the trustee are not subject to the debts of the insured; however, the statutory language regarding estates as beneficiaries was not as clear. As of September 1, 2013, though, Section 1108.052 of the Texas Insurance Code was amended to provide that the creditor exemptions apply regardless of whether the insured's estate is the beneficiary.

b. Retirement Plans and other Qualified Savings Plans. Texas Property Code Section 42.0021 provides that a person's right to the assets held in or to receive payments under certain retirement plans and other qualified savings plans is exempt from attachment, execution, and seizure for the satisfaction of debts to the extent the retirement plan or account is exempt from federal income tax, or to the extent federal income tax on the person's interest is deferred until actual payment of benefits to the person pursuant to certain provisions of the Internal Revenue Code. These plans and accounts include stock bonus, pension, annuity, deferred compensation, profit-sharing, health, education, or similar plans or accounts, including: a retirment plan sponsored by a proviate empoyer, government, or church; a retirement plan for self-employed individuals; a simplified employee pension plan; an individual retirement account or annuity, including an inherited individual retirement account or annuity; a Roth IRA, including an inherited Roth IRA; a health savings account; a Coverdell education savings account; a plan or account estaiblished under Subchapter F, Chapter 54, Educaiton Code, including a prepaid tuition contract; a plan or account established under Subchapter G, Chapter 54, Education Code, including a savings trust account; a qualified tuition program of any state that meets the requirements of Section 529, Internal Revenue Code of 1986; a qualified ABLE program of any state that meets the requirements of Section 529A, Internal Revenue Code of 1986; and an annuity or similar contract purchased with assets distributed from a plan or account described above (collectively herein referred to as

---

[5] *See* I.R.C. §§ 691(a), 501(a).

[6] Another resource for a thorough discussion of these issues is Wolf, *Drafting Considerations After the Secure Act*, State Bar of Texas 31st Annual Estate Planning and Probate Drafting, 2020.

[7] TEX. INS. CODE §§ 1108.001, 1108.051.

"qualified savings plans"). This statute was amended in 2013 to explicitly include Roth IRAs and inherited Roth IRAs and was amended in 2019 to include certain education accounts and ABLE accounts. The statute makes clear that the interest of a person in a qualified savings plan because of the death of another person is exempt to the same extent that the decedent's interest was exempt on the date of the decedent's death.[8] However, there is no such creditor protection afforded to an estate, so naming the client's "Estate" as the beneficiary of a retirement plan or other qualified savings plan will subject those assets to claims of creditors of the estate.

c. <u>Accounts with Survivorship Features.</u> On the other hand, some assets that pass outside of the probate estate may still be subject to claims of creditors of the decedent. For example, just because an account passes outside of the decedent's probate estate pursuant to a right of survivorship (as discussed further below), the account may still be subject to the debts of a deceased account holder. Section 113.252(a) of the Texas Estates Code provides that a multiple-party account is not effective against an estate of a deceased party to transfer to a survivor the amounts of estate taxes and expenses charged under Subchapter A, Chapter 124, to the deceased party, P.O.D. payeee, or beneficiary of the account; or, if other assets of the estate are insufficient, amounts needed to pay debts, other taxes, and expenses of administration, including statutory allowances to the surviving spouse and minor children; or the claim of a secured creditor who has a lien on the account. Any party receiving payment as a result of surviving must account to the personal representative for amounts the deceased party owned beneficially immediately before the party's death to the the extent necessary to discharge these claims and expenses, but only up to the amount that he or she received.[9] However, the personal representative of the decedent may only bring a proceeding to assert liability if the perosnal representative receives a written demand by a surviving spouse, a creditor, or a person acting on behalf of a minor child of the decedent.[10] Any proceeding by the personal representative to recover the property must be commenced before the second anniversary of the decedent's death.[11]

d. <u>Real Property Transferred by a Transfer on Death Deed.</u> As discussed in greater detail below, real property may pass oustide of probate via a transfer on death deed (or "TODD"). If the transferor's estate is insufficient to satisfy a claim against the estate, expenses of administration, any estate tax owed by the estate, or an allowance in lieu of exempt property or family allowance, then property passing under a TODD may be liable for those claims and expenses to the same extent it would be if it were part of the probate estate.[12]

The beneficiary of a TODD takes title to the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death.[13]

**G. <u>Probate Avoidance.</u>** Many clients enter an estate planning attorney's office with preconceived notions about the horrors of probate. Some have had a conversation with a banker about how much easier things are when assets pass pursuant to a right of survivorship and insist that as many assets as possible be structured as non-probate assets. Other times clients come to our office insisting that they need revocable trust planning to avoid probate altogether because their cousin's wife had such a terrible experience with her mother's probate in California. Fortunately, with proper estate planning in place, the probate procedure in Texas is relatively straightforward, and many clients change their minds after a discussion about what is involved in Texas probate. In some circumstances, of course, it may be appropriate to advise clients to engage in revocable trust planning, such as when a client would like management assistance with his or her assets or wants to keep any information regarding their estate plan out of public record. In those situations, each non-probate asset should be structured to coordinate with the revocable trust planning. A discussion regarding revocable trust planning is set out below.

There are reasons other than probate hysteria to arrange for certain assets to bypass probate, of course, and these should be considered. Often a client wants a household account to pass to his or her spouse at his or her death to avoid the possibility that the spouse will have to wait for the probate process to have access to

[8] TEX. PROP. CODE § 42.0021(c). It should be noted that the United States Supreme Court has held that if a client is in federal bankruptcy and chooses federal exemptions, inherited IRAs are not exempt from bankruptcy creditors. *Clark v. Rameker*, 573 U.S. 122 (2014).

[9] TEX. ESTS. CODE § 113.252(b).

[10] *Id.* at § 113.252(c).

[11] *Id.*

[12] *Id.* at § 114.106(a).

[13] *Id.* at § 114.104(a).

necessary funds for living expenses. Sometimes clients desire for there to be a fund immediately available for funeral expenses. Some clients may own real property in another state with a cumbersome probate process and want to avoid the need for an ancillary probate in that state. These concerns should be explored when discussing the disposition of non-probate assets.

## III. SPECIAL CONSIDERATIONS FOR A CLIENT WHO IS OR HAS BEEN MARRIED

**A. Marriage.** When representing clients who are married, consideration must be given to community property laws and the rights of spouses to non-probate assets, subject to any federal law preemptions.

1. Spouse's Community Property Interest. In Texas, if a client is married, the non-probate assets in his or her name are often community property (because they are acquired during the couple's marriage while residing in Texas). Even though a non-probate asset may be community property, only the owner of a life insurance policy (usually the insured) or the participant in the retirement plan has the right to designate the beneficiary.[14] If the non-insured or non-participant spouse is not named as the beneficiary, the community property interest of the non-insured or non-participant spouse must be taken into account in beneficiary designation planning. If the asset is payable to the surviving spouse, these issues become less important. Furthermore, provisions in the deceased spouse's Will providing for the non-pro rata division of community property assets can mitigate these issues.

2. Spouse's Rights in Plans Governed by Federal Law. In the case of certain qualified retirement plans and life insurance policies, federal law, specifically, the Retirement Equity Act of 1984 ("REA"), requires that plans provide that the participant's spouse receive a mandatory death benefit upon the death of the participant or a joint and survivor annuity upon the retirement of the participant.[15] With regard to assets held in most employer-sponsored retirment plans, a non-participant spouse must give his or her consent to the beneficiary designation if the participant names someone other than the non-participant spouse as the beneficiary.[16] If a non-participant spouse desires to give his or her consent regarding such a designation, the consent must take the form proscribed by statute. Several cases have held that these REA granted rights are not waived as a result of general waiver provisions in a premarital or antenuptial agreement.[17]

Therefore, if the client expresses a desire to direct non-probate assets to anyone other than the client's spouse, it is prudent to determine whether the asset is subject to federal law that would prevent such a designation without the spouse's consent and plan accordingly. Keep in mind that one spouse giving up rights to property that he or she would otherwise have raises issues regarding joint representation that are beyond the scope of this article.

**B. Divorce**. In the event that a client has been divorced or has had a marriage annulled, the divorce decree and all beneficiary designations for non-probate assets should be reviewed.[18]

1. "Divorce Revokes" Statutes. If a client has designated his or her spouse as a beneficiary of a life insurance policy or retirement plan and fails to update the beneficiary designation after divorce, whether as a result of forgetfulness, procrastination, or untimely death, Texas law may provide some protection. Texas Family Code Sections 9.301 and 9.302 provide that if a decree of divorce or annulment is rendered after a person has designated his or her spouse as a beneficiary under a life insurance policy, individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant which was in force at the time of the divorce or annulment, a provision in favor of the former spouse is not effective unless (1)

---

[14] *See* TEX. FAM. CODE § 3.102, TEX. INS. CODE § 1113.001. But see discussion regarding assets governed by federal statues, immediately below.

[15] 29 U.S.C. § 1055(a). It should be noted that a retirement plan governed by federal law may provide that benefits will not be payable to the surviving spouse unless the participant and such spouse had been married throughout the 1-year period ending on the earlier of the participant's annuity starting date or the date of the participant's death. *Id.* § 1055(b)(4).

[16] *Id.* § 1055(c).

[17] *See, e.g., Manning v. Hayes*, 212 F.3d. 866 (5th Cir. 2000), cert. denied, 121 S.Ct. 1401 (2001) (language in a premarital agreement not sufficiently explicit to constitute waiver); *Hurwitz v. Sher*, 789 F. Supp. 134 (S.D.N.Y 1992), aff'd by 982 F.2d. 778 (2nd Cir. 1992), cert denied 508 U. S. 912 (1995) (spouse had not waived rights to plan benefits because consent in proper form was signed before marriage and only a spouse can waive rights; antenuptial agreement after marriage did not meet requirements of statute for waiver); *Zinn v. Donaldson Co., Inc.*, 799 F.Supp. 69 (D. Minn. 1992) (language in antenuptial agreement not specific enough to constitute waiver).

[18] A client who is separated or in the process of obtaining a divorce may desire to make changes as well. As noted above, federal law may prevent changes without consent until the divorce decree is final.

the divorce decree designates the former spouse as the beneficiary; (2) the person redesignates the former spouse as the beneficiary after the divorce; or (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either the person or the former spouse. If either of those sections acts to revoke a designation of the former spouse as a beneficiary, the proceeds or benefits are payable to the named contingent beneficiary, or, if there is no named contingent beneficiary, to the estate of the deceased spouse.[19]

In 2015, the "divorce revokes" rule was extended to survivorship designations on pay on death (or "P.O.D.") accounts and multiple-party accounts (collectively referred to herein as "multiple-party accounts").[20] Texas Estates Code Section 123.151(b) now provides that if a decedent established a multiple-party account and the decedent's marriage was later dissolved by divorce, annulment, or a declaration that the marriage is void, any payable on death designation or survivorship agreement with respect to that account in favor of the decedent's former spouse or a relative of the former spouse (who is not also a relative of the decedent) is not effective unless: (1) the divorce decree designates the former spouse or the former spouse's relative as the payee on death or beneficiary or reaffirms the survivorship agreement in favor of the former spouse or former spouse's relative; (2) after the marriage was dissolved the decedent redesignated the former spouse or former spouse's relative as the payee on death or beneficiary or reaffirmed the survivorship agreement in writing; or (3) the former spouse or former spouse's relative is designated to receive the proceeds or benefits in trust for, on behalf of, or for the benefit of a child or a dependent of either the decedent or the former spouse.

Unlike the "divorce revokes" statutes for life insurance and retirement plans, this provision extends to any relative of the former spouse if the person is not also a relative of the decedent. A "relative" means an individual who is related to another individual by consanguinity or affinity.[21] Two individuals are related to each other by consanguinity if one is a descendant of the other or they share a common ancestor.[22] Two individuals are related to each other by affinity if they are married to each other or the spouse of one of the individuals is related by consanguinity to the other individual.[23]

If a pay on death or survivorship provision is revoked by the statute, then the account is payable to the named alternative P.O.D. payee or beneficiary, or if an alternative P.O.D. or beneficiary is not named, to the estate of the decedent.[24]

The statutes regarding transfer on death deeds also contain a "divorce revokes" provision. Divorce of the transferor and the designated beneficiary will result in the revocation of the TODD if notice of the final divorce decree is recorded before the transferor's death in the deed records in the county clerk's office of the county where the TODD is recorded.[25]

2. Limitations if Asset is Governed by Federal Law. However, clients should be advised to not blindly rely on these "divorce revokes" statutes, especially in relation to non-probate assets governed by federal law. The United States Supreme Court (the "Court") has held that when a "divorce revokes" statute acts to change the disposition of an asset governed by federal law, the statute is preempted.

In *Egelhoff v. Egelhoff*, a life insurance policy and pension planed governed by the Employee Retirement Income Security Act of 1974 ("ERISA") named Mr. Egelhoff's former spouse as beneficiary.[26] His children from a prior marriage contended that the state of Washington's "divorce revokes" statute acted to revoke the designation in favor of the former spouse. However, the Court held that because the statue attempted to include ERISA plans, it was expressly preempted by ERISA's preemption provision. ERISA states that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[27] ERISA contains no "divorce revokes" language. Accordingly, the Court held that benefits were properly payable to the former spouse pursuant to the beneficiary designation.

Further, a cause of action may not be available against a former spouse who receives the proceeds of an asset governed by federal law as the result of the failure of a "divorce revokes" provision. In *Hillman v. Maretta*, a life insurance policy governed by the Federal Employee's Group Life Insurance Act of 1954

[19] TEX. FAM. CODE §§ 9.301(b), 9.032(b).

[20] These types of accounts are discussed in more detail below.

[21] TEX. ESTS. CODE §§ 123.151(a)(3), 123.051.

[22] TEX. GOV. CODE § 573.022.

[23] *Id*. at § 573.024.

[24] TEX. ESTS. CODE § 123.151(c).

[25] *Id.* at § 114.057(c).

[26] *Egelhoff v. Egelhoff*, 121 S.Ct. 1322 (2001).

[27] 29 U.S.C. § 1144(a).

("FEGLIA") was at issue.[28] The parties in that case agreed that the portion of a Virginia statute revoking the designation of the former spouse as beneficiary was preempted by FEGLIA. At issue, however, was another provision of the statute, which created a cause of action rendering a former spouse liable to the person who would have received the asset if the "divorce revokes" provision was not preempted. The Court held that the provision in the statute creating a cause of action against the former spouse was likewise preempted.

Accordingly, if a client has been divorced, he or she should be advised to review any beneficiary designations and account agreements immediately and update them as necessary.

3. Proper Form of Waiver by Spouse. In addition to being wary of "divorce revokes" statutes, one cannot always rely on the language in a decree or agreement of divorce in connection with a former spouse's rights in an asset governed by federal law.

In *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, at Mr. Kennedy's death, his ERISA-governed savings and investment plan ("SIP") named his former spouse as the beneficiary.[29] The Court ruled that benefits should be paid to the former spouse even though the decedent had subsequently been married to another woman and the divorce decree between the former spouse and the decedent explicitly provided that the former spouse was divested of all of her rights in the SIP. The Court ruled that the waiver by the former spouse in the divorce decree was not effective because it was not in the form specifically required by the plan documents (a Qualified Domestic Relations Order, or "QDRO"). Accordingly, the benefits were properly payable to the former spouse.

In a situation such as this, presumably there would be some cause of action against the former spouse in the context of contract law. However, with regard to any non-probate asset that may be governed by federal law, the best practice would be to ensure that the instructions in the plan documents (often requiring a QDRO) are strictly followed with respect to divesting the former spouse of his or her interest in the asset.

4. Divorce Decree or Agreement Requiring Beneficiary Designation. If a client has been divorced, the divorce decree or agreement may require that the client designate his or her former spouse as the beneficiary of a non-probate asset such as a life insurance policy. Such a provision is relatively common when there are minor children involved and the client has a child support obligation to the former spouse. An attorney must be careful not to advise the client to change the disposition of an asset that may be subject to such restrictions. Therefore, it is advisable to review any documents related to the divorce that establish an ongoing obligation to the spouse.

After each of the foregoing considerations have been discussed and evaluated, the attorney can make a recommendation regarding whether each non-probate asset should be structured so that it passes to the client's estate to be distributed in accordance with his or her Will, outright to an individual or charity, or to a trustee of a trust (testamentary or otherwise).

## IV. IDENTIFYING AND COORDINATING NON-PROBATE ASSETS

Before non-probate assets can be coordinated with the estate plan, they must be identified. Generally, non-probate assets are those which, at the owner's death, pass via a statutory or contractual beneficiary designation rather than pursuant to the owner's Will or under the laws of intestate succession. When most people think about non-probate assets, the assets that immediately come to mind are life insurance policies and retirement accounts. Those are the easy non-probate assets to point out to clients, because clients generally remember that some kind of beneficiary designation was required in relation to those assets. (Of course, they may not know where the beneficiary designation forms are and may only be "pretty sure" who they named as beneficiary.)

In reality, however, the universe of non-probate assets is much broader. In some circumstances, clients may not realize that their joint brokerage account held as joint tenants with rights of survivorship (or other non-probate asset) will not pass pursuant to the terms of his or her Will. It is the attorney's job to educate the client regarding how each asset will be distributed at the client's death and provide appropriate guidance.

In this author's experience, the most commonly unrecognized non-probate assets are multi-party accounts that are structured to pass pursuant to survivorship designations at the client's death.

**A. Multi-Party Accounts.** Chapter 113 of the Texas Estates Code governs multiple-party accounts, which include joint accounts, P.O.D. accounts, trust accounts, and convenience accounts. Section 113.001(a) defines an "account" as a contract of deposit of funds between a depositor and a financial institution, and includes a checking or savings account, certificate of deposit, share account, or other similar

[28] *Hillman v. Maretta*, 133 S.Ct. 1943 (2013).

[29] *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S.Ct. 865 (2009).

arrangement. Chapter 113 addresses many issues associated with multiple-party accounts, including rights of survivorship, ownership during life, and ownership at death. There are special rules that govern accounts consisting of community property, however. Ownership of community property during life is governed by relevant provisions of the Texas Family Code. Rules for how community property accounts pass with rights of survivorship can be found in Chapter 112 of the Texas Estates Code and are discussed separately below.

Please note that as used in this outline, the term "multi-party accounts" includes any accounts that involve more than one party, including joint accounts, P.O.D. or transfer on death ("T.O.D") accounts, trust accounts, and convenience accounts.

1. Accounts with Survivorship Features. In Texas, we start with the presumption that if two or more people own an asset, no survivorship right exists and they own the property as tenants in common.[30] There must be some writing that affirmatively establishes a survivorship right among the parties. If a writing exists, Chapter 113 and Subchapter B of Chapter 111 of the Texas Estates Code control, or, with regard to community property, Chapter 112 of the Texas Estates Code controls. The requirements of these sections are discussed below. The term "accounts with survivorship features" as used in this outline include not only accounts that pass pursuant to rights of survivorship, but also as a result of P.O.D. or T.O.D. designations.

a. Ownership during Life (Other than Accounts of Community Property). During the lifetimes of the joint owners, joint accounts belong to the joint owners in proportion to the sums deposited by each of them.[31]

In contrast, a pay on death (or "P.O.D.") account belongs to the original account holder or holders during his or her life or their lives, and only passes to the P.O.D. beneficiary at the death of the account holder(s).[32]

Likewise, a trust account for which no actual trust exists (e.g., an account simply styled "John Doe, Trustee for Jane Doe," commonly referred to as a "Totten trust" or "poor man's trust") belongs beneficially to the trustee and only passes to the trust beneficiary at the death of the account holder.[33] If more than one trustee is named, the beneficial rights between them are governed by the rules applicable to joint accounts.[34] A trust account in this context is not to be confused with an irrevocable or revocable trust established pursuant to a trust agreement that is separate from a deposit agreement.

Clients should be cautioned: with a multi-party account (other than a convenience account as discussed below), any party to the account may pledge the account for his or her debts.[35] The only protection is that the financial institution must provide other joint tenants (but not P.O.D. payees, beneficiaries, or convenience signers) with written notice of any pledge of the account within 30 days after the security interest is perfected.[36]

Also with multi-party accounts other than convenience accounts, funds may be withdrawn by any party in excess of his or her net contributions.[37] However, the party who makes withdrawals in excess of his or her net contributions may be liable for civil conversion or be criminally convicted of theft.[38]

b. Ownership after Death. Without any survivorship features on a joint account, when one party to a joint account dies, the decedent's interest in the account does not belong to the other party, but rather passes as part of the decedent's probate estate.[39]

Texas Estates Code Sections 113.151 through 113.158 and 113.052 provide the requirements for establishing a right of survivorship in accounts other than community property accounts. For a joint tenancy account, Section 113.151(a) provides that there must be a written agreement between the parties, signed by the party that dies. In 2009, the Texas Supreme Court held in *Holmes v. Beatty* that simply titling the account as joint tenants created a right of survivorship.[40] Texas Probate Code Section 439(a) (now Texas Estates Code Section 113.151(c)) was amended in 2011 to overturn this decision and to make it clear that merely titling an account as a joint account is not enough to create a right of survivorship between the joint owners. That

[30] TEX. ESTS. CODE § 101.002.

[31] *Id.* § 113.102.

[32] *Id.* § 113.103.

[33] *Id.* § 113.104.

[34] *Id.*

[35] *Id.* § 113.251(a).

[36] *Id.* § 113.251(c).

[37] *See id.* § 113.003 (For purposes of establishing net contributions, financial institutions are not required to inquire regarding the source of funds received or amounts withdrawn from a multiple-party account).

[38] *See Hicks v. Texas*, 419 S.W.3d 555 (Tex. App.—Amarillo 2013, pet. ref'd).

[39] TEX. ESTS. CODE § 101.002.

[40] *Holmes v. Beatty*, 290 S.W.2d 852 (Tex. 2009).

Section provides explicit language that if included in an agreement will absolutely establish a survivorship right:

> On the death of one party to a joint account, all sums in the account on the death vest in and belong to the surviving party as his or her separate property.[41]

Substantially similar language will also act to create a right of survivorship.[42]

For a P.O.D. account, the agreement must be signed by the original payee(s), and upon the death of all original payees, the remaining funds belong to the then surviving P.O.D. payee(s).[43]

Likewise, for a trust account, the agreement must be signed by the trustee(s), and upon the death of all trustees, the then remaining funds belong to the surviving named beneficiaries. If more than one trustee is named, during the lifetimes of the trustees, the rights between the trustees are determined as for joint tenants.[44] Although no explicit provision states what happens when one trustee dies, in conformity with these provisions, the Texas Supreme Court has held that the funds did not pass to a surviving trustee who did not make any contributions to the account and the funds did not pass to the beneficiaries since a trustee was still surviving, but instead the account passed to the deceased trustee's estate.[45]

c. Uniform Account Form. The Texas Estates Code provides a uniform account form to conclusively establish the type of account indicated (other than community property accounts), whether it be with or without right of survivorship, and the form allows one or more convenience signers to be added to each type of account.[46] Unfortunately, despite the safe harbors provided by Texas law, many financial institutions do not use the specific language provided in Section 113.151 for creating rights of survivorship or the form of account agreement provided in Section 113.052.

d. Community Property with Rights of Survivorship. If spouses own community property with rights of survivorship in favor of the surviving spouse, Sections 112.001 through 112.253 of the Texas Estates Code control those accounts. Spouses may agree at any time that their community property will be subject to a right of survivorship in favor of the surviving spouse, as long as the agreement is in writing, signed by both spouses, and contains language creating the survivorship.[47] Note the distinction here from other multi-party accounts in that both spouse must sign the agreement. Section 452 of the Texas Probate Code (now Section 112.052(d) of the Texas Estates Code) was also amended in 2011 to overturn the *Holmes v. Beatty* decision discussed above so that a designation of joint tenacy is not enough to create a right of survivorship in community property.[48] Any one of four phrases will conclusively create a right of survivorship between spouses in community property:

(1) "with right of survivorship,"

(2) "will become the property of the survivor,"

(3) "will vest in and belong to the surviving spouse," or

(4) "shall pass to the surviving spouse."[49]

In addition, any agreement that "otherwise meets the requirements of this part" will create a right of survivorship.[50]

The creation of a right of survivorship does not affect the management rights of the property between the spouses.[51] Therefore, sole or joint management community property will remain so regardless of a right of survivorship.

2. Default Estate Planning by Financial Institutions. For estate planners, multi-party accounts with survivorship features can be frustrating. For people of modest means, who have no estate tax or other trust planning in their Wills, or for clients whose estate plan leaves all of their assets outright to adult beneficiaries, accounts with survivorship features may be fine. Many people have household checking accounts or other accounts with relatively small balances that are intended to pass outright to the surviving account holder. Survivorship features on these accounts generally do not cause a problem, so long as the account holder understands that the account will pass outright to the survivor, and not under the account holder's Will.

[41] TEX. ESTS. CODE § 113.151(b).

[42] *Id.*

[43] *Id.* § 113.152.

[44] *Id.* § 113.153.

[45] *Stegal v. Oadra,* 868 S.W.2d 290 (Tex. 1993).

[46] TEX. ESTS. CODE § 113.052.

[47] *Id.* §§ 112.051, 112.052.

[48] *Id.* § 112.052(d).

[49] *Id.* § 112.052(b).

[50] *Id.* § 112.052(c).

[51] *Id.* § 112.151.

In a typical estate plan when trust planning or multiple beneficiaries are involved, however, it is generally best if accounts are held in a form without survivorship features. Otherwise, trusts can end up being unfunded or underfunded or the property may pass to one beneficiary when the decedent intended to benefit more than one beneficiary. Who hasn't heard clients say that if they name Child A as the beneficiary of an account, Child A will just take care of everything and will make sure and share the account with the rest of his or her siblings?

Unfortunately, many advisors at banks and other financial institutions hype these accounts with survivorship features thinking that they are convenient for their clients without recognizing that such designations can thwart an otherwise sound estate plan. After death, it may not be possible to remedy these accounts, even by disclaimer, as discussed further below. Even with disclaimer as an option, the added expense and hassle may frustrate clients. Since most clients are naïve regarding these issues, it is important to advise them how to correctly title their accounts.

3. Changing Multi-Party Accounts to Remove Survivorship Features. Many clients are unaware of how their accounts are held, and accordingly it is purdent to advise the client to review the account designations in connection with the estate planning process. Bank or brokerage statements may indicate survivorship language on their account statements. Joint accounts often list two names, followed by the designation "JTWROS," "Jt. w/ Surv.," or with some other indication of survivorship. The account may also list one name, followed by the designation "P.O.D.," "T.O.D.," or with some other indication of survivorship. However, not all accounts with survivorship features are so clearly labeled. Survivorship is governed by the account agreement or signature cards that were signed when the account was opened (or when someone's name was added to the account). The terms of the account agreement or signature card, and not the names listed on the account statement, establish survivorship.

If necessary as part of the estate plan, the financial institution should be contacted to eliminate any survivorship designation.

Some financial institutions have proven uncooperative in altering these designations, based apparently on the well known legal maxim "that's the way we always do it. There's no reason for it, it's just our policy." Section 113.157 of the Texas Estates Code, however, allows any party to a survivorship account to alter its effect by written order received by the financial institution. The order must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by another written order of the same party during the party's lifetime.[52] With regard to a survivorship account between spouses of community property, a written agreement that does not provide another method of revocation must be signed by both spouses or one spouse must sign the agreement and deliver it to the other spouse.[53] Accordingly, if a written order to a financial institution is made with respect to such an account, both spouses should sign the document.

An example of a letter to a financial institution ordering that an account not include any right of survivorship is attached as "Exhibit A." Presumably, sending the letter by certified mail, return receipt requested, would satisfy any burden of proof with respect to this receipt requirement. The return receipt and copy of the letter should be retained by the client with his or her other estate planning documents.

Most account agreements contain a provision regarding governing law or choice of law. Texas law may prohibit a bank from enforcing the laws of another state if the branch or a separate office of the bank that accepts the agreement is located in Texas.[54] However, if an account agreement directs that the laws of a state other than Texas control, the client may find it difficult or impossible to remove survivorship provisions from multi-party accounts. This is especially true with the proliferation of online banking.

For example, in its deposit agreement effective as of January 7, 2017, Ally Bank, a popular online bank, provides that "all joint accounts are titled as joint tenants with right of survivorship."[55] The agreement further provides that all of Ally Bank's actions relating to the account "will be governed by the laws and regulations of the United States and, to the extent not preempted, the laws and regulations of the State of Utah."[56] Accordingly, a written order to Ally Bank pursuant to Texas Estates Code Section 113.157 may not be effective to remove a right of survivorship provision. Anecdotally, this author has also been told that GE Capital Bank account agreements have similar provisions with regard to joint accounts.

[52] *Id.* § 113.157.

[53] *Id.* § 112.054.

[54] *See* TEX. BUS. & COM. CODE § 4.102(c).

[55] Ally Bank Deposit Agreement and Disclosures; https://www.ally.com/resources/pdf/bank/ally-bank-deposit-agreement-upcoming.pdf (April 25, 2021).

[56] *Id.*

If a client has contacted a financial institution to eliminate a right of survivorship designation and has not been successful, the account agreement should be obtained and reviewed. An account agreement such as the one at Ally Bank may necessitate moving funds on deposit from the financial institution or changing the account to name only one account holder. Of course, clients attracted to a specific financial institution due to their interest rates or convenience may resist such a change. It is important for attorneys to advise clients of the impact of these issues on their estate plans.

4. Alternative to Accounts with Survivorship Features. If a client would like one or more friends or family members named on his or her account for purposes of convenience, or in the event of the client's disability, the best alternative may be to establish the account as a "convenience" account. A convenience account allows an account holder to name someone to sign on the account but gives no right of ownership or right of survivorship to the convenience signer.[57] In addition to not establishing a right of survivorship with the convenience signer, and in contrast to other multi-party accounts, the convenience signer may not pledge the account for his or her debts.[58] When the owner dies, his or her interest in the account passes under his or her Will or pursuant to the laws of intestate succession. If properly styled as a convenience account, an account does not give rise to the problems associated with accounts with survivorship features. Unfortunately, not every financial institutuion provides this option.

**B. Securities and Contracts Other than Deposits of Funds.** Section 111.052 of the Texas Estates Code covers a myriad of contracts, including insurance policies, employment contracts, promissory notes, retirement accounts, securities, and accounts with financial institutions. That Section states that if any of these contracts are at issue, the Texas Estates Code will not invalidate any provision in a written agreement related to these contracts that makes the account nontestamentary because of a right of survivorship, forgiveness of debt, or beneficiary designation.[59] In other words, the contract rather than the statutes control.[60]

Assets that are transferred pursuant to beneficiary designations include, but are not limited to: life insurance policies on the client's life, qualified or non-qualified retirement plans and IRAs, including rollover IRAs, in which the client is the participant, tax deferred annuities in which the client is the annuitant or owner, and immediate annuities in the client's name. Throughout this discussion, the term "sponsoring company" refers to the insurance company in the case of an insurance policy or annuity on the client's life, the administrator of the retirement plan in which the client participates, the custodian or trustee of the client's IRA or IRA rollover, or any other institution responsible for the administration of a non-probate asset requiring a beneficiary designation.

The beneficiary designation form, when properly completed and returned to the sponsoring company, is simply a contract between the client and the sponsoring company in which the sponsoring company agrees to pay the benefits to the named beneficiary at the time of the client's death. Because payment of these benefits is based upon contract law, all of the requirements imposed by the sponsoring company must usually be met in order for the contract to be honored. For example, the sponsoring company will frequently require that the beneficiary designation be made on the company's own form and delivered to the company on a timely basis.

Accordingly, for every asset that passes pursuant to a beneficiary designation, a change of beneficiary form should be obtained from the sponsoring company.

1. Absence of Beneficiary Designation. If the client fails to complete a beneficiary designation form, distribution of the asset at the client's death will be subject to the fine print in the sponsoring company's contract with the client. The contracts of sponsoring companies vary greatly, and accordingly, disposition of non-probate assets in the absence of a beneficiary designation vary as well. In many cases, the client's estate becomes the default recipient of property if no beneficiary has been named. In other cases, the client's spouse or children may be the default recipients, which may not align with the client's wishes, especially when minor children are involved.

2. Naming Contingent Beneficiaries. In many cases it is prudent to recommend that the

[57] TEX. ESTS. CODE §§ 113.105, 113.106, 113.154.

[58] *Id.* § 113.251(b).

[59] *Id.* § 111.052.

[60] Financial institutions are defined in Texas Estates Code Section 113.001 to include brokerage firms. This creates some murkiness and begs questions as to whether the earlier mentioned provisions of the Texas Estates Code apply to these types of accounts when securities rather that cash are held in the accounts and what provisions apply when both cash and securities are held in these accounts. Unfortunately, no clear answers exist. For an excellent discussion of the issues and case law that has seemingly ignored the distinction, see Karisch, *Multi-Party Accounts and Other Non-Probate Assets in Texas* (2011).

client name both a primary and a contingent (secondary) beneficiary of each non-probate asset for which a beneficiary designation is required. This is because (i) something could happen to both the client and the named primary beneficiary, in which case the contingent beneficiary will become the primary beneficiary, or (ii) if the primary beneficiary survives the client, naming a contingent beneficiary will give the primary beneficiary additional options through disclaimer.

It is not typically necessary to name a contingent beneficiary if the primary beneficiary is the trustee under the client's Will or revocable trust. However, if the sponsoring company insists on a contingent beneficiary, in most circumstances it may be acceptable to name the client's estate as the contingent beneficiary.

3. Problems that Sometimes Arise when Trusts are named as Beneficiaries. In many situations, the client's estate tax, creditor protection, and distribution goals will best be accomplished by naming the trustee of a trust as the beneficiary of a non-probate asset. In discussions with clients, attorneys often refer to "naming a trust" as the beneficiary as a form of shorthand. However, trusts are not legal entities that can hold title. Accordingly, the trustee of the trust should be named on each beneficiary designation form. Often, the trusts into which these assets are passing are testamentary trusts, and the proper beneficiary designation is **"The Trustee(s) named in the Will of [Name of Client]"** or **"The Trustee named in the [Revocable Trust],"** as applicable. However, when clients attempt to submit beneficiary designation forms with this language, they sometimes run into trouble. Some of the commonly encountered problems and possible solutions are listed below.

a. The sponsoring company wants the Trustee's name listed. Some sponsoring companies do not like a generic designation of the trustee named in the client's Will or revocable trust. Rather, they insist on having the actual name of the trustee listed. While the client's estate planning documents will likely name a primary trustee and provide for alternate trustees who will serve in the event that the primary trustee fails or ceases to serve, until the time of the client's death, there is no way to know who, in fact, will be serving as the trustee. Although you could try to explain this to the employee of the sponsoring company who is making the request, in our experience, bureaucrats are often very inflexible. As an alternative to the generic designation recommended to the client whose estate planning is through a Will, the client may designate his or her primary trustee by name, as the trustee in his or her Will, followed by "(or his/her successor)." For example, John Doe has named Jane Doe as the primary trustee in his Will. Therefore, he would word his beneficiary designation as follows: "Jane Doe, Trustee under the Will of John Doe (or her successor)."

b. The sponsoring company wants the date of the Will listed. Some sponsoring companies want the date the client's Will was signed included in the beneficiary designation. If required, it is generally not a problem to include the date of the Will. However, clients should be advised that the beneficiary designation should be updated each time a new Will or other estate planning document impacting the non-probate asset is signed.

c. The sponsoring company insists on a time limit for probating the Will. Some sponsoring companies want to add a provision to a Trustee beneficiary designation stating that the benefits will only be paid to the trustee under the Will if the Will is probated within a certain number of months. Generally, this is fine. Of course, the client's family or other people involved in the client's estate plan will need to be sure that the Will is actually probated within the specified time period.

d. The sponsoring company asks for additional beneficiary information. Some sponsoring companies also want additional information regarding the named beneficiary, such as current address, relationship, social security number, date of birth, etc. If the client is naming his or her spouse or any other individual as a beneficiary, the requested information should be included. However, if the client is naming the trustee in his or her Will as a beneficiary, this information is mostly inapplicable. This may be indicated on the form by entering "N/A" where appropriate.

e. The beneficiary designation form is not consistent with the attorney's instructions. Most beneficiary designation forms are structured so that the words "Primary Beneficiary" appear first, followed by a space to provide the appropriate name(s). These forms then have a second section entitled either "Contingent Beneficiary" or "Secondary Beneficiary," followed by a space to list the name(s). It is possible, however, to encounter a form that is not set up in this manner (such as a form containing preprinted beneficiary designation options with boxes that must be checked). If there is an option to choose "other," that should be done with an indication to see an attachment on which primary and contingent beneficiaries can be named as recommended by the

attorney. If the client is unable to determine how to complete a form, however, the client should reach out to the attorney for assistance. An attorney's participation in completing the paperwork to coordinate non-probate assets is discussed below.

4. Delivering Beneficiary Designations. Once a beneficiary designation form has been completed, the completed form must be returned to the sponsoring company according to its instructions.

a. Online Submission. Many sponsoring companies now allow beneficiary designation forms to be submitted online. If a form is returned to a sponsoring company in this manner, a copy of the confirmation page or page indicating the revised beneficiary designations should be printed and retained by the client with his or her other estate planning documents. If the form is submitted via email, the email should request written confirmation of receipt.

b. Submission Via Fax or Mail. If a beneficiary designation form is submitted via mail, it should be sent by certified or registered mail with a return receipt requested or by another trackable method. An example of a letter transmitting a beneficiary designation to a sponsoring company is attached hereto as "Exhibit B." The return receipt or confirmation of delivery and copy of the letter transmitting the completed beneficiary designation should be retained by the client with his or her other estate planning documents. If a beneficiary designation form is sent via fax, a copy of the fax transmission sheet should be retained in the same manner. In our experience, if proof is given to a sponsoring company that it received the beneficiary designation form, the beneficiary designation form will be honored.

5. Following Up. A transmission to a sponsoring company of a completed beneficiary designation form (whether by email, fax, or mail) should always request written confirmation from the sponsoring company that a change has been made. Once written confirmation is received from the sponsoring company, it should be retained with the client's other estate planning documents.

If confirmation that the change has been made is not received within a reasonable period of time (e.g., two weeks), the client should follow up to ensure that the change has been made. Often, beneficiary designations can be viewed online. However, if the beneficiary designation is not available online, the sponsoring company should be contacted to inquire whether the change has been made and to ask for written documentation regarding the same.

**C. Real Property Held with Survivorship Features**. Before 2015, it was relatively uncommon for real property in Texas to be held with survivorship features. However, in 2015 a Texas version of the Uniform Real Property Transfer on Death Act ("URPTODA") was enacted in Chapter 114 of the Texas Estates Code as the Texas Real Property Transfer on Death Act, and subseqently nontestamentary transfers of real property in Texas have become more common.

In many other states, it is customary for joint owners to hold real property in a way that creates some right of survivorship between them. [61] Accordingly, if the client owns real property in a state other than Texas or in any other foreign jurisdiction, it is prudent to request a copy of the deed to the property so that a determination can be made regarding whether the property is held with rights of survivorship.

1. Transfer on Death Deeds. The Texas Real Property Transfer on Death Act authorizes a transfer on death deed (sometimes called a "TODD") that transfers an individual's interest in real property to be effective on the death of the transferor.[62]

A TODD only affects interests in the real property at the death of the transferor. During the lifetime of the transferor, a TODD does not affect the interest or rights of the transferor or any other owner, and it will not affect the transferor's eligibility for any form of public assistance.[63] Likewise, the rights of a subsequent transferee or the rights of a secured or unsecured creditor or future creditor of the transferor are not affected by the TODD, even if the transferee or creditor has actual or constructive notice of the deed.[64] With respect to the beneficiary named in the TODD, no legal or equitable interests in the property are created, it will not affect the beneficiary's eligibility for

[61] In addition to Texas, some version of URPTODA has been enacted Mississippi, Montana, Utah, Maine, South Dakota, Washington, Alaska, West Virginia, New Mexico, Virginia, Nebraska, North Dakota, Illinois, Hawaii, Oregon, and Nevada. Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?CommunityKey=a4be2b9b-5129-448a-a761-a5503b37d884 (April 25, 2021). URPTODA has also been enacted in the District of Columbia and the US Virgin Islands, and as of April 2021, bills proposing the enactment of some form of URPTODA have been introduced in New Hampshire, North Carolina, and Tennessee. *Id.*

[62] TEX. ESTS. CODE § 114.051.

[63] *Id.* at § 114.101(1), (4).

[64] *Id.* at § 114.101(2), (3).

any form of public assistance, and the property will not be subject to the claims of the beneficiary's creditors.[65]

a. Form of transfer on death deed. In order for a TODD to be effective, it must contain the essential elements and formalities of a recordable deed, state that the transfer of an interest in real property to the designated beneficiary is to occur at the transferor's death, and be recorded in the deed records in the county clerk's office of the county where the real property is located before the transferor's death.[66] The deed must have been executed and acknowledged on or after September 1, 2015 (the effective date of the Act).[67] The transferor must execute the deed- it may not be created through the use of a power of attorney.[68]

When enacted, Subchapter D of Chapter 114 contained a statutory form TODD, which was subsequently revised in 2017. However, the statutory form was frequently criticized for being confusing, and in 2019, Subchapter D of Chapter 114 was repealed by House Bill 2782. The repeal of the statutory form did not affect the validity of transfer on death deeds. Section 47 of House Bill 2782 expressly provided that "[t]he repeal of Subchapter D, Chapter 114, Estates Code, by this Act does not affect the validity of a transfer on death deed or a cancellation of a transfer on death deed executed before, on, or after the effective date of this Act." That same year, Section 22.020(b) of the Government Code was amended by Senate Bill 874 to direct the Texas Supreme Court to promulgate a form of TODD and a form revocation of TODD, as well as instructions for the proper use of each form. The Texas Supreme Court created a Probate Forms Task Force in 2016 to make recommendations to the Court regarding the other forms to be promulgated by the Court pursuant to Government Code Section 22.020, and the Probate Forms Task force has now been tasked with creating the form TODD, revocation for TODD, and instructions. This author is a member of the Probate Forms Task Force and can confirm that those items are on the Task Force's current agenda. However, it is likely to take quite some time before the documents are drafted, approved by the Court, and made available to the public.

b. Revocation. A TODD is revocable regardless of whether the deed or another instrument contains a contrary provision.[69] However, A TODD cannot be revoked or superseded by a Will.[70]

It can be revoked by one of the following: (1) a subsequent TODD that revokes the preceding TODD, either expressly or by inconsistency; or (2) an instrument of revocation that expressly revokes the TODD.[71] In either case the revoking document must have been acknowledged by the transferor after the acknowledgement of the TODD being revoked, and must be recorded before the transferor's death in the deed records in the county clerk's office of the county where the TODD is recorded.[72] If a TODD was made by joint owners with right of survivorship, it may only be revoked by all of the living joint owners, unless the transferor is the last surviving joint owner.[73]

Divorce of the transferor and the designated beneficiary will also result in the revocation of the TODD if notice of the final divorce decree is recorded before the transferor's death in the deed records in the county clerk's office of the county where the TODD is recorded.[74]

A TODD can also be effectively revoked if the real property that is the subject of the TODD is subsequently transferred to someone else during the owner's lifetime and a valid instrument conveying the interest (or a memorandum sufficient to give notice of the conveyance of the interest) is recorded in the real property records in the county in which the TODD is recorded before the transferor's death.[75]

It should be noted that if a TODD is made by more than one transferor, and one of the transferors subsequently revokes the TODD, the revocation does not affect the deed as to the interest of any transferor who does not make that revocation.[76]

c. Effect of at death. In the event that a transferor is a joint owner with right of survivorship, the TODD is only effective to transfer property to the beneficiary named on the deed if the transferor is the last surviving joint owner.[77] If the transferor is survived by one or more other joint

[65] *Id.* at § 114.101(7), (4), (8).

[66] *Id.* at § 114.055.

[67] *Id.* at § 114.053.

[68] *Id.* at § 114.054.

[69] *Id.* at § 114.052.

[70] *Id.* at § 114.057(b).

[71] *Id.* at §114.057(a).

[72] *Id.*

[73] *Id.* at §§ 114.057(e), 114.103(c).

[74] *Id.* at § 114.057(c).

[75] *Id.* at § 114.102.

[76] *Id.* at § 114.057(d).

[77] *Id.* at § 114.103(b).

owners with rights of survivorship, the property belongs to the surviving joint owners.[78]

If the beneficiary named in the TODD survives the transferor by 120 hours, the interest in the real property is transferred to the designated beneficiary in accordance with the deed.[79] If the beneficiary fails to survive the transferor (including failure to survive by 120 hours), that beneficiary's share lapses and is subject to the provisions of Subchapter D of Chapter 255 of the Texas Estates Code, as if the TODD were a devise made in a Will.[80] Accordingly, unless the TODD provides otherwise, beneficiary designations in the deed will be subject to the so-called "anti-lapse statute," which establishes a default rule in the event that the beneficiary is a descendant of the testator or the testator's parent, the beneficiary does not survive the testator, and the Will (or in this case, the TODD) does not cover the contingency of the beneficiary's survival. In that case, the descendants of a deceased beneficiary become substitute takers.[81] Subject to the anti-lapse rule, concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship.[82]

Subject to Section 13.001 of the Texas Property Code (regarding the validity of an unrecorded instrument), the beneficiary of a TODD takes title to the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death.[83]

If a personal representative has been appointed for the transferor's estate, an administration of the estate has been opened, and the real property transferring under the TODD is subject to a lien or security interest, including a deed of trust or mortgage, the personal representative must give notice to the creditor of the transferor as the personal representative would any other secured creditor.[84] The creditor must then make an election under Texas Estates Code Section 355.151 within the prescribed amount of time to have the claim treated as a matured secured claim or a preferred debt and lien claim, and the claim is then subject to the claims procedures prescribed Texas Estates Code Section 114.104.

If the transferor's estate is insufficient to satisfy a claim against the estate, expenses of administration, any estate tax owed by the estate, or an allowance in lieu of exempt property or family allowance, property passing under a TODD may be liable for those claims and expenses to the same extent it would be if it were part of the probate estate.[85] If a personal representative receives a demand for payment from a third party and does not commence a proceeding to enforce liability against the property within 90 days of the demand for payment, then a creditor, distributee of the estate, surviving spouse of the decedent, guardian or other appropriate person on behalf of a minor child or adult incapacitated child of the decedent, or any taxing authority may bring a proceeding to enforce the liability.[86]

2. Tenancy by the Entirety. Although it is not a form of ownership recognized in Texas, real property in many states may be held as a tenancy by the entirety.[87] Tenancy by the entirety is a type of shared ownership of property available only to married couples. Generally, spouses who own property as tenants by the entirety each own an undivided interest in the property, each have full rights to occupy and use the property, and each have a right of survivorship in the property, so that upon the death of one of the spouses, the survivor is entitled to the decedent's share.

3. Evaluating Real Property Survivorship Features. Several considerations must be

[78] *Id.*

[79] *Id.* at § 114.103(a)(1).

[80] *Id.* at § 114.103(a)(2).

[81] *See id.* at § 255.153.

[82] *Id.* at § 114.103(a)(3).

[83] *Id.* at § 114.104(a).

[84] *Id.* at § 114.104(b).

[85] *Id.* at § 114.106(a).

[86] *Id.* at § 114.106(c).

[87] States that recognize tenancy by the entirety include Alaska (ALASKA STAT. § 34.15.140), Arkansas (*See Ford v. Felts*, 624 S.W.2d 449 (Ark. Ct. App. 1991)), Delaware (*See Citizens Sav. Bank, Inc. v. Astrin*, 61 A.2d 419 (Del. Super. Ct. 1948)), Florida (FLA. STAT. § 655.79), Hawaii (HAW. REV. STAT. § 509-2), Illinois (ILL. COMP. STAT. 65/22), Indiana (IND. CODE ANN. § 32-17-3-1), Kentucky (KY. REV. STAT. ANN. § 381.050), Maryland (MD. REAL PROP. CODE ANN. § 4-108); Massachusetts (MASS. ANN. LAWS ch. 209 § 1); Michigan (*See Butler v. Butler*, 332 N.W.2d 488 (Mich. Ct. App. 1983)), Mississippi (MISS. CODE ANN. § 89-1-7), Missouri (MO. REV. STAT. § 442.025); New Jersey (N.J. STAT. ANN § 46:3-17.4), New York (NY CLS REAL PROP. §240-b), North Carolina (N.C. GEN. STAT. § 39-13.3), Ohio (OHIO REV. CODE ANN. § 5302.21, *See Cent. Benefits Mut. Ins. Co. v. Ris Adam'Rs Agency*, 637 N.E.2d 291 (Ohio 1994)), Oklahoma (OKLA. STAT. tit. 60 § 74), Oregon (OR. REV. STAT § 91.020) Pennsylvania (69 PA. STAT. ANN. § 541), Rhode Island (*See Bloomfield v. Brown*, 25 A.2d 354 (R.I. 1942)), Tennessee (TENN. CODE ANN. § 66-1-109), Vermont (VT. STAT. ANN. tit. 15 § 67), Virginia (*See Rogers v. Rogers*, 512 S.E.2d 821 (Va. 1999)), Wyoming (WYO. STAT. ANN. § 34-1-140), and the District of Columbia (*See Travis v. Benson,* 360 A.2d 506 (D.C. 1976)).

made when advising clients regarding real property subject to a transfer on death deed, held in tenancy by the entirety, or with other survivorship features. For clients with estate tax or other trust planning in their Wills or revocable trusts, the inclination may be to change how the property is held so that no survivorship feature exists. However, tax advantages and trust protections must be weighed against the benefits of holding real property in a manner that provides a survivorship feature. If ownership of the real property would require a costly and cumbersome probate procedure in the state where the property is located, the client's interests may best be served by maintaining the survivorship feature to avoid probate. Additionally, under a tenancy by the entirety, it is typical that creditors of an individual spouse may not attach and sell the interest of a debtor spouse: only creditors of the couple may attach and sell the interest in the property owned by tenancy by the entirety. If the client has concerns about creditors, it may be prudent for the real property to be maintained in tenancy by the entirety.

If it is ultimately determined that changing the way that real property is held in order to eliminate survivorship features is the best course of action, generally a filing must be made in the real property records where the property is located to reflect the change. The requirements of such a filing in the jurisdiction where the property is located should be researched, and a deed or other document should be prepared and filed accordingly. If local counsel does not prepare the document, local counsel should at least review the document before it is filed.

**D. Motor Vehicles Held with Survivorship Features.** It is now relatively easy to pass title to a Texas vehicle in a nontestamentary manner. The Texas Department of Motor Vehicles has promulgated forms that can be used to create rights of survivorship between joint owners or to transfer a motor vehicle to a beneficiary on the owner's death.

1. Rights of Survivorship. If a vehicle is titled in Texas in the names of multiple owners, the bottom section of the title contains an agreement that can be signed and dated by the co-owners to create rights of survivorship between them.[88] If that portion of the title is completed and signed, the parties agree that the ownership of the vehicle described in the title shall from that day forward be held jointly, and in the event of death of any of the persons named, the ownership of the vehicle shall vest in the survivor(s).

If the vehicle is not titled or registered in the names of all persons who intend to own the vehicle jointly with rights of survivorship, then rights of survivorship may also be created by the completion of a Texas Department of Motor Vehicles Form VTR-122, Rights of Survivorship Ownership Agreement for a Motor Vehicle. Upon completion of the Form VTR-122, two options are available.

A "Survivorship Rights" remark can be placed on the title by submitting the completed Form VTR-122 with a Texas Department of Motor Vehicles Form 130-U, Application for Texas Title and/or Registration, to a county tax assessor-collector's office. In addition to the remark, up to two names can be printed as survivors on the Texas title. If there are more than two survivors, "Multiple Survivors" is printed. After the death of any of the persons named in the agreement, the survivor(s) may obtain a new Texas title by submitting a new Form 130-U in the name of the survivor(s) supported by a copy of the deceased person(s) death certificate.

Alternatively, the original Form VTR-122 can be retained, and after death of any person(s) named in the agreement, the survivor(s) may obtain a new title by submitting a new Form 130-U in the name of the survivor(s), the original completed form VTR-122, and a copy of the death certificate of the deceased party.

A rights of survivorship agreement may be revoked only if the persons named in the agreement file a joint application for a new title in the name of the person or persons designated in the application.[89] Accordingly, if a Texas title reflects a "Survivorship Rights" remark, a new Form 130-U and the Texas title signed by all individuals listed on the Rights of Survivorship agreement must be submitted to a county tax assessor collector's office to remove the remark and issue a new Texas title in the owners' names without the remark.

2. Beneficiary Designation. Prior to 2017, the non-probate transfer of vehicles was only available to parties who owned the vehicle jointly during life. However, in 2017 it also became possible for the owner of a motor vehicle to transfer the owner's interest to a sole beneficiary at the owner's death by designating a beneficiary as provided by Section 501.0315 of the Texas Transportation Code.[90] If a motor vehicle that is the subject of a beneficiary designation is owned by joint owners with right of

[88] This survivorship agreement on the title is mandated by Texas Transportation Code Section 501.031(a).

[89] TEX. TRANS. CODE § 501.031(d).

[90] TEX. ESTS. CODE § 115.002(a).

survivorship, the beneficiary designation must be made by all of the joint owners. [91]

The beneficiary designation can be made by completing a Texas Department of Motor Vehicles Form VTR-121. Unlike the Form VTR-122 creating rights of survivorship, the beneficiary designation on a Form VTR-121 is not effective if it is held until after the owner's death. The Texas Transportation Code specifically provides that a beneficiary designation or a change or revocation of a beneficiary designation made on an application for title of a motor vehicle that has not been submitted to the department before the death of a vehicle's owner or owners who made, changed, or revoked the designation, as applicable, is invalid.[92] Accordingly, in order to effectively name a beneficiary, a Form VTR-121 and Form 130-U should be completed, and both forms, along with relevant title application fee, should be submitted to the county tax assessor-collector's office before the owner's death.

The beneficiary designation may be changed or revoked at any time without the consent of the designated beneficiary.[93] However, if the designation was made by joint owners with rights of survivorship, the beneficiary designation may only be revoked by all of the joint owners or by the last surviving joint owner.[94] To revoke or change a beneficiary designation, another Form VTR-121 form must be completed and submitted with a Form 130-U, the title application fee, and the current title.

During the lifetime of the owner of the motor vehicle, a beneficiary designation does not: (1) affect an interest or right of the owner or owners making the designation, including the right to transfer or encumber the motor vehicle that is the subject of the designation; (2) create a legal or equitable interest in favor of the designated beneficiary in the motor vehicle that is the subject of the designation, even if the beneficiary has actual or constructive notice of the designation; (3) affect an interest or right of a secured or unsecured creditor or future creditor of the owner or owners making the designation, even if the creditor has actual or constructive notice of the designation; or (4) affect an owner's or the designated beneficiary's eligibility for any form of public assistance, subject to applicable federal law.[95]

At the death of the owner of the motor vehicle, the beneficiary must submit a Form 130-U not later than the 180th day after the date of the owner's death or, if the vehicle is owned by joint owners, the last surviving owner's death, as applicable, along with the death certificate of the owner(s).[96]

3. Evaluating Motor Vehicle Survivorship Features. Even without survivorsip features, in Texas the transfer of a vehicle after death is relatively simple. However, in circumstances in which the client knows the person to whom he or she would like the vehicle to pass (e.g., the surviving spouse or a child who uses the vehicle), the foregoing nontestamentary transfers are useful. Generally the value of a vehicle makes up a relatively insignificant portion of the owner's estate, and testamentary transfers of vehicles are typically made outright. Accordingly, having the vehicle pass via right of survivorship or beneficiary designation will generally not thwart the estate plan. Additionally, the joint owner or beneficiary will be able to transfer title as soon as the death certificates are available, and will not have to wait for the probate process or rely on the personal representative to complete the paperwork necessary to transfer title.

## V. ESTATE PLANNING THROUGH A REVOCABLE TRUST

A discussion about non-probate assets would be incomplete without addressing revocable trusts. Technically, any trust that can be revoked is a revocable trust. However, in the context of estate planning, revocable trusts are often used as Will substitutes where a client's assets are transferred to the trust during his or her lifetime and the terms of the trust instrument dictate the passage of assets at the client's death. Because of the availability of independent administration in Texas, estate planning through revocable trusts is much less common here than in other jurisdictions where probate is more cumbersome and costly. Nevertheless, revocable trust planning can still be beneficial to many clients.

**A. Determining the Advisability of Revocable Trust Planning.** The determination regarding whether a revocable trust is an appropriate estate planning tool will be made on a case-by-case basis. The benefits of revocable trust planning should be considered and weighed against the additional cost and administrative efforts of transferring assets to the trust based on each client's particular needs.

[91] *Id*. at §115.003(a).

[92] TEX. TRANS. CODE § 501.0315(e).

[93] TEX. ESTS. CODE §115.002(b)(1).

[94] *Id*. at §115.003(b).

[95] *Id*. at §115.004.

[96] TEX. TRANS. CODE § 501.0315(d).

1. Probate Avoidance. If a revocable trust is fully funded with all of the client's probate-type assets during the client's lifetime, it will not be necessary for the decedent's estate to go through the probate process. In Texas this may not be a driving factor, but in other jurisdictions probate can be an expensive and cumbersome proposition. Real property owned by a Texas resident in another state may be subject to ancillary estate administration in that state if it is not held with survivorship features. Accordingly, if a Texas client has real property in another jurisdiction in which probate is undesirable, a revocable trust can be an effective tool to avoid the ancillary probate. Similarly, for mobile clients who are based in Texas but move frequently, implementing estate planning through a revocable trust can minimize the need for an overhauled estate plan after each move.

2. Privacy. The desire for privacy is also frequently cited as a reason for revocable trust planning. Once filed for probate, a Will becomes public record, and is often immediately available for viewing by anyone who has access to a computer. In contrast, a revocable trust remains private with respect to uninterested parties. Even if a pour-over Will is used to fund the trust post-death, the revocable trust should not be part of the probate record.

If a decedent's estate is probated, the personal representative of the estate must prepare a detailed inventory of all estate property.[97] The default rule is that the inventory must be filed with the with the court, and many clients and beneficiaries balk at the idea of such personal information being public record. However, since 2011, it has been possible for a personal representative to avoid filing the inventory in Texas. In an independent administration, if there are no unpaid debts (other than secured debts, taxes, and administration expenses) at the time the inventory is due, then instead of filing the inventory itself, an independent executor may provide each of the beneficiaries of the estate with a copy of the inventory and file an affidavit with the court stating that the inventory has been prepared, there are no unpaid debts, and the inventory has been provided to the beneficiaries.[98] If a beneficiary is only entitled to receive gifts with an aggregate value of $2,000 or less, has received all of the amounts to which the beneficiary is entitled to the Will, or has waived the right to receive the inventory, then the inventory does not have to be provided to the beneficiary before an affidavit in lieu of inventory is filed.[99] The availability of the affidavit in lieu of inventory has alleviated some privacy concerns, but it is not always available (e.g., if the personal representative is still negotiating with creditors at the time the inventory is due). Accordingly, revocable trust planning remains the best method to ensure privacy.

3. Immediate Access to Assets at Grantor's Death. If a decedent's estate must be probated, another detriment is that often there is some period of time after the decedent's death during which the decedent's assets cannot be accessed to pay debts or expenses or to be distributed to the beneficiaries. Even with respect to joint accounts, once the financial institution learns of the decedent's death, the entire account may be frozen, and the surviving spouse or other co-owner may not be able to access his or her own funds until a personal representative is appointed. Once an application to probate a Will has been filed with the court, a hearing may not be held for at least 10 days.[100] Even after that statutory waiting period has lapsed, it can take weeks or even months before the court has availability for the hearing. However, if assets are held in a revocable trust, then at the decedent's death the assts of the trust remain available to the trustee or become immediately available to the successor trustee of the trust.

4. Reducing Risk of Contest. If the client has concerns that the estate plan may be contested, a fully funded revocable trust may offer better protection than planning through a Will. Although a revocable trust can be contested on similar grounds to a Will, it may be more difficult for a disgruntled family member or other party to prove they have standing to challenge the trust. It may also be more difficult to allege lack of capacity or undue influence if the trust is administered for a long period of time before the grantor's death. Additionally, since a revocable trust does not have to be filed at the decedent's death like a Will does, a potential claimant may not ever be put on notice that the trust exists or become aware of the terms of the trust.

5. Management Vehicle on Incapacity. Planning through a revocable trust may also be a good option if a client has early signs or incapacity or simply would rather have someone else manage his or her financial affairs. In that case, a revocable trust that has been funded can serve as an effective management vehicle and can avoid the need for a court created guardianship. Even if the client has executed a power of attorney naming an agent to manage his or her affairs, it is often easier for a trustee

[97] TEXAS ESTS. CODE § 309.051(a).

[98] *Id*. at § 309.056(a).

[99] *Id*. at § 309.056(b-1).

[100] *See id*. at § 51.053(b).

to access and manage property than an agent acting under a power of attorney.

**B. Funding a Revocable Trust.** If it has been determined that revocable trust planning is appropriate for the client, the next steps are determining which assets will be funded into the revocable trust and making the appropriate transfers. Of course, probate can only be avoided if all of the client's probate-type assets are funded into the trust before the client's death. Transferring some assets into the trust may not pose a problem. However, other assets may require deeper consideration.

1. Transfer of Real Property. Several issues that are unique to real property must be evaluated in connection with transfer of the property to a revocable trust.

a. Homestead Issues. In Texas, homesteads are afforded with special treatment. Subject to some exceptions, the Property Code provides that homesteads are exempt from seizure or forced sale for the claims of creditors or debts.[101] Additionally, Section 11.13 of the Texas Tax Code provides for a property tax reduction for a homestead. In order for property held in trust to qualify for this treatment, both the Texas Property Code and the Texas Tax Code require that the trust be a "qualifying trust."[102] However, the definitions of a "qualifying trust" differ slightly in each of those statutes.

Under the Property Code, in order for a trust to be a "qualifying trust," the instrument or court order creating the trust must provide that the grantor or beneficiary has the right to (1) revoke the trust without consent of another person; (2) exercise an inter vivos general power of appointment over the property that qualifies as the homestead; or (3) use and occupy the residential property as the grantor's or beneficiary's principal residence at no cost other than the payment of taxes and other costs and expenses specified in the trust agreement for (i) the life of the grantor or beneficiary; (ii) for a term of years specified in the trust agreement; or (iii) until the trust is revoked by an instrument recorded in the real property records which sufficiently describes the property.[103]

The Tax Code provides that a qualifying trust is a trust in which the agreement, will, or court order creating the trust, an instrument transferring property to the trust, or any other agreement that is binding on the trustee, grants the grantor or beneficiary of the trust the right to use and occupy the grantor's or beneficiary's principal residence rent free and without charge except for taxes and other costs and expenses specified in the instrument or court order.[104]

Recently there has been a flurry of discussion on this particular topic because of a 2019 bankruptcy case. The San Antonio bankruptcy court in *In re Cyr* held that a home owned by a trust was not protected from creditors under the Property Code because the language in the trust instrument allowing the debtor to live in the home "rent free and without charge," which followed the language in the Tax Code, was not the same as providing that the debtor could live there "at no cost," which is the phrase used in the Texas Property Code.[105]

However, the debtor subsequently appealed to the district court. The district court reversed the bankruptcy court after determining that "rent free and without charge" meant the same thing as "at no cost," and that as a result, the homestead was exempt from creditor claims in the bankruptcy.[106]

During the 2021 legislative session, the Real Estate, Probate & Trust Law Section of the State Bar of Texas ("REPTL") included a proposal in its trust bill for a revision to Texas Property Code Section 41.0021 in response to *In re Cyr.* Despite the fact that *In re Cyr* was reversed, REPTL's change sought to eliminate any future argument by adding "or rent free and without charge" following "at no cost" to the Property Code provision. Unfortunately, as with many other bills in the session, REPTL's trust bill did not make it through.

If a homestead is being transferred to a revocable trust, it is imperative to make sure that the trust agreement contains language necessary to make it a "qualifying trust" under the Tax Code and Property Code. Providing that the grantor may use and occupy the principal residence "at no cost, or rent free and without charge" should assure that status.

b. Mortgage Issues. If the real property being transferred to the trust is encumbered by debt, practitioners should be mindful of due-on-sale clauses, which are provisions in loan documents that allow a lender to accelerate the note if the property is transferred by the borrower to a third party. With respect to a loan secured by a lien on residential real

[101] *See* TEX. CONST. Art XVI § 50; TEX. PROP. CODE § 41.001.

[102] TEX. PROP CODE 41.0021(a), TEX. TAX. CODE § 11.13(a) and (j).

[103] TEX. PROP CODE 41.0021(a).

[104] TEX. TAX. CODE § 11.13(j)(3).

[105] *In re Cyr*, 605 B.R. 784 (W.D. Tex. 2019).

[106] *Cyr v. SNH NS MTG Props. 2 Tr.*, No. SA:19-CV-0911-JKP (W.D. Tex. Nov. 30, 2020).

property containing less than five dwelling units, however, federal law prohibits a lender from exercising its option pursuant to a due-on-sale clause upon certain transfers.[107] The exemptions from due-on-sale clauses include a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.[108] As a result, the transfer to a revocable trust of a client's homestead and any other residential real property with less than five dwelling units should not result in the exercise of a due-on-sale clause.

If real property being transferred to the trust is subject to a due-on-sale clause and the transfer is not covered by a federal exemption, consent from the lender should be obtained before the property is transferred. Although lenders may give verbal confirmation that a due-on-sale clause will not be exercised, it is always best practice to obtain a written agreement to that effect. The agreement can be a simple document in which the lender acknowledges the existence of the due-on-sale clause but agrees that the clause will not be exercised as a result of the contemplated transfer. Because some lenders may still attempt to enforce the due-on-sale clause even if the property is subject to a federal exemption, it may be helpful to at least have a discussion with the lender before the transfer to make sure the lender understands the structure of the transfer and to confirm there will not be an issue.

If a lender insists that a due-on-sale clause will be triggered on transfer, the client can choose to wait until the mortgage is paid or the loan is refinanced to make the transfer. If the client is concerned about continuing to own the property outright for a period of time, a transfer on death deed can be signed with respect to the property, providing that at the death of the client the property will pass to the trustee of the revocable trust.

c. Property Outside of Texas. If the client owns real property outside of Texas, local counsel should be consulted to identify any issues that may arise as the result of the transfer of the property to a revocable trust, and if appropriate, to assist with the preparation of the transfer documents. In states in which a state inheritance or estate tax is imposed, while transferring real property to a revocable trust may avoid the need for probate in that state, it may not avoid the imposition of state inheritance or estate tax. In that event, it might be more advantageous to first transfer the property to an entity such as an LLC, and then transfer the LLC interest to the revocable trust.

[107] 12 U.S.C. § 1701j-3(d).

[108] *Id.*

d. Method of Transfer. Real property located in Texas can be transferred to the revocable trust by deed. A "deed" is a written instrument, duly executed and delivered, conveying real property from one party to another.[109] No particular form is required to convey title to land. Under the Texas Property Code, the only requirements for a deed are that it be in writing, be signed by the grantor, and be delivered to the grantee.[110] If the intention to pass the title can be inferred, the courts will give effect to it, and construe the words accordingly.[111] However, a deed must accurately describe the property being conveyed, and will be void if it fails to furnish the means of determining with reasonable certainty the land intended to be covered by it.[112]

There are several types of deeds that are commonly used in Texas. The differences between the deeds generally relate to what type of warranty the transferor is giving the transferee with respect to title to the property. Texas Property Code Section 5.022(b) expressly states that a covenant of warranty is not required in a conveyance, but nonetheless warranties are commonly made in deeds. Whether the deed contains a general warranty, special warranty, or no warranty, the actual conveyance itself is not affected.[113] The warranty does not constitute a part of the conveyance nor strengthen or enlarge the title conveyed.[114] Rather, a warranty is a covenant by the grantor that if there is some defect in the title to the property, the grantor will assume liability for the loss to the grantee to the extent provided in the warranty.

(1) General Warranty Deed. If a deed contains a general warranty, it is an absolute guarantee that clear title exists as to the complete chain of title, all the way back to the inception of title from the sovereign (i.e., the State of Texas). The covenant of a general warranty is a continuing obligation that runs with the land, meaning that it passes from one transferee to another as the land is transferred.[115] Accordingly, if any defect in title is later discovered, a

[109] *See Johnson v. Cherry*, 726 S.W.2d 4, 5 (Tex. 1987).

[110] *See* TEX. PROP. CODE § 5.021.

[111] *Harlowe v. Hudgins*, 19 S.W. 364, 365 (Tex. 1892).

[112] *Rubiolo v. Lytle*, 370 S.W.2d 202, 205 (Tex. App.—San Antonio 1963, writ ref'd n.r.e.), citing 19 Tex.Jur.2d 422, § 123.

[113] *Flanniken v. Neal*, 4 S.W. 212 (Tex. 1887).

[114] *City of Beaumont v. Moore*, 202 S.W.2d 448, 453 (Tex. 1947).

[115] *See Flanniken,* at 214.

grantor or the grantor's heirs or successors are liable to the grantee or any later owner of the property.[116]

Texas Property Code Section 5.002 provides a form for a general warranty deed, which contains the following language common in making the general warranty: "I do hereby bind myself, my heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said grantee, his heirs, and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof."

Because of the vast liability associated with a general warranty deed for defects in title potentially going back centuries, it is generally not advisable to use general warranty deeds to transfer property.

(2) Special Warranty Deed. A special warranty in a deed also guarantees good title to the property, but not back to the sovereignty. The warranty covers only the period of time during which the grantor owns the land.[117] The language of warranty in a special warranty deed is generally limited to defects in title arising "by, through, or under the grantor, but not otherwise." Because a special warranty deed restricts the grantor's liability to any defects in title that arose after the grantor acquired the property, it is generally preferable to a general warranty deed, and is the form that is generally best suited to the transfer of real property to a trust, as long as the client is confident that he or she has good title to the property.

(3) Deed Without Warranty. A deed without warranty is just what it sounds like- it does not contain any warranty of clear title. A disclaimer similar to the following is generally included: "This conveyance is made and accepted without warranty of title, whether statutory, expressed or implied and all such warranties are hereby excluded and waived."

Although this type of deed is not common, it may be used if uncertainty exists about grantor's title to the property. Because quitclaim deeds are generally viewed unfavorably in Texas, deeds without warranty may be used where quitclaim deeds might otherwise be used.

(4) Quitclaim Deed. A quitclaim deed operates to convey the grantor's title to the property, if any, as opposed to the conveyance of the property itself.[118] A grantor who executes a quitclaim deed may or may not have a valid interest in title or to the real property.

It has been held that a recipient of a quitclaim deed takes with notice of all defects in title and equities of third persons.[119] A party who acquires real property in which there is a quitclaim deed in the chain of title, however remote, cannot assert the protections that normally inure to the benefit of an innocent purchaser for value as against an adverse title, equity or secret trust existing at the time the quitclaim was executed.[120] For this reason, title companies generally dislike quitclaim deeds and may refuse to issue a title policy if a quitclaim deed is in the chain of title. Accordingly, a practitioner should be weary of advising a client to accept a quitclaim deed, which may result in a cloud on the client's title to the property, and a quitclaim deed should not be used to transfer property if it can be avoided.

(5) Recording of Deed. Once the deed has been prepared and signed by the grantor, it should be recorded in the real property records where the property is located. In order to record an instrument conveying real property, the instrument must be signed and acknowledged by the grantor in the presence of two or more credible subscribing witnesses or acknowledged before and certified by an officer authorized to take acknowledgements or oaths, as applicable.[121]

e. Actions After Transfer. After real property is transferred to a revocable trust, the client should ensure that any liability insurance covering the property is transferred to the revocable trust. With respect to a homestead transferred to a revocable trust, the client will also have to reapply with the taxing authority for the homestead exemption for property tax purposes. If mineral interests are transferred to the revocable trust, the issuance of new division orders will also likely be required.

f. Interests in Closely Held Businesses. A minefield of issues can arise when transferring closely held business interests. Accordingly, before any transfer is made, the entity's governing documents should be analyzed to identify any potential complications and to determine the requirements for an effective transfer. Some operating agreements will contain transfer restrictions prohibiting transfer of the interest, although in many cases exceptions to the restrictions will apply to transfers to trusts such as revocable trusts. Transfers may also trigger buyout, buy/sell, or other similar clauses. If

---

[116] *See id.*

[117] *See Owen v. Yocum*, 341 S.W.2d 709, 710 (Tex. App. – Ft. Worth 1960, no writ).

[118] *Cook v. Smith,* 174 S.W. 1094, 1095 (Tex. 1915).

[119] *Hall v. Tucker*, 414 S.W.2d 766, 769 (Tex. Civ. App. – Eastland 1967, ref., n.r.e.).

[120] *Houston Oil Co. of Tex. V. Niles*, 255 S.W. 604, 610 (Tex. Com. App. 1923).

[121] TEX. PROP. CODE § 12.001(b).

these types of issues exist, amendments to the governing documents may be necessary in connection with the transfer. Even if a transfer is permissible, it may be subject to approval by the partners, members, or management of the entity, or an opinion letter from attorney as to the tax or securities consequences may be required prior to a transfer being effective. While some of these requirements may be a mrere formality, it is important that they be followed.

2. Transfer of Other Assets. Other than the transfer of real property and closely held business intersts, in many cases clients can work independently to fund assets into the trust.

a. Bank Accounts. Cash or cash equivalents held in banks, credit unions, savings and loan associations, or other financial institutions should be transferred to new accounts in the name of the revocable trust. Although it generally advisable that accounts with large sums on deposit be transferred, the client may choose not to retitle one or two smaller accounts that are used for day to day expenditures or household expenses. Unless such an account is held with survivorship features, however, the account will be subject to probate at the client's death.

In most instances financial institutions will request a copy of the trust agreement when establishing accounts for the trust. Rather than providing a copy of the trust agreement, a certification of trust, outlining only the identity and powers of the trustee and other statutorily required provisions, but not the dispositive terms, can be proffered instead.[122]

If the client has other investments, such as certificates of deposit, with a financial institution, the client should communicate with the financial institution regarding whether the change from the client as an individual to the trustee of the revocable trust will adversely affect the interest being paid on the investment. If a penalty or a forfeiture of interest would be imposed because of the transfer, then to avoid financial loss the client can wait until the certificate matures and transfer the funds at that time.

b. Stocks and Bonds. With respect to stocks and bonds that are held in a brokerage account, the transfer will be handled much the same as for a bank account. For other publichly traded stocks or bonds, it will be becessary to work thorugh a stockbroker or transfer agent to effectuate the transfer.

With respect to stock in a privately held corporation, a stock power or other similar instructions should be provided to the company so that new stock certificates can be issued in the name of the trustee of the revocable trust.

c. Promissory Notes. If the client is the holder of a promissory note or debt instrument, the note can generally be endorsed over to the trustee of a revocable trust. However, if there are security documents associated with the note such as a deed of trust, the client should consult with an attorney regarding the apprpriate paperwork to be prepared and filed.

d. Retirement Accounts and Life Insurance. Retirement funds are typically not transferred into the revocable trust during the participant's lifetime. Likewise, there is no need to transfer the ownership of life insurance policies to the revocable trust while the insured is alive. However, the trust can be named as a primary or contingent beneficiary of these assets if appropriate. After weighing the considerations influencing the most appropriate disposition of non-probate assets (as discussed in Section II of this outline), a recommendation may be made that the trstuee of the revocable trust be named as a primary or contingent beneficairy of these types of assets.

e. Personal Effects and Collectibles. Generally we do not recommend a documented transfer of houshold goods and personal effects to a revocable trust during the client's lifetime. However, if the client owns an asset or collection of significant value (e.g., valuable artwork or a coin collection), then those items may be tranferred to the revocable trust through a bill of sale or specific assignment.

## VI. THE ATTORNEY'S ROLE

So what is the role of an attorney preparing a client's estate plan in all of this? How far must the attorney go to ensure that non-probate assets are properly coordinated with the estate plan? Certainly an attorney should ask about the client's assets and educate and advise clients regarding the disposition of non-probate assets. However, the extent of the attorney's actual participation in the activities required to coordinate non-probate assets should be determined by the individual attorney and his or her client and should be addressed in the engagement agreement between them.

**A. Gathering Information.** Before the initial meeting, if feasible, or during the initial meeting, the attorney should gather as much information as possible regarding the client's assets in order to identify each non-probate asset. A helpful way to request this information is to ask that a client complete a data-gathering form. The data-gathering form can request

[122] *See* TEX. PROP. CODE § 114.086.

personal information about the client, the client's family, and others who may be involved in the client's estate plan, and any other information that will help the attorney to better understand the client's goals regarding disposition of his or her estate. The data-gathering form should also request information about the client's assets which will assist the attorney in identifying any non-probate assets. An example of the portion of a data-gathering form relating to the client's assets is attached hereto as "Exhibit C."

To avoid overwhelming clients with requests for information, the sample excerpt is not designed to gather all of the information that the attorney will need to evaluate and coordinate each non-probate asset. Rather, the sample form requests just enough information to alert the attorney that a certain type of non-probate asset exists (e.g., the client owns life insurance on his or her life). During the initial meeting, the attorney can gather additional information about each non-probate asset that will be required when advising clients about coordinating those assets with the overall estate plan (e.g., How many life insurance policies are there, and in what amounts? Are the policies term or whole life policies? Are they provided by the client's employer, which may rise to federal law issues? Who are the named beneficiaries of each policy?).

In addition to requesting information about the client's assets, a data-gathering form should inquire about circumstances which may influence the way non-probate assets are handled. For example, if the client has been divorced, a divorce decree or agreement incident to divorce may subject the client to an ongoing obligation to a former spouse, or may direct that the client hold life insurance naming the former spouse as a beneficiary. A client may be subject to a buy-sell agreement that requires the ownership of life insurance. It is important to identify each source of such an obligation and review the document imposing the obligation.

**B. <u>Educating the Client about Non-Probate Assets</u>**. Even if a client has completed a beneficiary designation form with regard to a non-probate asset, he or she may not understand that signing a Will or revocable trust does not direct the disposition of all of his or her assets.

The attorney must take the time to educate the client regarding what assets in his or her estate are non-probate assets, the considerations that are involved in directing the disposition of those assets, and the practical steps for coordinating non-probate assets with the overall estate plan.

**C. <u>Participation in Coordination of Non-Probate Assets.</u>** The engagement agreement between the attorney and client should make clear whether the active coordination of non-probate assets (such as completing beneficiary designation forms or drafting documents to transfer assets to a revocable trust) is included in the engagement, or whether it will be undertaken by the attorney only at the explicit request of the client. Our firm's typical engagement agreement states that we will assist the client with the preparation of beneficiary designation forms for their non-probate assets only to the extent that they request us to do so. If the fee quoted for preparing estate planning is a "fixed fee," the agreement explicitly states that the fixed fee will not cover drafting or reviewing actual beneficiary designations, but that if such a service is requested, additional fees will be charged based on our standard hourly fees. Any work done in connection with funding a revocable trust is generally handled similarly.

If the attorney is engaged to complete or review beneficiary designation forms and otherwise actively coordinate non-probate assets, the attorney should communicate with the client regarding the extent of his or her participation. For example, the attorney should either commit to following up with each sponsoring company to ensure that beneficiary designations have been changed as requested, or should advise the client that the client will be responsible for doing so.

If a client has a relationship with a financial advisor or financial planner, it is often helpful to take a team approach to coordination of non-probate assets. Often, the financial advisor will have direct access to financial institutions and will be familiar with the forms and paperwork required. If the client consents, the attorney should communicate with the financial advisor so that he or she can take an active role.

**D. <u>Providing Clients with Tools to Coordinate Non-Probate Assets</u>**. Regardless of whether or not a client requests that the attorney assist with the active coordination of non-probate assets, the attorney should provide clients the necessary tools to coordinate non-probate assets on their own to the extent possible. After clients leave our offices, their assets seldom remain static. For example, a client may acquire new life insurance polices, roll over an employer-sponsored retirement plan to an IRA, or inherit an IRA. In those situations, it is helpful for clients to have a clear set of instructions regarding how to handle the paperwork involved in coordinating those assets with their estate plan.

During the initial meeting and when drafts of estate planning documents are sent to our clients, we advise

them that they should begin gathering beneficiary designation forms and checking accounts for survivorship designations. If the estate plan includes a revocable trust, we remind them that all non-probate assets will need to be transferred to the trust in order to avoid probate, and ask for them to begin collecting documents such as deeds, partnership agreements, etc. When clients come to our office to sign their estate planning documents, we provide them with a memorandum regarding the coordination of non-probate assets with their estate plan. The memorandum contains some of the information set out in this outline, including what constitutes a non-probate asset, steps to follow, sample language to be used on beneficiary designation forms, and tips for troubleshooting issues that sometime arise in connection with changing the beneficiary designations. If necessary, included with the memorandum is a chart specific to the client showing recommended beneficiary designations. Examples of charts that may be provided to clients who are married and who have employed "disclaimer bypass" trusts or typical tax planned trusts in their Wills are attached as "Exhibit D" and "Exhibit E," respectively. Charts such as these should not be generic, but rather should be tailored to meet each client's needs.

We also provide a Frequently Asked Questions document regarding titling accounts which explains rights of survivorship, P.O.D. and T.O.D. designations, and their implications. Included with the FAQ for the client's use if necessary is the sample letter attached as "Exhibit A" instructing a financial institution to remove survivorship provisions.

Lastly, if the client's estate plan includes a revocable trust, a memorandum is provided regarding funding the trust, which includes information about how title should be taken, information about how to transfer assets, and requests that the client consult with us in certain situations to identify issues associated with the funding.

Providing these written recommendations and instructions to the client is a best practice for an estate planning attorney. Although preparation of the written material and tailoring the material for each client takes time, it provides untold additional value, and our clients are always extremely appreciative of the effort.

## VII. POST-MORTEM REMEDIES IF NON-PROBATE ASSETS ARE NOT CORRECTLY COORDINATED

Hopefully, at a person's death, all of his or her non-probate assets will have been perfectly coordinated with his or her overall estate plan. However, many times, this will not be the case. If at a person's death, his or her non-probate assets have not been correctly coordinated with the estate plan, there are a few post-mortem actions that can be taken to remedy the situation.

**A. Scrutinize Account Agreements.** If a multi-party account is at issue, the account agreement or signature card governing the account should be scrutinized. As mentioned above, although the Texas Estates Code provides a uniform account form, experience shows that many financial institutions do not use the specific language provided. As a result, the language on the account agreement or signature card may be insufficient to create a right of survivorship.

If that is the case, the decedent's portion of the account may pass as part of the decedent's probate estate. The personal representative may contact the financial institution to collect the assets and explain to the proper representative of the financial institution (generally in the legal department) that the account agreement or signature card does not create a right of survivorship. I have had several experiences with smaller, local banks in which the banks have conceded that the language on their form was not sufficient to create a right of survivorship under Texas law and have acknowledged the estate's ownership. However, some financial institutions are not as easy to reason with. In those circumstances, if the other party to the account understands the law and receives the decedent's portion of the account from the financial institution, then upon receipt, that party may deliver the funds or assets to the personal representative of the estate as the proper owner.

**B. Consider Disclaimers.** If a person is the proper recipient of a non-probate asset (as a result of a right of survivorship, beneficiary designation, or otherwise), he or she may have an option to disclaim (i.e., renounce) his or her right to receive the property or any portion of the property.

If an asset or any portion of an asset is disclaimed, it will pass as if the disclaiming party predeceased the decedent. Accordingly, before disclaimer is recommended, a determination should be made regarding what would happen and who would receive the disclaimed asset as a result of the disclaimer. Successive disclaimers might need to be made by multiple parties if necessary to obtain the desired disposition of the property.

A disclaimer is a complete renunciation of property and to be valid in Texas must be made in accordance with Chapter 240 of the Texas Property Code. For the disclaimer to be a qualified disclaimer pursuant to

federal law, the disclaimer must also be made in accordance with Section 2518 of the Internal Revenue Code. Prior to 2015, the Texas disclaimer rules were largely based on federal tax law. However, in 2015 Texas adopted a version of the Uniform Disclaimer of Property Interests Act, which replaced the prior disclaimer statutes in the Texas Estates Code and Texas Property Code. The Texas disclaimer laws are now significantly different then the federal disclaimer laws, so each should be reviewed at the time of disclaimer to ensure full compliance with both.

Texas Property Code Section 240.009 provides that to be effective, a disclaimer must:

1. Be in writing;

2. Declare the disclaimer;

3. Describe the interest or power disclaimed;

4. Be signed by the person making the disclaimer; and

5. Be delivered or filed in the manner provided by Subchapter C of Chapter 240.

For a disclaimer to be qualified under Section 2518 of the Internal Revenue Code, the following requirements must be met.

1. The disclaimer must be in writing.[123]

2. It must be received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than 9 months after the day on which the transfer creating the interest is made.[124] If the disclaimant is receiving non-probate property as a result of a person's death, the date of the transfer creating the interest is generally the decedent's date of death.

3. The disclaimant must not have previously accepted the interest or any of the benefits of the property.[125]

4. The disclaimed property must generally pass in a manner that the disclaiming party will not benefit from the property.[126] An important exception to this rule, however, permits the surviving spouse to disclaim property and still retain benefits from a trust into which the property may pass.[127]

5. The disclaimed property must pass without direction or control of the disclaiming party.[128] This requirement may prevent a disclaimant from serving as a trustee of any trust into which the assets are disclaimed, unless the trustee's powers are appropriately restricted. If the trust contains unduly broad powers, other family members or a professional trustee may serve as trustee.[129] This restriction also prevents a trust beneficiary from retaining a power of appointment over the trust property.

**C. <u>Equalization by Beneficiaries</u>.** A recipient of a non-probate asset may be altruistic enough to voluntarily distribute the proceeds of the asset among others if he or she believes that was the decedent's intent. Similarly, if there are debts, expenses, or taxes payable by the estate, the recipient may desire to pay his or her "share." While the recipient's goodwill may be utilized to effectuate the decedent's intent, people who desire to take such equalizing actions should be aware of gift tax consequences that may arise as a result.

If any amount is given outright to another person, it will be a gift from the original recipient for federal gift tax purposes.[130] If debts, expenses, or taxes are paid by the original recipient that he or she is not obligated to pay, the amount paid will be deemed to be a gift to the people from whose share the amounts should have been paid.

The federal transfer tax system imposes a tax on the right to transfer assets by gift.[131] Annual gifts of up to $15,000 per donee can be made without any gift tax consequences and without the necessity to file a federal gift tax return.[132] This $15,000-per-donee amount is referred to as the "annual exclusion." However, if the amount given to any one donee is in excess of the annual exclusion, the donor will be required to file a federal gift tax return and the amounts given in excess

[123] I.R.C. § 2518(b)(1).

[124] *Id.* § 2518(b)(2). If the person receiving the interest is under the age of 21 at the decedent's death, the disclaimer must be made within 9 months of the day on which such person attains age 21.

[125] *Id.* § 2518(b)(3).

[126] *See id.* § 2518(b)(4).

[127] *See id.*, Treas. Reg. §§ 25.2518-2(e)(5) Examples (4)-(6).

[128] I.R.C. § 2518(b)(4).

[129] *See* Treas. Reg. §§ 25.2518-2(e)(2), (e)(5) Examples (4)-(6).

[130] Note that the use of a disclaimer to equalize is not considered a gift by the disclaimant as long as it is a qualified disclaimer under federal law.

[131] I.R.C. § 2501(a)(1).

[132] *Id.* § 2503(b). While the Internal Revenue Code states that the annual exclusion is $10,000 per donor per donee per year, the Taxpayer Relief Act of 1997 provides for an inflation adjustment of this amount beginning in 1999, with the adjustment rounded to the next lowest $1,000.

of the annual exclusion will reduce the person's lifetime gift tax exemption ($11,700,000 for 2021[133]), or, if the lifetime Gift Tax exemption has been used, the amounts will be subject to gift tax with a top marginal rate of 40%.

## VIII. CONCLUSION

The best result can be achieved for our clients when clients coordinate their non-probate assets with their overall estate plan. An attorney advising clients in this area should be knowledgeable about the myriad of issues and considerations associated with non-probate assets and should be able to identify clients' non-probate assets and educate clients regarding those assets.

Additionally, the attorney should put into place purposeful policies and practices in order to facilitate the collection of information about clients' non-probate assets, to set clear guidelines regarding responsibilities for coordination of non-probate assets, and to ensure best practices in the practical actions involved in coordination of the non-probate assets if they are engaged to do so.

If non-probate assets are not properly coordinated, there are some post-mortem actions that can be taken in an attempt to align the non-probate assets with the overall estate plan. However, these post-death fixes are not always available, and the best result will be achieved if the disposition of non-probate assets is carefully considered and coordinated in connection with the estate plan at the outset.

[133] This amount is subject to an inflation adjustment each year through 2025, when it will return to $5,000,000 (indexed for inflation beginning in 2011).

**Exhibit A**
**Written Order Pursuant to Texas Estates Code Section 113.157**

[Date]

**CM-RRR #____________________________**
To: ________________________________
________________________________
________________________________
________________________________

Re: Account Number ____________________________________
Styled "____________________________________________"

Dear Sir or Madam:

Section 113.157 of the Texas Estates Code allows any party to an account to contact a financial institution to advise them that the account is not to be held in the form of joint tenants with right of survivorship. For estate planning purposes, it is important that the referenced account not include any right of survivorship; rather, on the death of either one of us, we intend that his or her interest in the account should pass to his or her estate, not to the survivor.

Therefore, this letter constitutes notice and a written order to you that the referenced account shall ***not*** pass by right of survivorship to the survivor of us (or to anyone else) upon the death of the first of us to die. Please immediately update your records to reflect this change.

_______________________________________

_______________________________________

**Exhibit B**
**Letter Transmitting Beneficiary Designation Form**

[Date]

**CM-RRR #___________________________**
To: ______________________________
______________________________
______________________________
______________________________

Re: Beneficiary Designation Form
Account Number ___________________________________
Styled "__________________________________________"
SSN: ____________________________________________

Dear Sir or Madam:

Enclosed is an original Beneficiary Designation Form for the above referenced account, to be effective immediately. Please update your records to reflect these changes and provide written confirmation of same to me at the following address.

____________________________
____________________________
____________________________

If you have any questions regarding this matter, please feel free to contact me. Thank you for your attention to this matter.

_____________________________________

## Exhibit C
## Example of Excerpt from Data Gathering Form

Estimated Value of Your Estate

| | |
|---|---|
| $________________ | Real Estate (residence, rental property, land, vacation homes, etc.) |
| $________________ | Oil & gas interests |
| $________________ | 401(k), pension plans, annuities, IRAs |
| $________________ | Stocks/Bonds/Mutual Funds (not held in retirement accounts) |
| $________________ | Cash/Savings |
| $________________ | Household furnishings/personal effects/motor vehicles |
| $________________ | Life Insurance |
| $________________ | Business or partnership interests |
| $________________ | Other (Describe:________________________________________________) |
| $________________ | SUBTOTAL |
| $(______________) | Estimated Total Debts and Mortgages Owed |
| $________________ | TOTAL |

Do you own any property outside of Texas? If yes, please describe (location, type, how held).

Are either of you the creator or beneficiary of any trust? If yes, please describe (trust name, date, trustee, grantor).

If either of you have been married before, please furnish the following information as to each prior marriage:

1. Name of former spouse:
2. Date and place of marriage:
3. Date of termination of marriage and whether due to death or divorce:
4. If either of you are subject to an ongoing obligation in favor of a former spouse, please describe and provide a copy of the divorce decree or other document.

If either of you is a party to a buy-sell agreement with regard to any company, please describe and provide a copy of each agreement.

**Exhibit D**
**Example for Disclaimer Bypass Trust Planning including Disclaimer Bypass Trust and Descendant's Trusts**
**Suggested Life Insurance, Annuity, and Retirement Plan Beneficiary Designations**

| | | Primary Beneficiary | Contingent Beneficiary |
|---|---|---|---|
| Life insurance | on [Husband]'s life | "[Wife]" | The Trustee(s) named in insured's Will |
| | on [Wife]'s life | "[Husband]" | The Trustee(s) named in insured's Will |
| | | | |
| "Qualified" retirement plan benefits (IRA, 401(k), pension, thrift, profit-sharing, KEOGH, etc.) | relating to [Husband]'s employment | "[Wife]" | "The Trustee(s) named in the Will of [Husband]" |
| | relating to [Wife]'s employment | "[Husband]" | "The Trustee(s) named in the Will of [Wife]" |
| | | | |
| "Nonqualified" retirement plan benefits (including any "Rabbi Trust") | relating to [Husband]'s employment | "[Wife]" | The Trustee(s) named in the Will of [Husband] |
| | relating to [Wife]'s employment | "[Husband]" | The Trustee(s) named in the Will of [Wife] |
| | | | |
| Tax-deferred annuities | in [Husband]'s name | "[Wife]" | "The Trustee(s) named in the Will of [Husband]" |
| | in [Wife]'s name | "[Husband]" | "The Trustee(s) named in the Will of [Wife]" |
| | | | |
| Immediate annuities (i.e., non tax-deferred annuities) | in [Husband]'s name | "[Wife]" | The Trustee(s) named in the Will of [Husband] |
| | in [Wife]'s name | "[Husband]" | The Trustee(s) named in the Will of [Wife] |
| | | | |

**Exhibit E**
**Example for Typical Tax-Planned Wills including Marital, Bypass, and Descendant's Trusts**
**Suggested Life Insurance, Annuity, and Retirement Plan Beneficiary Designations**

| | | Primary Beneficiary | Contingent Beneficiary |
|---|---|---|---|
| Life insurance | on [Husband]'s life | "The Trustee(s) named in the Will of [Husband]" | None |
| | on [Wife]'s life | "The Trustee(s) named in the Will of [Wife]" | None |
| | | | |
| "Qualified" retirement plan Benefits (IRA, 401(k), pension, thrift, profit-sharing, KEOGH, etc.) | relating to [Husband]'s employment | "[Wife]" | "The Trustee(s) named in the Will of [Husband]" |
| | relating to [Wife]'s employment | "[Husband]" | "The Trustee(s) named in the Will of [Wife] " |
| | | | |
| "Nonqualified" retirement plan Benefits (including any "Rabbi Trust") | relating to [Husband]'s employment | "The Trustee(s) named in the Will of [Husband]" | None |
| | relating to [Wife]'s employment | "The Trustee(s) named in the Will of [Wife] " | None |
| | | | |
| Tax-deferred annuities | in [Husband]'s name | "[Wife]" | "The Trustee(s) named in the Will of [Husband]" |
| | in [Wife]'s name | "[Husband]" | "The Trustee(s) named in the Will of [Wife]" |
| | | | |
| Immediate annuities (i.e., non tax-deferred annuities) | in [Husband]'s name | "The Trustee(s) named in the Will of [Husband]" | None |
| | in [Wife]'s name | "The Trustee(s) named in the Will of [Wife]" | None |
| | | | |