



## LEGAL HOTLINE FOR TEXANS

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# HOW PROPERTY CAN BE OWNED IN TEXAS TO MINIMIZE THE NEED FOR PROBATE

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The pamphlets of the Legal Hotline for Texans are general in nature and should not be relied on as advice for your particular circumstances. For advice that is specific to your particular circumstances, you should consult a lawyer.

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The Legal Hotline for Texans (LHT) is a telephone hotline providing free legal advice and consultation and other free legal services to Texans Age 60 and Older or Eligible for Medicare; Crime Victims Age 60 and Older and their Family Members and Authorized Claimants; and Pension and Retirement Plan Employees, Participants and Beneficiaries.

Eligible Clients can consult with an attorney of the Legal Hotline for Texans free of charge by calling one of the phone numbers listed above. If clients would like to consult with an attorney in their communities, or if ongoing representation by an attorney is needed, the Legal Hotline for Texans may be able to make a referral.

Depending on individual circumstances and local availability, such a referral may be to an organization providing free attorneys to low income persons, or may be to an attorney on the Legal Hotline for Texans' reduced-fee panel, or may be to a statewide or local lawyer referral service.

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The Legal Hotline for Texans is a project of the Texas Legal Services Center with support from the Texas Department of Aging and Disability Services (DADS), the U.S. Centers for Medicare and Medicaid Services (CMS), the U.S. Administration on Aging (AoA), and the Texas Equal Access to Justice Foundation through the Texas Basic Civil Legal Services Program (BCLS) and the Texas Crime Victims Civil Legal Services Program (CVCLS).

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### Introduction

This pamphlet is one in a series. This particular pamphlet (#0405) discusses the methods of property ownership in Texas that can minimize the need for probate. Additional pamphlets discuss the various procedures for the transfer of property after death (#0406), the tax consequences that may arise when a person dies (#0407), and the duties of an independent executor (#0408).

The pamphlets of the Legal Hotline for Texans are general in nature and should not be relied on as advice for your particular circumstances. For advice that is specific to your particular circumstances, you should consult a lawyer. You can call the Legal Hotline for Texans, at 1-800-622-2520 (Travis County: 512-477-3950).

#### **1. How Property Can Be Owned in Texas To Minimize the Need for Probate**

In Texas, a person can own property - whether tangible or intangible, and whether personal property or real estate, in the form of separate property (especially if the person is single, and less likely, if the person is married) or community property. Title to property can be held as separate property, joint property, joint property with right or survivorship, payable on death property, life estates, insurance, annuities, community property, and community property with right of survivorship.

Community property, which will be discussed in greater detail later on, "consists of the property, other than separate property, acquired by either spouse during marriage." Texas Family Code § 3.002. Property possessed by either spouse during (or on dissolution of) marriage is presumed to be community property. Texas Family Code § 3.003. A spouse's separate property consists of the property owned or claimed by the spouse before marriage, the property acquired by the spouse during

marriage by gift, devise, or descent, and damages awarded to a spouse for personal injuries during marriage (but any recovery of damages for loss of earning capacity, during marriage, is community property). [Texas Family Code § 3.001](#).

It is important to keep in mind that when one spouse dies, the survivor already owns one-half of the community property. [Texas Probate Code § 45](#) provides as follows:

(a) On the intestate death of one of the spouses to a marriage, the community property estate of the deceased spouse passes to the surviving spouse if:

- (1) no child or other descendant of the deceased spouse survives the deceased spouse; or
- (2) all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse.

(b) On the intestate death of one of the spouses to a marriage, if a child or other descendant of the deceased spouse survives the deceased spouse and the child or descendant is not a child or descendant of the surviving spouse, one-half of the community estate is retained by the surviving spouse and the other one-half passes to the children or descendants of the deceased spouse. The descendants shall inherit only such portion of said property to which they would be entitled under [Section 43](#) of this code. In every case, the community estate passes charged with the debts against it.

The above section of law details how the deceased's interest in the community property will pass if a person died without a valid will. If the deceased had a valid will, the will controls how the deceased's one-half of the community estate will pass. If the community property is owned with right of survivorship, as discussed later on, the property will pass automatically to the surviving spouse upon the death of one spouse. If there are no surviving children or their descendants--if the deceased died without a will, and his or her share of the community property will pass entirely to the surviving spouse--no probate administration is necessary to transfer the deceased's share of the community property to the surviving spouse. [Texas Probate Code § 155](#).

Under [Texas Family Code § 4.001](#), persons who are going to be married can execute a written premarital agreement. Among other matters, such an agreement can specify that certain property will remain separate property, even after marriage. Any such agreement should be prepared with the assistance of an attorney. If such an agreement is not based on full disclosure of assets and liabilities, or is otherwise unfair, it can be set aside. After marriage, spouses can agree in writing to partition or exchange community property. Thereby, separate property may arise out of what was formerly community property. Also, spouses can agree that income or property arising from separate property will remain separate property.

In 1999 the voters approved an amendment to the Constitution that allows spouses to agree in writing that all or part of separate property owned by either or both of them shall be community property. These matters, again, are best handled with the assistance of an attorney.

Property that is separate property will descend according to the laws of "intestate succession" unless dealt with by will. The intestate succession laws of Texas are described in the brochure "To Will or Not to Will," prepared by the Texas Young Lawyers Association, which can be ordered from the Legal Hotline for Texans.

## **2. Joint Tenancy Property**

As indicated at the beginning of this section, persons can own property as "joint tenants" or as "joint tenants with right of survivorship." Property that is merely owned jointly--without explicit, written agreement that it is owned jointly with right of survivorship--does not automatically go to the surviving joint tenant. Rather, if the deceased had a will, the deceased's portion of the jointly owned

property will be distributed in accordance with the will. If the deceased did not have a will, and if the jointly owned property was not owned with right of survivorship, the deceased's share of the jointly owned property will pass in accordance with the above-mentioned law of intestate succession. Each joint tenant will own that portion of the joint account which he or she contributed to the account.

A very important means of minimizing probate, in the case of joint tenancy property, is to create a survivorship feature in such joint property. The Texas Probate Code states that: "...joint owners may agree in writing...that the interest of any joint owner who dies shall survive to the surviving joint owner or owners...." Texas Probate Code § 46. Note that this survivorship feature must be agreed to in writing between the joint owners. The mere fact that property is held in joint tenancy does not mean that the surviving joint tenant owns all of it upon the death of the other joint tenant. If there was not a written agreement for survivorship, then when one joint tenant dies and the other joint tenant survives, the survivor only owns automatically that portion of the joint property that is proportionate to his or her contribution to the joint property. What happens to the deceased joint tenant's portion depends on whether the deceased had a will and what its terms were. Of course, if the deceased did not have a will and if there was no written survivorship agreement, then the deceased's proportionate share of the joint tenancy property will be distributed in accordance with the law of intestate succession.

Therefore, a written agreement that an item or items of joint tenancy property will be owned with right of survivorship is one means of transferring property automatically to the surviving joint tenant, when the first joint tenant dies, without the need for probate. Where title to property specifically includes the names of the joint tenants and the words "with the right of survivorship," this is sufficient to show the existence of an agreement. As mentioned above spouses may partition community property and "convert" it to separate property. Also, spouses may hold property in joint tenancy with right of survivorship under Texas Probate Code § 46.

In regard to joint bank accounts, if it is written in the account that "On the death of one party to [this] joint account, all sums in the account on the date of death vest in and belong to the surviving party as his or her separate property and estate," then the surviving joint tenant(s) will own the account after the deceased of another party to the account. Texas Probate Code § 439.

Generally, while both (all) parties to a joint account are living, if the account is in the form of "A" and "B," then both A and B must sign to make withdrawals. Generally, while both (all) parties to a joint account are living, if the account is in the form of "A" or "B," then either A or B alone can make withdrawals. However, to make sure that these concepts apply in your particular bank, you should speak with an officer of the bank to determine if, in your bank, "and" requires both (all) parties to sign for withdrawals, whereas "or" allows either (any) party to make withdrawals.

One typical benefit to "and" accounts is this: If the other party is a trustworthy relative or other deeply trusted person, because an "and" account (in most banks) generally requires both (all) parties to sign for withdrawals, an "and" account can be a way of preventing scams whereby a person is conned into withdrawing their life savings and giving the money to a stranger. Since, in the usual case, an "and" account requires both (all) parties sign, such a confidence game would only succeed if both (all) parties fell for it. Of course, this is only a control--a safeguard--if the other "and" party is trustworthy.

### **3. Payable on Death Property**

Another way of owning non-community accounts, so that they will pass automatically--without probate--to a designated person (or persons) is to own them as "payable on death." Payable on death accounts differ from joint accounts in that, during the life of the owner(s), the payable on death beneficiary does not have an ownership interest in the account. Rather, it is only when the account owner(s) has (have) (all) died that the payable on death beneficiary(ies) becomes (become) owner(s) of the account. But, again, this will happen--with a payable on death account--without the need for any

probate proceeding. The transfer to the payable on death beneficiary occurs "by operation of law." Most often, the transfer can be completed by the beneficiary simply giving to the bank a copy of the death certificate, and explaining that the account was "payable on death" to the beneficiary, which the bank can verify through its own records.

Individual retirement accounts can be established with a "payable on death" beneficiary (or beneficiaries).

#### **4. Life Estates, Life Insurance, and Annuities**

In a sense, life estates, life insurance, and annuities with a survivorship benefit, are all forms of "payable on death property," although the term "payable on death" usually is used with bank accounts. A life estate usually is used in connection with real property (although there can be a life estate in personal property, but this is rarely used). With a life estate, the person who is the "life tenant" of the property has the right to use and enjoy the real property during his or her life, however, when the life tenant dies, the real property automatically belongs to whoever was designated in the deed for the property as being the "remainder persons." One very great difference between a life estate in real property and a "payable on death" account is that the life tenant usually does not have the right to sell the real estate without the agreement of the remainder person(s); whereas the owner of a payable on death account can fully use (deplete down to zero) the account, and the "payable on death" beneficiary does not have the legal right to object.

##### **4a. Life Estates**

A life estate is established by this means: The owner of the real estate has a deed prepared, which deeds the property to whomever the owner wants to receive the property when the owner dies, but the owner "reserves" in the deed a life estate in himself or herself. Thereby, the owner retains the right to live in, occupy, use, and enjoy the real property. The life tenant (owner) usually cannot sell the property unless all the "remainder persons" join in the sale. When the owner dies, the real property (in which the owner had a life estate) will automatically belong to the persons that the owner named as "remainder persons" in the deed. (They are called "remainder persons," because what they receive is what remains of the property after the owner has "carved out" a life estate for himself or herself. When the owner has died, the "remainder," of course, is the entire property, because the owner no longer is using it.)

As long as the owner of real property does not try to achieve an illegal or discriminatory goal, an owner can generally deed real property however he or she wants. As noted, a life estate basically provides that, during his or her lifetime, the owner has the right to occupy and use the real property; and when the owner dies, the property belongs to whoever was designated by the owner as holding the "remainder." Such a deed requires the assistance of an attorney. However, in the proper circumstances--which will vary from person to person--putting real property into life estate ownership form can be a means of automatically transferring that property to the remainder persons--without need of probate--when the owner dies.

In the experience of Legal Hotline for Texans, it should be noted that great caution should be used in considering a life estate to transfer the home. Situations have been encountered in which the home has been deeded to another, by an older Texan who retains a life estate, and later, when repairs are needed to the home, the older Texan is unable to borrow money to pay for the repairs because lending institutions and publicly subsidized loan programs require that all parties with an interest in the property sign the loan papers. If the remainder person refuses to sign, the money for repairs cannot be obtained. Any person considering transferring the home during their lifetime and retaining a life estate should consult an attorney prior to making this decision.

#### **4b. Life Insurance**

Life insurance and annuities are contracts, and therefore the terms on which they are payable to someone who survives the deceased depend on the wording of the contract. Generally, insurance that is called "term insurance" does not have cash value for the insured person--such insurance will pay benefits to the designated beneficiaries if the insured has died while the insurance was in force, but before death, term insurance does not usually have cash value to the insured. "Whole life" or "endowment" insurance policies, in addition to paying benefits when the insured dies, have the added feature (usually) of having a cash value. They can be liquidated and converted into cash before death, or they can be "borrowed" against. Of course, term insurance is generally less expensive than whole life or endowment policies. On the other hand, term insurance only pays benefits if the insured dies while the insurance premiums are current--if the premiums have been paid. With whole life or endowment policies, a point may be reached, under the policy, where no more premiums are required--the insurance is fully paid for, and regardless of when, thereafter, the insured dies, benefits will be paid. However, the terms of an insurance policy should be carefully reviewed to determine if the "paid up" benefit and the cash value benefit is truly worth the increased premiums.

With any kind of life insurance it is important to keep this in mind: If your goal is to have property go to loved ones without the need for probate, you will want your insurance beneficiaries to be named persons or organizations, rather than "[your] estate." If you name your estate as beneficiary of your life insurance, then the insurance benefits will pass according to your will (or, if you have no valid will, according to the law of intestate succession), but in any event, the insurance will have to go through a probate proceeding. That would eliminate one of the main advantages of life insurance--its quick availability to named beneficiaries.

#### **4c. Annuities**

Annuities are contracts. Often, the purchaser (owner) is the beneficiary. However, a purchaser can buy an annuity for someone else, who is the beneficiary. After a certain number of years of premium payments by the purchaser, the beneficiary of an annuity has a right to receive payments from the annuity over a set term, as defined in the contract. Depending on the terms of the particular annuity, there may be a "survivorship feature"--there may be a payment, owed by the annuity company, to a person designated by the owner, to receive a further benefit upon the first beneficiary's death. Again, if a named person (or named persons) are designated to receive the survivor benefit, the benefit will be payable outside of--without the need for--a probate proceeding. A person considering the purchase of an annuity should carefully review the contract and should specifically determine the following: the applicable commissions paid upon purchase of the annuity and upon the distribution of benefits; the penalties which would be incurred in the event of early withdrawal of benefits; whether the funds held in the annuity are insured or not; and what type of investments are made with the annuity funds.

The above methods of owning property can be used alone or in combination by persons who are not married--those who never married, or those who have become widowed or divorced--to transfer property upon death without the need for probate for the items of property so owned.

For persons who die leaving a spouse, a method of transferring community property in its entirety, automatically to the surviving spouse and without the need for probate, is to own the property as "community property with right of survivorship."

## **5. Community Property with Right of Survivorship**

In the 1980's, [Article 16, § 15](#) of the Texas Constitution was amended, to allow spouses to "agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse."

The [Texas Probate Code](#) has a section that corresponds to Article 16, Section 15 of the Texas Constitution. [Texas Probate Code § 451](#) states "[a]t any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse." [Texas Probate Code § 452](#) provides that such agreements must be in writing and must be signed by both spouses. Such an agreement--in writing and signed by both spouses--will be sufficient to create community property with right of survivorship, if it includes any of the following phrases: "with right of survivorship," "will become the property of the survivor," "will vest in and belong to the surviving spouse," or "shall pass to the surviving spouse."

Property subject to an agreement between spouses creating a right of survivorship in community property remains community property during the marriage of the spouses. Such an agreement does not affect the rights of the spouses concerning management and control, unless the agreement provides otherwise. [Texas Probate Code § 453](#).

When the first spouse dies, property that was made subject to--identified in--the community property with right of survivorship agreement passes to the surviving spouse by reason of the agreement, and not because of any probate proceedings. [Texas Probate Code § 454](#). Thus, the use of a community property with right of survivorship agreement can be a means by which married persons can see to it that all community property made subject to the agreement automatically belongs to the surviving spouse, after the first spouse has died, without the need for any probate proceeding in regard to such property.

It is recommended that an attorney's services be used to obtain a community property with right of survivorship agreement. Note that the community property with right of survivorship agreement must be a separate written agreement and is not merely stated on the title to an asset. For example, it is not enough for a deed to property to be in the name of the spouses with the recitation "with right of survivorship." A separate document, the survivorship agreement, must be executed by both parties and filed in the county records to be effective. This separate agreement needs to contain provisions regarding the revocation by either spouse of the survivorship agreement. If the survivorship agreement is effective, property will pass without probate to the surviving spouse upon the death of the first spouse. An important point to remember is that the survivorship is only effective to transfer property to a surviving spouse; it will not transfer property upon the subsequent death of the second spouse. At the death of the second spouse, the property will pass either by the will of the second spouse or by the laws of intestate succession as they would apply to that second spouse as his or her separate property if the second spouse dies without a will.

A caution must be stated, in regard to community property with right of survivorship agreements: Although the [Texas Probate Code](#) indicates that such agreements are self-actuating--do not require a court process--the [Texas Probate Code § 456](#) nonetheless provides for an "adjudication" of such agreements:

An agreement between spouses creating a right of survivorship in community property that satisfied the requirements of this part is effective without an adjudication. After the death of a spouse, however, the surviving spouse or the personal representative of the surviving spouse may apply to the court for an order stating that the agreement satisfied the requirements of this

code and is effective to create a right of survivorship in community property. The original agreement shall be filed with the application for an adjudication . . . .

Because the Texas Probate Code allows for this adjudication, some title insurance companies may take the position that they will not insure title in the surviving spouse unless there is an adjudication. The Texas Probate Code, as noted, does not require an adjudication, for property to be transferred to the surviving spouse under a community property with right of survivorship agreement. But, because the Texas Probate Code permits an adjudication, some title insurance companies may refuse to insure the surviving spouse's title unless there is an adjudication of the community property with right of survivorship agreement. For this reason, the comparative benefits of a community property with right of survivorship agreement, versus just a will, can only be estimated. This is a matter that is best discussed individually with an attorney familiar with the particular couple's circumstances.

Note: Texas Probate Code § 461 provides that the community property subject to the sole or joint management, control, and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse upon death without regard to a right of survivorship in the decedent's surviving spouse under an agreement made in accordance with the provisions of this part. As noted above, spouses may partition community property into separate property and may convert separate property into community property. Thus, spouses may hold property in joint tenancy with right of survivorship under Texas Probate Code § 46 or may hold property in community property right of survivorship under Texas Probate Code §§ 451-61.

### **Conclusion**

If you qualify as a Legal Hotline for Texans client, you may contact the Legal Hotline for Texans for any of the pamphlets in this series mentioned at the top of page one (1) of this pamphlet.

For further information, you may also want to order from the Legal Hotline for Texans one or more of the following more specific brochures:

#0402 Living Trusts

#0403 To Will or Not to Will (by Texas Young Lawyers Association)

#0409 Form for spouses to sign to own a motor vehicle with right of survivorship

#0512 Community Property With Right of Survivorship

#0601 IRS Publications Order Form.

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