Class Notes— Wills & Estates (Johanson)

General Class Information
• If you need to miss a class, you can attend and sign in at the later section
  o M, W, Th 11:50a-12:57p in TNH 2.137

Part One— Introduction

I. Lewis v. State Bar of California
• Facts: Petitioner attorney was hired to handle the estate of the client’s deceased wife. He is charged with violating his oath and duties as an attorney in that he:
  o 1) Negligently and improperly conducted the administration of an estate,
     ▪ Petitioner consulted experienced probate attorney to have himself appointed administrator, but then failed to consult him on any estate affairs thereafter.
  o 2) Obtained a loan from a client without appropriate disclosure and without the client’s written consent, and
     ▪ Petitioner sold securities belonging to the estate (authorized by the court), but did not tell the court that one of his purposes in selling those securities was to pay his own fee. Petitioner failed to place the proceeds in a separate account, and did not seek court approval for further disbursements.
     • Known as conflict of interest, or “self-dealing.”
  o 3) Failed to maintain complete and accurate records of funds belonging to a client.
     ▪ Petitioner failed to prepare an inventory of the estate’s assets, and failed to file any of the required state or federal tax returns.
     • (Essentially, petitioner performed no services for the estate after he was appointed administrator and received probate court approval for the sale of the securities).
• Procedural Posture: This is a proceeding to review a recommendation of the Disciplinary Board of the State Bar that petitioner be suspended for 30 days, but that such suspension be stayed and petitioner placed on probation for one year.
• Holding: Court adopted Disciplinary Board’s recommendation.
  o Concurring opinion: “The burden of this rule unfortunately appears to fall disproportionately on younger members of the legal profession…”
• Note: When a husband or wife dies without a will, the first person to be appointed administrator is always the surviving spouse.

II. Shapira v. Union National Bank
• Facts: The testator placed a provision in his will which provided that his two sons would receive a portion of his estate only on the condition that they each marry a Jewish girl whose parents were both Jewish, within seven years of the testator’s death. If the condition was not met, that son’s share would pass to the State of Israel.
One of the testator’s sons (plaintiff) filed a motion for a declaratory judgment and construction of the will, asserting that the condition violated his constitutional right to marry and was unenforceable as contrary to public policy.

**Reasoning:** The son analogized direct state legislative action (*Shelley v. Kraemer*) to enforcement by state judicial proceedings of private provisions restricting the right to marry.

- However, the court distinguishes *Shelley v. Kraemer* by saying the court is not being asked to enforce restrictions on the petitioner’s constitutional right to marry. Rather, the court is being asked to enforce the testator’s restriction on his son’s inheritance.
- Johanson’s Note: The problem with the petitioner son’s argument is that it cuts too deeply regarding private discrimination. If you extend the concept of state action to simple or mere enforcement of the terms of a will, a testator would not be able to include any sort of discriminatory terms at all (i.e. married/unmarried, etc.) no matter what the purpose.

**Supplement—*Shapira Case Problems***

- [See separate typed answers]
- Johanson’s Note (Regarding Note 4 on page 34 of casebook): In *Estate of Feinberg*, the Illinois Supreme Court upheld a trust provision providing that a descendant “who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased)” as reasonable.
- *Ellis v. Birkhead*: Testator’s gift to daughter was conditioned on daughter’s divorce from her husband. The court upheld the condition, reasoning that it was valid if the testator’s motivation was to provide support for the daughter while she is single. The condition would only be invalid if the testator’s motive was to encourage or facilitate divorce.

**Hypothetical**—Client (dentist, solo practitioner) with a professional corporation (P.C.)

- Only members of that profession can be shareholders in a professional corporation.
  - So in this case, only other dentists could be shareholders in the client’s P.C.
- What if the client wants to leave the business to her children? As her attorney, your job is to find a way to get the client from point A to point B (help them accomplish what they want). So one way to help this client is to find another entity, such as a family limited partnership, that does not have these same restrictions.

**The take-away from the Shapira case is that the validity of the provision is determined by the motivation behind the condition.**

- There is an important distinction between total (invalid) and partial (valid) restraints on marriage.

**Hypothetical**—What if Dr. Shapira were still alive when Daniel approached him saying he was engaged to a Roman Catholic woman?
This case is different because we don’t know how Dr. Shapira would have reacted if he knew that his son was already in love with and engaged to a non-Jewish woman. There are two basic ways he could have reacted to this situation:
- Dr. Shapira could have chosen to still cut Daniel out of the will unless the original provision was satisfied, or
- He could have said that Daniel is his son and he loves him, so it doesn’t matter.

The point here is that you can reason and negotiate with a living person, but the door is slammed shut once the person dies and the will goes into effect.

III. Simpson v. Calivas

- Facts: An intended beneficiary brought an action for negligence and breach of contract alleging that his father’s lawyer failed to draft a will that incorporated the father’s actual intent to leave all his land to the intended beneficiary in fee simple.
  - The specific question at issue was whether the term “homestead” as used in the will included just the physical structure of the house, or the entire property/land?
- Holding: The court held that although there was no privity between a drafting lawyer and an intended beneficiary, the obvious foreseeability of injury to the beneficiary demanded an exception to the privity rule and that an identified beneficiary had third-party beneficiary status.
  - The court further held that an intended beneficiary stated a cause of action simply by pleading sufficient facts to establish that an attorney negligently failed to effectuate the testator’s intent as expressed to the attorney.
  - The court found no basis for collateral estoppel because a finding of actual intent by the probate court was not necessary for that judgment.
- Notes: Collateral estoppel is a doctrine that bars the same two parties from re-litigating an issue that is identical to one that was already litigated and decided.

IV. Barcelo v. Elliott (supplement)—Privity of Contract as a Defense

- Facts: Plaintiff grandchildren brought action for malpractice, seeking review of a decision holding that defendant attorney preparing estate planning documents owed a duty only to his client (testator) and not to third parties intended to benefit under the estate plan.
- Holding: The court affirmed the order granting summary judgment in favor of the defendant attorney, holding that the defendant owed no professional duty of care to plaintiff grandchildren who were beneficiaries under a will drafted by the defendant.
  - The court held that the plaintiff grandchildren could not recover under a third party beneficiary theory because legal malpractice is founded in principles of tort (rather than contract law).
- Johanson’s Note: Privity of contract has been eliminated as a defense in most states, but not in Texas.
  - Two recent Texas Supreme Court decisions have somewhat undercut the position that privity of contract is a defense, but it still exists in Texas (NY is another notable exception where privity of contract still exists as a defense).
Recall that when the client died four months after the trust was executed, the trustee still hadn’t signed the document agreeing to serve as trustee, with the result that the will’s “pour over” gift to the trust failed.

- Who caused the delay, the attorney or the client? How might the attorney have prepared for this contingency to make sure he couldn’t be blamed?
  - See delivery confirmation/return receipt requested options on pages 9 and 13 of the supplement. Also includes examples of “ticker files,” which refers to the practice of certain law firms to send periodic reminders to clients that they may need to make changes and updates to their wills.

V. Estate Planning Problem— Howard and Wendy Brown (CB p. 50)
- The basic plan in this hypothetical was an outright gift to Howard’s spouse (Wendy), with remainder to the children.
- Potential problems and issues with the will:
  - 1) Howard’s will says, “If Wendy does not survive me, to my children in equal shares.” Wendy’s will says, “If Howard does not survive me, to my children in equal shares.”
    - Michael is Wendy’s child from a previous marriage, so there is no legal relationship between Michael and Howard. (So depending on who dies first, there could be two children or three children). This presents a conflict of interest, which can be dealt with in three different ways:
      - Option 1: Open relationship
        - See the Bourland letter— p. 10, first paragraph at the top of the page).
      - Option 2: Closed relationship
        - Generally a bad idea and one that clients almost never choose.
        - Attorney: I will not disclose to the other party anything either of you tells me in confidence if you so instruct me.
      - Option 3: Independent counsel
        - Each party retains his or her own attorney to prepare the will. See Bourland letter— p. 9, last paragraph at the bottom of the page).
  - 2) Michael is 21 years old, Sarah is 16 years old, and Stephanie is 13 years old.
    - A guardianship administration would be the worst way to handle the property that will pass to the minor daughters. The best method to employ is probably a contingent trust.
    - Hypo: What if 20 years pass, and Sarah marries and has a child. She then dies before Wendy. Does her share pass through her estate to her child? [Yes]
  - 3) If Wendy dies first, or Wendy and Howard die simultaneously, then Howard or both of them have failed to name an executor.
    - It is generally a good idea to use a “time of survival” clause.
- Revised Will of Howard Brown
  - [See notes and highlighting on document].
“Magic language”— In Texas, an individual must be named as an “independent executor,” because Texas has an independent administration of wills and thus requires the use of certain “buzz words” to help avoid court involvement.

- Wills must always be drafted within the context of the laws of a particular state. Because there is such wide variation, there is no such thing as a “general will,” although we will try to explore some general principles in this class.
- Note that Texas is one of nine community property states, which is one of the reasons why we use it as an example. The other state we will frequently use as an example is Colorado, because it has adopted the UPC.

Uniform Probate Code (UPC)

- There are two versions—the original 1969 version and the early 1990s version. The UPC has only been partially adopted in about 18 states.
- If Howard and Wendy die simultaneously, the default guardianship rule in every state is that the grandparents take custody.
- The guardian of the person is charged with the custody, welfare, etc. of the child. The guardian of the estate manages the minor’s property.
  - Usually the same person occupies both roles, although that is not required.
    - Obviously whoever you name as guardian should be notified that they have been appointed to such a role. You should also always appoint an alternate in case that person dies, doesn’t want the job, etc.)
  - However, a guardianship is universally regarded as the worst way to manage a minor’s property. The preferred method is generally the contingent trust.

Probate and Nonprobate Property on the Brown Balance Sheet

- Hypo: Frank has a $500,000 life insurance policy that names Donna as beneficiary. After a heated argument, Frank amends his will to name his sister Irene as the beneficiary. Who takes the proceeds?
  - Donna, because life insurance policies are non-probate assets, and thus do not pass by will (instead, they are governed by the terms of the contract).

- Hypo: Suppose that Howard and Wendy Brown own 200 shares of AT & T stock; the stock certificate names as owners “Howard and Wendy Brown, as joint tenants with right of survivorship.”
  - Because Wendy has a right of survivorship, Howard cannot transfer his interest to his sister Carol (because the stock is non-probate property that is governed by the terms of the contract [in this case, the stock certificate]).
  - Either joint tenant has the right to convey his or her interest to a third party, severing the right of survivorship and converting the interest into a tenancy in common.

- Hypo: Suppose that Frank deposits $100,000 in a savings account with the account agreement (signed by both Frank and Donna) stating that: “On the death
of either party, the amount on deposit shall vest in and belong to the surviving party.” Has Frank made a gift to Donna?

- No, because the gift is incomplete. No gift actually occurs until Frank dies and Donna withdraws the money. Before Frank’s death, however, he could change his mind or withdraw the money, and the gift will never occur (which is why it is considered “incomplete” and therefore not a received gift).

- Non-probate assets
  - 1. Property passing by contract
    - Life insurance
    - Employee [death] benefits and IRAs
  - 2. Property passing by right of survivorship
    - Joint tenancies
    - Joint and survivor bank accounts
  - 3. Property held in trust *
  - 4. Property held in power to appoint *
    - [* We’ll discuss this later in the course]

**Part Two— Intestacy as an Alternative to a Will**

I. Rules of Intestate Succession

- *Situs* Rule: If the decedent passes away in one state but owns real property in another state, an ancillary administration in that jurisdiction (location of the real property) is required.
  - Under the *situs* rule, only the courts in which the land is located can determine the ownership of land within that state. The courts of one state cannot adjudicate the ownership and transfer of land located in another state (commonly referred to as “foreign” real property).
- The nine community property states:
    - * Income from separate property is community property.
- In many states, the intestate succession rules are not as generous as the UPC. So if spouses like Howard and Wendy Brown want to leave their entire estate to their spouse, they are each basically required to write a will.
  - At common law, the surviving spouse was not an “heir” at all. Instead, the wife (usually) took a dower/life estate instead. This law has mostly changed, except for some East Coast states.
- Intestate succession rules apply only to the net estate, after any liabilities are deducted (funeral expenses, etc.)
- Exempt personal property set aside (CB p. 474)
  - Under UPC § 2-403, these exemptions are taken off the top of the estate before intestate succession rules are applied.
- In Texas, any property that is exempt from creditors during life is also exempt from creditors after death (the list of exempt personal property in Texas is very extensive).
  - Only if the estate is insolvent is the title of the surviving spouse and children absolute. If the estate is solvent, the title of the surviving spouse is only temporary.

II. Intestate Succession— UPC Jurisdiction
- Intestate succession rules only apply to probate assets. These assets are governed by:
  - Uniform Probate Code §§ 2-102 and 2-103 (casebook p. 73).
- Intestate succession in a community property state that has enacted the UPC is governed by an alternate section, § 2-102A. This section provides for the same distribution of separate property as is provided in § 2-102 and further provides that all community property passes to the surviving spouse whether or not the decedent is survived by descendants or parents.
  - (Community property is defined negatively as anything that is not separate property).
    - This is different in Texas, Louisiana, and Idaho, where income from separate property is also community property (income from separate property remains separate property in other community property states).
    - Also see Texas Probate Code § 271— Exempt Property Set Aside
      - This exemption comes off the top, over and above anything going to the spouse in the will. The monetary limit imposed applies to the fair market value of the items as they are today, not the purchase price.
      - In Texas, the exempt property set aside is subject to the requirements and provisions in § 278 and § 279 (depending on whether the estate is solvent or insolvent). In most other states, the exemption is permanent and does not depend on whether the estate is solvent or insolvent.
      - TPC § 278— Amount of Family Allowance. In Texas, the surviving spouse is not entitled to a family allowance if the surviving spouse has separate property that is adequate for his or her maintenance.
        - But in Texas, all community property is tied up in probate administration (not just the decedent’s one-half interest). So even in a $5-6 million estate, the surviving spouse would be entitled to a family allowance (because otherwise she would have nothing to actually live on until the probate administration was completed).
  - Under the Colorado UPC, the Browns would have $182,000 that was subject to intestate distribution (for example: $240,000 probate estate - $18,000 funeral expenses - $20,000 exempt personal property - $20,000 family allowance).
    - Any property acquired by gift, will, intestate success is exempt for federal income tax purposes.
- *Estate of Wolfe* (Supplement Part II, p. 4)
Facts—Appellant, decedent’s son, asserts that the probate court erred by granting his stepmother’s request for a family allowance, by failing to consider and deduct as separate property (a) the life insurance proceeds received by the surviving spouse…(b) the individual retirement account benefits received by the surviving spouse…and (c) the income earned and to be earned by the surviving spouse.

Rules/Reasoning—Texas Probate Code § 288 states that “No such [family] allowance shall be made for the surviving spouse when the survivor has separate property adequate to the survivor’s maintenance.

- The court said it has been held that “separate property” for purposes of a family allowance, including that acquired by “gift, devise, or descent” does not mean the surviving wife’s interest in the community property of herself and deceased husband, so as to bar her from the right to an allowance for the first year’s support of the community estate of herself and husband.
- In other words, life insurance proceeds, as community property of Richard and Sondra before Richard’s death, are not considered to be the “separate property” of Sondra following his death in the family allowance calculation.

Holding—Only the surviving spouse’s separate property at the time of Richard’s death affects her entitlement to a family allowance.

Note—The vast majority of surviving spouses do not ask for exempt personal property or family allowances. Why? There is generally no need, because the majority of everything the couple owns will go to the surviving spouse through probate anyway.

III. Intestate Succession—Community Property Jurisdiction

- Each spouse’s salary is community property. For real property, the name listed on the title doesn’t matter.
  - In Texas, the community presumption applies for any property acquired during the marriage. This presumption can only be overcome through “clear and convincing evidence” to the contrary.
- Supplement problems, Pt. II, page 24
  - 1) Texas law applies. In 1994 Winona, then single, bought 1,000 shares of Micron common stock at $5 per share (total cost of $5,000). In 1998, Winona married Hubert. In 1999, Micron declared and paid a dividend of $1/share, and Winona received a check for $1,000. Was the $1,000 community property, or Winona’s separate property?
    - In Texas, income from separate property is community property (“Spanish rule”).
      - a) Winona sold the 1,000 shares of Micron stock in 2005 for $100/share (total sale price $100,000), making an impressive $95,000 profit. How should the $95,000 be characterized for marital law property purposes?
        - (“Capital gain” is the income tax term for profit).
        - The rule that income from separate property is community property does not apply to capital gains. Proceeds from the
sale of separate property assets are themselves separate property.

• Recall that intestate succession in a community property state that has enacted the UPC is governed by an alternate section, § 2-102A. This section provides for the same distribution of separate property as is provided in § 2-102 and further provides that all community property passes to the surviving spouse whether or not the decedent is survived by descendants or parents.
  o (Community property is defined negatively as anything that is not separate property).
    ▪ This is different in Texas, Louisiana, and Idaho, where income from separate property is also community property (income from separate property remains separate property in other community property states).
  o (This section means that in Idaho, the surviving spouse succeeds to the entire community property estate. As to the decedent’s separate property, the surviving spouse’s share is governed by § 2-103).

• *Howard and Wendy Brown Hypo— Analysis*
  o Step 1: Take any nonprobate property off the table.
    ▪ Once the probate property has been separated, segregate community property and separate property.
      ▪ In this example, Howard’s separate property is $70,000. So Wendy takes it all, because it is within the $225,000 limit of § 2-102(3).
  o Howard Brown’s Varoom Mutual Fund (Supp. Pt. II, pgs. 28-29)
    ▪ This section was simply intended to demonstrate how complicated this issue becomes in Texas, where the income from separate property is community property. The issue is much simpler in a state like California, where the income from separate property is separate property.

• Supplement problems, Pt. II, page 24 (continued)
  o 2) Texas Family Code § 7.001— General Rule of Property Division
    ▪ Only community property is subject to just and right division in the case of a divorce and court distribution.
    ▪ However, because community funds were used to discharge the debt on H’s separate property, the community estate may have an equitable claim for reimbursement against H’s separate estate.
      ▪ An equitable claim for reimbursement may also be available when community property funds are used to enhance the value of one spouse’s separate property.
    ▪ Note that an equitable claim for reimbursement is a *community* claim!
      ▪ Texas Family Code § 3.402(a)(3)— There is no claim for equitable reimbursement for interest on a loan or property taxes. The equitable claim for reimbursement applies to a reduction of the *principal* balance only.
    ▪ Where installment payments on a purchase are begun before marriage and completed after marriage, the purchased asset is separate property. The inception of title rule applies (whether the credit purchase is by mortgage or by installment contract), and there is no community property presumption for property purchased or acquired before marriage.
• “Inception of Title” Rule—Under this rule, the separate or community character of an asset is always determined at the time the asset is acquired. If title to an asset is acquired before marriage, it is the acquiring spouse’s separate property.
  o Subsequent expenditures of community funds, as by paying off secured debt or making improvements on the property, do not affect the property’s separate character, but go only to the possibility of an equitable claim for reimbursement.
    ▪ (Recall that an equitable claim for reimbursement is a community claim).
• Even if H pays the mortgage solely out of his salary, those funds themselves are community property if earned after marriage.
  ▪ But see, TFC § 3.402(c): “Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate…”
• § 3.402(f)—“ ‘Economic contribution’ does not include…
  o All we care about is the principal balance of the mortgage and how much it was reduced during the marriage.
    ▪ The Legislature was primarily concerned with making the division simple!
• Note § 3.402(d)—“Reimbursement for funds expended by a marital estate for improvements to another marital estate shall be measured by the enhancement in value to the benefitted marital estate.”
  o Recall that “marital estate” is actually the generic term for three different types of estates: his separate property, her separate property, and the property they own together.
  o 3) Under the inception of title rule, the starting point for property acquired during marriage is the presumption that it is community property.
  ▪ This problem must be viewed as is the amount paid at the time was the full $100,000, rather than the $40,000 down payment and the $60,000 mortgage.
  • Because the promissory note does not specify that it is based solely on Herb’s separate credit, it is presumptively community credit.
  • Community credit presumption—An asset acquired on credit during marriage is presumptively acquired on community credit. Under this rule, the source of funds later used to pay off the credit obligation is irrelevant.
    o In theory, you can bind only the separate estate and overcome the community property presumption. In reality, however, a bank wants as many sources of funds as possible, so it is unlikely the bank (lender) will agree to this arrangement.
  • If Herb pays off the $60,000 mortgage from his salary (community property), there is no equitable claim for reimbursement because
community property is being used for the benefit of community property.
  o There is a possibility of an equitable claim for reimbursement only if community funds are being used to enhance separate property.
  ▪ “Mixed ownership”— When property is part community property and part separate property.
  o 4) This gift is governed by the classification rule that all property acquire during marriage by gift, descent, or devise is separate property, and by the rule that the parties cannot change the character an asset acquires by law. Someone cannot make a gift to the community and impress the donated property with community status.
  ▪ To make the property community property, H and W must sign a written conversion agreement. If there is no such agreement, H and W hold the property as tenants in common, each with an undivided one-half share of separate property.
    • Recall that in a Texas divorce, only community property is on the table for “just and right division.” A judge cannot divest title in the separate property of one spouse and award it to another.
  ▪ Under TFC § 4.203, only grantors need to sign, not grantees.
  o 5) Governed by TPC § 439.
  o 6) Governed by TPC § 452, because this is an agreement for survivorship rights between spouses, rather than between a parent and child.
    ▪ Winona does not have a valid survivorship right under § 452 because the agreement must be in writing and signed by both spouses.
    ▪ a) Since this part of the question deals with Hank’s separate property and not community property, it falls under § 439(a) and thus the property ($48,000) passes through Hank’s estate with right of survivorship.
  o 7) Molly has a valid right of survivorship in Sageacre, even though the title was issued to Fred and the deed makes no mention of Molly.
    ▪ Governed by TPC § 454—Transfers Nontestamentary.
    ▪ Johanson—It could create significant problems if people did what Fred and Molly did. But luckily this practice never caught on and has remained a theoretical problem (perhaps because people do not know it is an option, etc.)
    ▪ Survivorship rights are widely employed in Texas, but only with regard to existing property (not future property).
      • Spouses in Texas can create valid survivorship agreements as long as both spouses sign the agreement.
      ▪ Remember—Joint tenancies of real property are not found in Texas! But they are found in other states.
      • (In Texas, real property insurance policies exclude any liability for an existing right of survivorship as a special exception).
  • Recap—Joint and Survivor Bank Accounts
Recall that if the account is between parent and child, only the decedent is required to have signed the agreement (TPC § 439). However, if the agreement is between spouses, both are required to have signed the agreement (TPC § 452).
- (The first situation may be subject to the Fraud Upon the Spouse doctrine, but that will be discussed later in the course).
- In Texas, a joint tenancy with right of survivorship for real property virtually does not exist.

**Homestead Rights (and *Howard and Wendy Brown*)**
- TPC § 38 deals with the distribution of separate property. TPC § 45 governs the distribution of community property.
  - If Howard dies intestate, the distribution of his estate is governed by § 45(a)(2), because all of Howard’s descendants are also Wendy’s (surviving spouse) descendants.
  - If Wendy dies intestate, the distribution of her estate will be governed by § 45(b), because Michael is a descendant of Wendy but not Howard.
    - Howard retains 1/2 of the community estate, and the other half passes to the children of the deceased spouse (Michael, Sarah, and Stephanie).
- **Hypo**—Michael shows up after Wendy’s death to claim is 1/6 share as a tenant in common of the house.
  - Howard’s homestead rights (the exclusive right of occupancy) trump Michael’s claim.
  - Under *Hill v. Hill*, Howard (as homestead occupier) is responsible for taxes on the real property, and for paying the mortgage interest. However, the fee simple owner (which includes Michael, as 1/6 fee simple owner) is responsible for the mortgage principal and casualty insurance premiums.
    - If one co-tenant pays more than her share, this does not change the ownership interests—still split down the middle. It only means that these extra expenditures may be considered if and when the property is ultimately sold.
  - [Insert “bite the hand that feeds you” principle]
- Homestead rights are essentially equivalent to a life estate determinable. The surviving spouse is entitled to possess and occupy the homestead so long as he or she occupies it. When the occupancy ceases, the right ceases. If the spouse moves to another home, she has “abandoned” the homestead, and the right of occupancy ceases.
  - **Hypo**—Howard remarries Winona. After Howard’s death, does Winona continue to have an exclusive right of homestead occupancy?
    - TPC § 285—When Homestead can be partitioned.
    - No. When Howard dies, his exclusive right of occupancy dies with him.
- **Hypo**—Ethel, a widow, died. She was survived by her 33 year old son D, who lived with Ethel. Ethel left “all my property” to her sister Sarah. Does D have a right of occupancy?
- No, because the homestead occupancy rights only apply to the surviving spouse and minor children. However, creditors cannot reach Ethel’s house because she was survived by adult children living at home.
  - So Sarah takes the house, and can essentially use D’s present to guard the house from creditors (even though D actually has no right to live there).
    - Furthermore, creditors still do not get to take the house if Sarah subsequently sells, because the homestead occupancy rights are based on a snapshot of the situation at the time of Ethel’s death.
  - Recall that the homestead exemption is based solely on acreage, not value.
- In most other states, the homestead exemption is limited to a dollar amount. So the Texas exemptions (10 acres for an urban homestead and 100 acres for a rural homestead) and the Florida exemptions (1/2 acre for urban and 160 acres for rural) are very generous.
  - Hypo—Intestate succession for separate property
    - If H dies intestate, W inherits 1/3 of his separate personal property, and the children take the remaining 2/3. The surviving spouse is limited to a 1/3 life estate because the goal when the statute was written was to keep land in the family.
      - The surviving spouse essentially has all of the same rights as a tenant in common, including the right of partition.
    - If a decedent dies intestate survived by a spouse but no descendants, the surviving spouse takes all of the decedent’s separate personal property (TPC § 38(b)(2)).
      - Parents and collateral kin never take for separate personal property if the decedent is survived by a spouse. For separate real property, the surviving spouse inherits 1/2, with the rest passing through other rules of descent and distribution.
        - (In one example, mom and brother take remaining 1/2).
  - Important to note that Texas has very generous homestead laws!

IV. Inheritance—Introduction

- In Trimble v. Gordon, the Supreme Court held unconstitutional, as a denial of equal protection, an Illinois statute denying a nonmarital child inheritance rights from the father.
o TPC §§ 42(a) and (b)—“(b) For the purpose of inheritance, a child is the child of his biological father if the child is born under circumstances described by § 160.201, Family code, is adjudicated to be the child of the father by court decree...was adopted by his father, or if the father executed an acknowledgment of paternity...A person claiming to be a biological child of the decedent, who is not otherwise presumed to be a child of the decedent...may petition the probate court for a determination of right of inheritance. If the court finds by clear and convincing evidence that the purported father was the biological father of the child, the child is treated as any other child of the decedent...”

o TFC §§ 160.201 and 160.204—“[160.204] A man is presumed to be the father of a child if: (1) he is married to the mother of the child and the child is born during the marriage; (2) he is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;...(4) he married the mother of the child after the birth of the child...he voluntarily asserted his paternity of the child, and: (a) the assertion is in a record filed with the bureau of vital statistics; (b) he is voluntarily named as the child’s father on the child’s birth certificate; or (c) he promised in a record to support the child as his own; or (5) during the first two years of the child’s life, he continuously resided in the household in which the child resided and he represented to others that the child was his own.
  ▪ Note that under § 160.204(b), “a presumption of paternity established under this section may be rebutted only by an adjudication...”
  ▪ Johanson—Essentially, TFC § 160.204 requires a marriage or attempted marriage, plus something else (with the exception of (5)).

• Case law is divided on whether a judge can or should exhume a body to determine paternity.
• Supplement Pt. II, page 35
  o Does Andy take an intestate share of Wendy’s estate?
    ▪ Yes, because it is clear under TPC § 42(a) that Michael is Wendy’s son, and clear under § 42(b) that Michael is Andy’s father.

  o Assume that Sarah also predeceased Wendy. Does Betty, an adopted grandchild, take an intestate share of Wendy’s estate?
    ▪ Yes. Under TPC § 40, an adopted child is treated the same as a natural child for inheritance purposes.

• Supplement Pt. II, page 37
  o Case 2—Mary, an unmarried teenager, gives birth to Billy. Mary signs an “Affidavit of Relinquishment of Parental Rights,” and Billy is adopted by another family.
    ▪ In some states, Billy would not have inheritance rights from and through his natural mother, Mary.
    ▪ But see TPC § 40—In Texas, Billy continues to have inheritance rights from and through his natural parents. But notice that this is a one-way street!
      • A child can inherit through his natural parent, but the natural parent cannot inherit through the natural child if he has subsequently been adopted by another family.
• [A child has no right to find out who his natural parents are in any state except Oregon. Texas courts will only release biological parent-child information if both sides are looking.]
  ▪ TFC § 161.206— A child retains inheritance rights from and through his natural parents, even if there has been an order terminating parental rights, unless the termination order says otherwise.
  ▪ So in this case, the Family Code can trump the probate code (§ 40).
    o Note that the important term here is “parent,” not mother or father, which simply expresses a biological fact. A parent is the only one that owes legal duties to the child, and a person can only have one set of parents at any given time.
• There are different rules of inheritance for people adopted as adults versus individuals adopted as minors. Why? Because the courts are worried about heirs “perverting” the intent of the testator.
  ▪ TFC § 162.507— The adopted adult is entitled to inherit through his adopted parents, but not through the adopted parent’s parents and so on.

V. Shares of Descendants
• In all jurisdictions, after the spouse’s share (if any) is set aside, children and descendants of deceased children take the remainder of the decedent’s property to the exclusion of everyone else.
  ▪ When one of several children has died before the decedent, leaving descendants, all states provide that the child’s descendants shall represent the dead child and divide the child’s share among themselves.
    ▪ (So essentially, a grandchild of the decedent takes nothing if her parent [the child of the decedent] is still living).
  ▪ Sons/Daughters-in-law are excluded as intestate successors in virtually all states.
• Strict per stirpes (also called English per stirpes)
  ▪ About 1/3 of states follow this system of representation, which treats each line of descendants equally. The property is divided into as many shares as there are living children of the designated person and deceased children who have descendants living.
    ▪ The children of each deceased descendant represent their deceased parent and are moved into their parent’s position beginning at the first generation below the designated person.
  ▪ (Essentially, strict per stirpes means that you always cut the shares at the child level, whether or not any of the children are actually alive.
    ▪ So in this example, we have three lines of issue— Michael, Sarah, and Stephanie. Each gets 1/3, with Andy taking Michael’s 1/3 by representation.
• Modern per stirpes (Per capita with representation)
  ▪ Nearly half of the states use this system of representation, including Texas.
  ▪ Under this approach, one looks first to see whether any children survived the decedent. If so, the distribution is identical to that under strict (English) per stirpes. If not, the estate is divided equally (per capita) at the first generation in which there are living takers.
• This system treats equally each line beginning at the closest living generation.

• Recall that a child (grandchild of the decedent) has no right or interest in any property owned by her mother (child of the decedent) while her mother is still alive. The child merely has an expectancy, which is not an interest.
  • So in the above example, Betty would only take by representation if Sarah predeceased the testator.

• Per capita at each generation
  • The intestate rules were not necessarily designed or intended to be fair. They are simply intended to provide some sort of solution in the case that a decedent does not write a will. UPC § 2-106(b) was intended to address this problem of fairness by promulgating a new system of distribution, known as per capita at each generation (followed in about a dozen states).
  • Under UPC § 2-106(b), the initial division of shares is made at the level where one or more descendants are alive (as under modern per stirpes), but the shares of deceased persons on that level are treated as one pot and are dropped down and divided equally among the representatives on the next generational level.
    • In the above example, this approach would result in Sarah taking 1/3, then Andy, Connie, Donnie, Eddie, and Freddie splitting the remaining 2/3, each taking 2/15.
  • This system treats equally each taker at each generation with the other takers at that generation. The premise of this approach is that those equally related to the decedent should take equal shares—“equally near, equally dear.”

• Hypo—If Sarah also predeceases Wendy.
  • Under strict per stirpes (Illinois)—Andy and Betty each take 1/3, Connie, Donnie, Eddie, and Freddie each take 1/12.
  • In Texas (per capita with representation) and UPC land, ABCDEF each take 1/6.

• Casebook page 96
  • Hypo—Decedent is survived by his mother, sister, and two nephews (children of deceased brother).
    • How is the estate distributed under UPC § 2-103?
      • The decedent has no surviving spouse or descendants, so the entire estate goes to the mother as the only surviving parent (under UPC § 2-103(a)(2)).
    • Under the Texas intestacy statute?
      • The decedent has no surviving spouse or descendants, so under TPC § 38 and 43, the estate is split into two equal portions. One half goes to the mother, and the other half goes to the sibling(s) and their descendants. So the mother takes 1/2, the sister takes 1/4, and the two nephews each take 1/8.
  • A “parcenary” refers to an undivided holding by two or more heirs.

• “Half-Bloods”
  • Under UPC § 2-107, a relative of the half-blood is treated the same as a relative of the whole blood. However, in a few states (including Texas!) a half-blood is given a one-half share—this is known as the Scottish rule.