



## Peace Of Mind: Estate Planning Made Simple

Anna Nicole Smith, a common enough name with uncommon associations. Ms. Smith's shining beauty was overshadowed by her estate planning problems. The recent news that the Texas native died, interrupted our daily lives in print, radio and television mediums for several weeks. Was it the popularity of the celebrity, or the unique but practical questions that came about surrounding her untimely death and the paternity of her child? Planning one's life is challenging, but preparing for one's death or incapacity is paralyzing to some. It is unlikely that you will be the subject of such controversy as surrounds the former reality show TV star at the time of your own death. However, let us take a few moments to explore estate planning options to give you and your family a peace of mind.

### *Dying Without a Will*

Death, like divorce and illness, affects people in many different ways. Family, friends and colleagues experience grief for the loss of the decedent and a need to move forward. Confusion exists as to the wishes of the decedent in the absence of clear written directives. A will or trust document reduces the need for court and public intervention. It further protects the survivors' privacy and allows them to move on.

While there is a myriad of emotions to cope with upon the death of a loved one, there are just as many, if not more, legal issues to address as well. It is crucial to keep the family and businesses going long after the loved one dies. The complexities of the legal issues reduce considerably when we take the time to conduct a little "housekeeping" in the way of estate planning. While it is unlikely that we can eliminate the bereavement and sorrow associated with the loss of a loved one, we can greatly impact our family's ability to cope by preparing some very important documents in the event of incapacity or death.

### *What is an Estate?*

Each person has an estate at death. The estate consists of real and/or personal property. Real property is land, improvements on the land, oil, gas and other mineral interests. Personal property consists of cash, bank accounts, clothing, jewelry, household furnishings, motor vehicles, stocks, bonds, life insurance policies, retirement benefits, pension plans and other personal effects. Property is further characterized as either community or separate property. Given that Texas is a "community property state", the presumption is that all property is community unless and until proven otherwise.

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It is simpler to identify separate property. Separate property is that property which is either owned before the marriage or acquired during the marriage by gift or inheritance. Money awards attributed to settlement or judgment for pain and suffering or loss of consortium resulting from a personal injury type claim are also the separate property of the spouse who incurred the harm. Community property is all other property that is acquired by either spouse during the course of the marriage. A person only controls the distribution of his separate property and his half interest in the community property in a will, trust or other estate planning method. When a person dies without a will, the courts are left to determine the heirs' identity, identify and characterize the assets, and dispose of such assets according to the law. We strongly encourage you to ensure that your estate, including real and personal property, pass according to your wishes, not those of the court.

A will is a testament, or legal document, when executed properly, allows the testator to direct the distribution of his or her property at death. Texas recognizes three types of wills: oral; handwritten; and typewritten. Each type of will has specific requirements; however, common to each of them is that the testator be of sound mind at the time of the will's rendition and have knowledge of his estate. The process by which a will transfers title from the decedent to the beneficiaries is referred to as "probate". Probate simply means proving the Will in a court so that the testator's desires are followed.

Intestacy is the name given to an estate without a valid will. The property then transfers according to the Texas Probate Code:

### **§38. Persons who Take Upon Intestacy**

#### **(a) Intestate Leaving No Husband or Wife.**

Where any person, having title to any estate, real, personal or mixed, shall die intestate, leaving no husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the following course:

1. To his children and their descendants.
2. If there be no children nor their descendants, then to his father and mother, in equal portions. But if only the father or mother survive the intestate, then his estate shall be divided into two equal portions, one of which shall pass to such survivor, and the other half which shall pass to such survivor, and the other half shall pass to the brothers and sisters of the deceased, and to their descendants; but if there be none such then the whole estate shall be inherited by the surviving father or mother.
3. If there be neither father nor mother, then the whole of such estate shall pass to the brothers and sisters of the intestate, and to their descendants.
4. If there be none of the kindred aforesaid, then the inheritance shall be divided into two moieties, one of which shall go to the paternal and the other to the maternal kindred, in the following course: To the grandfather and grandmother in equal portions, but if only one of these be living, then the estate shall be divided into two equal parts, one of which shall go to such survivor, and the other shall go to the descendant or descendants of such deceased grandfather or grandmother. If there be no such descendants, then the whole estate shall be inherited by the surviving grandfather or grandmother. If there be no surviving grandfather or grandmother, then the whole of such estate shall go to their descendants, and so on without wend, passing in like manner to the nearest lineal ancestors and their descendants.

#### **(b) Intestate Leaving Husband or Wife.**

Where any person having title to any estate, real, personal or mixed, other than a community estate, shall die intestate as to such estate, and shall leave a surviving husband or wife, such estate of such intestate shall descend and pass as follows:

1. If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life, in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants.



## Inheritance By and From Adopted Children

### ***Texas Probate Code §40. Inheritance By and From an Adopted Child***

Section 40 below is effective for estates of person show die on or after September 1, 2005.

For purposes of inheritance under the laws of descent and distribution, an adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such adopted child the same as if such child were the natural child of such parent or parents by adoption. The natural parent or parents of such child and their kin shall not inherit from or through said child, but, except as provided by §162.507 (c) Family Code, the child shall inherit from and through its natural parent or parents. Nothing herein shall prevent any parent by adoption from disposing of his property by will according to law. The presence of this Section specifically relating to the rights of adopted children shall in no way diminish the rights of such children, under the laws of descent and distribution or otherwise, which they acquire by virtue of their inclusion in the definition of “child” which is contained in this Code.

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## §38. Persons who Take Upon Intestacy

*2. If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one-half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; provided, however, that if the deceased has neither surviving mother nor father nor surviving brothers or sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate*

After reviewing the excerpt of the Texas Probate Code, do you feel confident that your property will transfer according to your desires?

## What Happens to My Children?

Each one of us wants to ensure the protection of our children in the event of our incapacity or death. Careful estate planning is required to address the specific needs of each family. Parents must consider remote contingencies that allow for the continued financial and personal care of their family and reduce or eliminate estate taxes. Parents of minor children must decide who and how their children will be taken care of in their absence. Appointment of guardians of the children and trustees of the assets are prudent in estate planning with children in mind. We encourage both parents to consider which relative or family friend they each believe to be suitable as the guardian for the children before the need arises. The trustee of the assets may differ from the person you select as guardian.

In addition to the estate planning tools discussed, we suggest you also address lifetime contingencies or disabilities with:

- Declaration of Guardian
- Healthcare Power of Attorney
- Physician Directive
- Living Trust

Failure to plan ahead and maintain current estate planning may lead to public and disastrous legacies for our family, friends and colleagues. Estate planning not only addresses the financial aspect of our estate, it gives respect to our loved ones.



For more information regarding **Chamblee & Ryan's** Estate Planning Law practice, please contact Lydia L. Dews at 214-905-2003.

