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

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I. INTRODUCTION

When crafting a comprehensive estate plan for clients, planning for and coordinating assets that pass outside of probate is an imperative part of the process.[1] Most clients' estates include non-probate assets; in fact, the

1. Arielle M. Prangner, *Nuts and Bolts: Planning for the Transfer of Non-Probate Assets at Death* 16 ANN. EST. PLAN., GUARDIANSHIP & ELDER L. CONF. 1, 1 (2014), https://utcle.org/ecourses/OC5711/get-asset-file/asset_id/33384 [https://perma.cc/RCS7-KAEB] (Portions of this article have been adapted

proportion of these non-probate assets in relation to the overall value of the client's estate is quite significant.[2] 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.[3] Accordingly, attorneys must advise clients to incorporate these assets into the estate plan, and not just as an afterthought.[4]

Obviously, attorneys must ascertain each client's personal goals concerning the overall estate plan in order to determine the ultimate disposition of the client's non-probate assets.[5] 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.[6] The paperwork involved in directing the disposition of non-probate assets can sometimes be daunting.[7] The forms required are as varied as the financial institutions, life insurance companies, plan administrators, and plan custodians involved.[8]

This Article is not intended to address every issue associated with the coordination of non-probate assets with the rest of the estate plan.[9] In particular, the nuances of the income tax and distribution considerations involved in the disposition of retirement plans are not addressed.[10] Rather, the goals of this Article 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.[11]

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

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from a CLE given on August 7, 2014.).

2. *See* Russell N. James, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & CMTY. PROP. L.J. 1, 27–28 (2015); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984).

3. Langbein, *supra* note 2, at 1110.

4. *See id.*

5. *See* Melissa J. Willms & Mickey R. Davis, *The Brave New World of Estate Planning*, 2014 ST. BAR TEX. PROF. DEV. PROGRAM, LAW. COMPETENCY IN THE 21ST CENTURY ch. 9, 13, https://www.texasbar.com/Content/NavigationMenu/ForLawyers/AgingLawyerIssues/BraveNewWorld.pdf [https://perma.cc/FUG4-NSCB].

6. *See id.*

7. *See generally* Langbein, *supra* note 2, at 1137–39 (discussing how a will cannot dictate the outcome of non-probate assets); Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 75–78 (2015).

8. *See* Leslie & Sterk, *supra* note 7, at 75–78.

9. *See supra* notes 5–7 and accompanying text.

10. *See supra* notes 5–7 and accompanying text.

11. *See supra* notes 5–7 and accompanying text.

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.[12] Although the general considerations of clients are usually similar, each client's personality and situation is unique, and clients will inevitably place different emphasis on each of the considerations.[13] 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.[14] It is important to evaluate each of these goals when advising a client.[15]

Most clients can identify exactly who they would like to receive their property at their death.[16] 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.[17]

A. Minor Children

If minor children are involved in the estate plan, it is essential to ensure that property will not pass to those children outright.[18] In Texas, children under the age of eighteen are minors and deemed to be under a legal incapacity.[19] 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.[20] 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 the client's will.[21] Non-probate assets, therefore, should be structured to avoid passing to minor children outright.[22]

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12. *See supra* notes 5–7 and accompanying text.
13. *See* Leslie & Sterk, *supra* note 7, at 66.
14. *See id.*; Carolyn Burgess Featheringill, *Estate Tax Apportionment and Nonprobate Assets: Picking the Right Pocket*, 21 CUMB. L. REV. 1, 2–5 (1990–1991).
15. *See* Leslie & Sterk, *supra* note 7, at 81–83.
16. *See id.* at 81–87.
17. *See id.* at 81–89.
18. *See* R. Kevin Spencer, *Estates Code and Estate Planning Issues Affecting Your Family Law Practice*, 43 ST. BAR OF TEX. PROF. DEV. PROGRAM, ADVANCED FAM. L. COURSE ch. 54, § X (2017).
19. TEX. EST. CODE ANN. §§ 22.016, 20.022.
20. *See* Spencer, *supra* note 18; EST. § 1301.053.
21. *See* Spencer, *supra* note 18.
22. *See id.*

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 affects qualification.[23] If so, receipt of inherited assets by the beneficiary—whether outright or in trust—may disqualify the beneficiary from acceptance of those benefits.[24] Careful consideration and planning is required if a client knows or anticipates that one of the client's intended beneficiaries may qualify for governmental benefits.[25] A supplemental needs trust (sometimes called a special needs trust) may need to be created to hold funds for a beneficiary receiving governmental assistance so that the beneficiary may continue to qualify for the assistance.[26] 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.[27]

C. Providing for Surviving Spouse and Children in Succession

If a client's goal is to provide for the client's spouse for the surviving spouse's lifetime and then provide for the client's children, leaving assets outright to a spouse may not accomplish these objectives.[28] If a spouse receives property outright, whether through a bequest in the client's will or the designation of the spouse as beneficiary of a non-probate asset, there is no guarantee that at the surviving spouse's later death the surviving spouse will leave that asset to the first spouse's children.[29] This tends to be a more pressing concern when working with married couples who have children from prior relationships.[30] Many couples employ trust planning to achieve ultimate disposition to a second generation at the death of the second spouse.[31] The attorney should evaluate non-probate assets to determine whether they should pass to the trustee of such a trust instead of outright to the surviving spouse.[32]

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23. *See* Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91, 92 (2000).

24. *See id.*

25. *See id.*

26. *See id.*; Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIA. L. REV. 757, 761 (2008).

27. Rosenberg, *supra* note 23, at 92.

28. *See* Willms & Davis, *supra* note 5, at 13–14.

29. *See id.*

30. *See id.*

31. *See id.*

32. *See* McCouch, *supra* note 26, at 759 (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 will not be available to pass to children or other descendants at the spouse's later death.); *id.*

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).[33] 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.[34] 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.[35]

For example, if a client has a probate estate of approximately $3 million 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.[36] This is because the estate's creditors will first look to the probate assets for satisfaction of their debts.[37] 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.[38] In that case, Child A's portion may be greatly depleted while Child B's portion would be left untouched.[39] 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.[40]

Accordingly, if a client expresses a desire to provide for beneficiaries in such a manner, the attorney should discuss these issues with the client and should scrutinize and modify the apportionment clauses in the client's will or revocable trust as necessary to accomplish the client's objectives.[41]

E. Tax Savings

I have yet to encounter a client whose goals do not include saving tax.[42] The considerations involved in tax savings, whether about estate tax or

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33. *See* UNIF. PROB. CODE § 6-102 (UNIF. L. COMM'N 2010).
34. *See id.*
35. *See id.* (showing a nonprobate transfer only pays creditor claims if probate estate cannot pay debts).
36. Author's original hypothetical.
37. *See* UNIF. PROB. CODE § 3-807 (UNIF. L. COMM'N 2010).
38. *See* Patrick v. Patrick, 182 S.W.3d 433, 437 (Tex. App.—Austin 2005, no pet.); TEX. EST. CODE ANN. § 124.005(b).
39. Author's original hypothetical; *see* EST. § 124.005(b).
40. *See* I.R.C. § 2503.
41. *See id.*
42. Author's original thought.

income tax, are complicated.[43] Nonetheless, the attorney should make the client aware of tax issues involved in the disposition of non-probate assets.[44]

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.[45] Otherwise, these trusts can end up being unfunded or underfunded.[46] 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.[47] However, to take advantage of portability, a federal estate tax return must be filed for the deceased spouse within nine months of the deceased spouse's date of death (or within fifteen months with a timely filed extension request).[48] For married clients who may have estate tax exposure, it is essential to discuss the various methods of estate tax planning and coordinate non-probate assets accordingly.[49]

2. Income Tax

Attorneys should make clients aware of the income tax implications of naming beneficiaries on certain non-probate assets.[50] 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.[51]

If a client has charitable inclinations, naming a charity as a beneficiary of such a qualified retirement plan may be the most tax-efficient way to

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43. Author's original thought.

44. *See infra* Sections II.E.1–2.

45. *See* Thomas M. Featherson, Jr., *Will or Revocable Trust, What's Best for the Client*, 2015 E. TEX. EST. PLAN. COUNCIL 7–8, https://www.baylor.edu/law/facultystaff/doc.php/232443.pdf [https://perma.cc/T3FD-YT9Q].

46. *See id.*

47. *See id.*

48. I.R.C. § 2010(c)(5) (If an estate tax return is being filed purely for portability purposes and would not otherwise have to be filed, then the executor has two years from the decedent's date of death to file the return.).

49. *See* Featherson, *supra* note 45, at 7–8.

50. *See* I.R.C. § 401.

51. *Id.* § 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* Karen S. Gerstner, *Estate Planning for Retirement Plans in View of the Secure Act*, 13 TEX. TECH UNIV. SCH. L. ANN. EST. PLAN. & CMTY. PROP. L. J. SYMP. (2021).

accomplish charitable goals.[52] 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.[53]

While a complete discussion of the nuances involved in such a determination is outside of the scope of this Article, the attorney must consider the income tax implications when planning for these qualified non-probate assets.[54]

F. Creditor Protection

If a client has concerns about a beneficiary's creditors or their own creditors, the attorney should carefully consider the rules relating to creditor exposure when directing the disposition of non-probate assets.[55]

1. Creditors of the Beneficiary

A client may have specific reasons for seeking creditor protection for a beneficiary.[56] 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.[57] However, many clients just like the idea that their beneficiaries' inheritance may be protected from general creditors and potential claims in a divorce.[58] 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.[59]

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52. *See* I.R.C. § 502.

53. *See id.* §§ 501(a), 691(a).

54. Harry W. Wolff III, *Drafting Considerations After the SECURE Act*, 31 ST. BAR OF TEX. PROF. DEV. PROGRAM, ANN. EST. PLAN. & PROB. DRAFTING ch. 13 (2020); *see* Kathrine C. Akinc, *A Quick and Dirty Guide to Retirement Benefits*, 16 ANN. EST. PLAN., GUARDIANSHIP & ELDER L. CONF. 1, 1 (2014), https://utcle.org/ecourses/OC6382/get-asset-file/asset_id/33381 (another resource for a thorough discussion of these issues) [https://perma.cc/ZC46-BTYD].

55. *See infra* Sections II.F.1–3.

56. Author's original hypothetical.

57. Author's original hypothetical.

58. Author's original thought.

59. *See* William C. Hussey, II, *Personal Representatives and Fiduciaries: Executors, Administrators and Trustees and Their Duties*, WHITE & WILLIAMS, LLP, https://www.whiteandwilliams.com/resources-alerts-Personal-Representatives-and-Fiduciaries-Executors-Administrators-and-Trustees-and-Their-Duties.html (last visited Oct. 14, 2021) [https://perma.cc/SW4H-E9QQ].

2. Creditors of the Decedent

Additionally, the client may be concerned about the client's own creditors.[60] At the client's death, the client's personal creditors will become creditors of their estate.[61] Most assets that are administered as part of the estate will be exposed to claims of creditors of the estate.[62] 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.[63] However, those actions may not be necessary or may not have the desired effect of creditor protection.[64]

3. Creditor Exposure and Protection for Some Non-Probate Assets

The discussion below highlights a few notable creditor issues for select non-probate assets.[65]

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.[66] 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.[67] For many years, it was believed that if an estate was the recipient beneficiary, these protections did not apply.[68] Texas Insurance Code Section 1104.023 makes it clear 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.[69] As of September 1, 2013, Section 1108.052 of the Texas Insurance Code was

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60. Author's original thought; *see* TEX. EST. CODE ANN. § 113.252.

61. *See* EST. § 113.252 (discussing rights of a creditor).

62. *See id.* § 114.106.

63. *See id.*

64. *See id.*; author's original thought.

65. *See infra* Sections II.F.3.a–d.

66. *See* Brian Beers, *How to Avoid Taxation on Life Insurance Proceeds*, INVESTOPEDIA (June 23, 2021), http://www.investopedia.com/articles/pf/06/transferlifeinsurance.asp [https://perma.cc/SC2S-WXJW].

67. TEX. INS. CODE ANN. §§ 1108.001, 1108.051.

68. *See* Barclay Palmer, *Naming a Trust as Beneficiary of a Retirement Account: Pros and Cons*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/09/trust-beneficiaries.asp (last updated June 24, 2021) [https://perma.cc/K6PC-H58P].

69. INS. § 1104.023.

amended to provide that the creditor exemptions apply regardless of whether the insured's estate is the beneficiary.[70]

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.[71] 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 private employer, 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 established under Subchapter F, Chapter 54, Education 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 "qualified savings plans").[72]

This statute was amended in 2013 to explicitly include Roth IRAs and inherited Roth IRAs and amended again in 2019 to include certain education accounts and ABLE accounts.[73] The statute makes clear that the interest of a person in a qualified savings plan that results from 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.[74] However, there is no such creditor protection afforded to an estate, so naming the client's "estate" as the beneficiary of a

70. *Id.* § 1108.052.

71. TEX. PROP. CODE ANN. § 42.0021.

72. *See* I.R.C. § 529; TEX. EDUC. CODE ANN. § 54.701.

73. *See* I.R.C. § 529(A); PROP. § 42.0021.

74. PROP. § 42.0021(c). Note 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. *See* Clark v. Rameker, 573 U.S. 122, 127 (2014).

retirement plan or other qualified savings plan will subject those assets to claims of creditors of the estate.[75]

c. Accounts with Survivorship Features

On the other hand, some assets that pass outside of the probate estate may still be subject to claims of creditors of the decedent.[76] For example, an account could pass outside of the decedent's probate estate pursuant to a right of survivorship (as discussed further below), but the account may still be subject to the debts of a deceased account holder.[77] 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, pay on death (P.O.D.) payee, 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.[78] 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 discharge these claims and expenses, but only up to the amount that the party received.[79] However, the personal representative of the decedent may bring a proceeding to assert liability only if the personal representative receives a written demand by a surviving spouse, a creditor, or a person acting on behalf of a minor child of the decedent.[80] Any proceeding by the personal representative to recover the property must be commenced before the second anniversary of the decedent's death.[81]

d. Real Property Transferred by a Transfer on Death Deed

As discussed in greater detail below, real property may pass outside of probate via a transfer on death deed (or "TODD").[82] 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

75. *See* PROP. § 42.0021(c); *Rameker*, 573 U.S. at 127.
76. *See* TEX. EST. CODE ANN. § 113.252(a).
77. *See id.*
78. *Id.*
79. *Id.* § 113.252(b).
80. *Id.* § 113.252(c).
81. *Id.*
82. *Id.*

those claims and expenses to the same extent it would be if it were part of the probate estate.[83]

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.[84]

G. Probate Avoidance

Many clients enter an estate planning attorney's office with preconceived notions about the horrors of probate.[85] 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.[86] 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.[87] 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.[88] 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 the client's assets or wants to keep any information regarding the client's estate plan out of public record.[89] In those situations, each non-probate asset should be structured to coordinate with the revocable trust planning.[90] This Article sets out a discussion regarding revocable trust planning below.[91]

There are reasons other than probate hysteria to arrange for certain assets to bypass probate, of course, which the attorney should consider.[92] Often, clients want a household account to pass to their spouse at their death to avoid the possibility that the spouse will have to wait for the probate process to have access to necessary funds for living expenses.[93] Sometimes clients desire for there to be a fund immediately available for funeral

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83. *Id.* § 114.106(a).
84. *Id.* § 114.104(a).
85. Author's original thought.
86. Author's original thought.
87. Author's original thought.
88. Author's original thought.
89. Author's original thought.
90. Author's original thought.
91. *See infra* notes 92–96 and accompanying text.
92. Legal Hotline for Texans (TLSC), *How to Minimize the Need for Probate in Texas*, TEX. LAW HELP.ORG (July 13, 2021), https://texaslawhelp.org/article/how-to-minimize-the-need-for-probate-in-texas [https://perma.cc/SAK2-33Q9].
93. *Id.*

expenses.[94] Some clients may own real property in another state with a cumbersome probate process and want to avoid the need for ancillary probate in that state.[95] One should explore these concerns when discussing the disposition of non-probate assets.[96]

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

A. Marriage

When representing clients who are married, one must give consideration to community property laws and the rights of spouses to non-probate assets, subject to any federal law preemptions.[97]

1. Spouse's Community Property Interest

In Texas, if a client is married, the non-probate assets in the client's name are often community property (because they are acquired during the couple's marriage while residing in Texas).[98] 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.[99] 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.[100] If the asset is payable to the surviving spouse, these issues become less critical.[101] Furthermore, provisions in the deceased spouse's will providing for the non-pro rata division of community property assets can mitigate these issues.[102]

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 the participant's spouse with a mandatory death benefit upon the death of the participant or a joint and survivor annuity upon

94. *See id.*
95. *See id.*
96. *See id.*
97. *See id.*
98. *See* TEX. FAM. CODE ANN. § 3.002.
99. *See id.* § 3.102; TEX. INS. CODE ANN. § 1113.001; *but see infra* notes 103–08.
100. *See* FAM. § 3.102; INS.§ 1113.001.
101. *See* INS. § 1113.001.
102. *See* FAM. § 3.102.

the retirement of the participant.[103] With regard to assets held in most employer-sponsored retirement plans, a non-participant spouse must give their consent to the beneficiary designation if the participant names someone other than the non-participant spouse as the beneficiary.[104] If a non-participant spouse desires to give their consent regarding such a designation, the consent must take the form prescribed by the statute.[105] 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.[106]

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.[107] Keep in mind that one spouse giving up rights to property that the spouse would otherwise have raises issues regarding joint representation that are beyond the scope of this Article.[108]

B. Divorce

If a client has been divorced or has had a marriage annulled, the attorney should review the divorce decree and all beneficiary designations for non-probate assets.[109]

1. "Divorce Revokes" Statutes

If a client has designated the client's 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,

103. 29 U.S.C. § 1055(a). It should be noted that a retirement plan governed by federal law may provide those benefits will not be payable to the surviving spouse unless the participant and such spouse had been married throughout the one-year period ending on the earlier of the participant's annuity starting date or the date of the participant's death. *See id.* at (b)(4).

104. *Id.* § 1055(c).

105. *See id.*

106. *See* Hurwitz v. Sher, 789 F. Supp. 134, 137 (S.D.N.Y 1992) (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, 73–75 (D. Minn. 1992) (language in antenuptial agreement was not specific enough to constitute waiver); *see, e.g.*, Manning v. Hayes, 212 F.3d. 866, 876–77 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (language in a premarital agreement not sufficiently explicit to constitute waiver).

107. *See supra* notes 103–06 and accompanying text.

108. Author's original thought.

109. Author's original thought (A client who is separated or in the process of obtaining a divorce may desire to make changes, but federal law may prevent changes without consent until the divorce decree is final.).

procrastination, or untimely death, Texas law may provide some protection.[110] 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 the person's 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) 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.[111] 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.[112]

In 2015, the "divorce revokes" rule was extended to survivorship designations on P.O.D. accounts and multiple-party accounts (collectively referred to herein as multiple-party accounts).[113] Texas Estates Code Section 123.151(b) now states that if a decedent created a multiple-party account and their marriage ended—through divorce, an annulment, or being declared void—any P.O.D. or survivorship agreement regarding that account and the decedent's former spouse or relative of that spouse, who is unrelated to decedent is not effective.[114] Exceptions to ineffectiveness arise if: (1) the divorce decree specifies the former spouse or former spouse's relative as the P.O.D. payee or beneficiary, or reaffirms the existing survivorship agreement for the former spouse or relative; (2) after the marriage was dissolved, the decedent redesignated the former spouse or former spouse's relative as either the P.O.D. payee or the beneficiary, or reaffirmed the survivorship in writing; or (3) the former spouse or former spouse's relative is designated to receive the proceeds for or on behalf of a child or dependent of the former spouse or decedent.[115]

Unlike the "divorce revokes" statutes for life insurance and retirement plans, Section 123.151 extends to any relative of the former spouse if the person is not also a relative of the decedent.[116] A "relative" is anyone related

110. *See* TEX. FAM. CODE ANN. §§ 9.301–.302.
111. *See id.*
112. *See id.* §§ 9.301(b), 9.302(b).
113. *See* TEX. EST. CODE ANN. § 123.151.
114. *See id.*
115. *See id.*
116. *See id.*

to someone else by consanguinity or affinity.[117] Consanguinity is where two people either share a common ancestor or one is descended from the other.[118] Affinity occurs either through marriage or by a spouse of one person related by consanguinity of another, like an in-law.[119]

If the statute revokes a pay on death or survivorship provision, the account may be paid to the named alternative P.O.D. payee or beneficiary, or to the decedent's estate if no alternative is named.[120]

The statutes regarding transfer on death deeds also contain a "divorce revokes" provision.[121] 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 death of the transferor in the county in which the TODD is recorded.[122]

2. Limitations if Asset is Governed by Federal Law

Attorneys should not blindly advise clients to rely on these "divorce revokes" statutes, especially regarding non-probate assets governed by federal law.[123] 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, federal law preempts the statute .[124]

In *Egelhoff v. Egelhoff*, a life insurance policy and pension plan governed by the Employee Retirement Income Security Act of 1974 (ERISA) named Mr. Egelhoff's former spouse as beneficiary.[125] 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.[126] However, the Court held that because the statue attempted to include ERISA plans, it was expressly preempted by ERISA's preemption provision.[127] 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.[128] ERISA contains no "divorce revokes" language.[129] Accordingly,

117. *Id.* § 123.151(a)(3).
118. TEX. GOV'T CODE ANN. § 573.022.
119. *Id.* § 573.024.
120. EST. § 123.151(c).
121. *Id.*
122. *Id.* § 114.057(c).
123. *See* Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 143–51 (2001).
124. *See id.*
125. *Id.*
126. *Id.* at 143.
127. *Id.* at 143–51.
128. *See id.*; 29 U.S.C. § 1144(a).
129. *See Egelhoff*, 532 U.S. at 143–51; 29 U.S.C. § 1144(a).

the Court held that benefits were properly payable to the former spouse under the beneficiary designation.[130]

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.[131] In *Hillman v. Maretta*, a life insurance policy governed by the Federal Employee's Group Life Insurance Act of 1954 (FEGLIA) was at issue.[132] 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.[133] 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.[134] The Court held that the provision in the statute creating a cause of action against the former spouse was likewise preempted.[135]

Accordingly, if a client has been divorced, the client should be advised to review any beneficiary designations and account agreements immediately and update them as necessary.[136]

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.[137]

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.[138] 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.[139] The Court ruled that the waiver by the former spouse in the divorce decree was not effective because it was not in the form required explicitly by the plan documents (a

130. *Egelhoff*, 532 U.S. at 143–51.
131. *See* Hillman v. Maretta, 569 U.S. 483, 487–88 (2013).
132. *Id.*
133. *Id.* at 490–500.
134. *Id.* at 494–95.
135. *Id.* at 499–500.
136. *See id.* at 487–88; Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 143–51 (2001).
137. *See* Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 288–91 (2009).
138. *Id.*
139. *Id.*

Qualified Domestic Relations Order, or QDRO).[140] Accordingly, the benefits were properly payable to the former spouse.[141]

In a situation such as this, presumably, there would be some cause of action against the former spouse in the context of contract law.[142] However, concerning 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 their interest in the asset.[143]

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 the client's former spouse as the beneficiary of a non-probate asset, such as a life insurance policy.[144] Such a provision is relatively common when there are minor children involved and the client has a child support obligation to the former spouse.[145] An attorney must be careful not to advise the client to change the disposition of an asset that may be subject to such restrictions.[146] Therefore, it is advisable to review any documents related to the divorce that establish an ongoing obligation to the former spouse.[147]

After each of the foregoing considerations has 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 the client's will, outright to an individual or charity, or to a trustee of a trust, testamentary or otherwise.[148]

IV. IDENTIFYING AND COORDINATING NON-PROBATE ASSETS

Before non-probate assets can be coordinated with the estate plan, they must be identified.[149] Generally, non-probate assets are those which, at the owner's death, pass via a statutory or contractual beneficiary designation contrary to the owner's will or under the laws of intestate succession.[150] When most people think about non-probate assets, the assets that

140. *Id.*
141. *Id.*
142. *See id.*
143. *Id.*
144. *See* TEX. FAM. CODE ANN. §§ 9.301(b), 9.302(b).
145. *See id.*
146. *See Kennedy*, 555 U.S. at 288.
147. *See id.*
148. *See* FAM. §§ 9.301(b), 9.302(b).
149. *See* Langbein, *supra* note 2, at 1108.
150. *See id.*

immediately come to mind are life insurance policies and retirement accounts.[151] 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; however, they may not know where the beneficiary designation forms are and whom they named as beneficiary.[152]

In reality, however, the universe of non-probate assets is much broader.[153] In some circumstances, clients may not realize that their joint brokerage account held as joint tenants with rights of survivorship, or other non-probate assets, will not pass according to the terms of the client's will.[154] 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.[155]

In my 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.[156]

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.[157] 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 another similar arrangement.[158] Chapter 113 addresses many issues associated with multiple-party accounts, including rights of survivorship, ownership during life, and ownership at death.[159]

There are special rules that govern accounts consisting of community property.[160] Ownership of community property during life is governed by relevant provisions of the Texas Family Code.[161] 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.[162]

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151. *See id.* at 1109.
152. *See id.*
153. *See* Thomas R. Andrews, *Creditor's Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 WASH. L. REV. 73, 92 (1990).
154. *See id.* at 73–75.
155. *See* Leslie & Sterk, *supra* note 7, at 64.
156. Author's original thought.
157. *See* TEX. EST. CODE ANN. §§ 113.001–.253.
158. *Id.* § 113.001(a).
159. *See id.* §§ 113.001–.253
160. *See id.* §§ 112.001–.253.
161. TEX. FAM. CODE ANN. § 3.002.
162. *See* EST. §§ 112.001–.253.

Please note that as used in this Article, the term "multi-party accounts" includes any account that involves more than one party, including joint accounts, P.O.D. or transfer on death (T.O.D) accounts, trust accounts, and convenience accounts.[163]

1. Accounts with Survivorship Features

In Texas, there is a presumption that if two or more people own an asset, no survivorship right exists, and they own the property as tenants in common.[164] There must be some writing that affirmatively establishes survivorship right among the parties.[165] 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.[166] The requirements of these sections are discussed below.[167] The term "accounts with survivorship features" as used in this Article includes not only accounts that pass pursuant to rights of survivorship but also as a result of P.O.D. or T.O.D. designations.[168]

a. Ownership During Life (Other Than Accounts of Community Property)

During the lifetimes of joint owners, joint accounts belong to the joint owners in proportion to the sums deposited by each of them.[169]

In contrast, a P.O.D. account belongs to the original account holder or holders during their life and passes to the P.O.D. beneficiary only at the death of the account holder(s).[170]

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 passes to the trust beneficiary only at the death of the account holder.[171] If more than one trustee is named, the beneficial rights between them are governed by the rules applicable to joint accounts.[172] A trust account in this context is not to be confused with an irrevocable or revocable trust,

163. *Id.* § 113.002.
164. *See id.* § 101.002.
165. *See id.* § 111.001; Wagenschein v. Ehlinger, 581 S.W.3d 851, 858 (Tex. App.—Corpus Christi–Edinburg 2019, pet. denied).
166. EST. §§ 113.001–.253, 111.051–.054, 112.001–.253.
167. *See id.*
168. *See id.* § 113.001.
169. *Id.* § 113.102.
170. *Id.* § 113.103.
171. *See id.* § 113.104.
172. *See id.*

established under a trust agreement that is separate from a deposit agreement.[173]

The attorney should caution clients: with a multi-party account, excluding a convenience account, any party to the account may pledge the account for the party's debts.[174] The only protection is that the financial institution must provide other joint tenants, excluding P.O.D. payees, beneficiaries, and convenience signers, with written notice of any pledge of the account within thirty days after the security interest is perfected.[175]

Also, with multi-party accounts other than convenience accounts, funds may be withdrawn by any party in excess of the party's net contributions.[176] However, the party making withdrawals greater than their net contributions may be liable for civil conversion or be criminally convicted of theft.[177]

b. Ownership After Death

For joint accounts without any survivorship features, when one party to a joint account dies, ownership in their interest in the account does not pass to the other party but instead passes as part of the decedent's probate estate.[178]

Texas Estates Code Sections 113.052 and 113.151 through 113.158 provide the requirements for establishing a right of survivorship in accounts other than community property accounts.[179] 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*.[180] In 2009, the Texas Supreme Court held in *Holmes v. Beatty* that simply titling the account as joint tenants created a right of survivorship.[181] Texas Probate Code Section 439(a) (now Texas Estates Code Section 113.151(c)) was amended in 2011 to overturn this decision and clarify that merely titling an account as a joint account is insufficient to create a right of survivorship between the joint owners.[182] Section 113.151(c) provides explicit language that, if included in an agreement, establishes 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

173. *See id.*
174. *See id.* § 113.251(a).
175. *See id.* § 113.251(c).
176. *See id.* § 113.202 (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.).
177. *See* Hicks v. Texas, 419 S.W.3d 555, 559 (Tex. App.—Amarillo 2013, pet. ref'd).
178. *See* EST. § 101.002.
179. *Id.* §§ 113.151–.158, 113.052.
180. *Id.* § 113.151(a).
181. Holmes v. Beatty, 290 S.W.3d 852, 862 (Tex. 2009).
182. EST. § 113.151(c).

surviving party as his or her separate property."[183] Substantially similar language will also act to create a right of survivorship.[184]

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 transfer to the then surviving P.O.D. payee(s).[185]

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 transfer to the surviving named beneficiaries.[186] If more than one trustee is named during the lifetimes of the trustees, the rights between the trustees are determined as joint tenants.[187] Although no explicit provision states what happens when one trustee dies, in conformity with these provisions, the Texas Supreme Court held that funds do not pass to a surviving trustee who did not contribute to the account and funds do not pass to the beneficiaries when there is a surviving trustee; instead, the account passes to the deceased trustee's estate.[188]

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 also allows one or more convenience signers to be added to each type of account.[189] 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.[190]

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.[191] Spouses may agree at any time that their community property will be subject to a right of survivorship in favor

183. *Id.*
184. *See id.*
185. *See id.* § 113.152.
186. *See id* § 113.153.
187. *See id.*
188. *See* Stegal v. Oadra, 868 S.W.2d 290, 294 (Tex. 1993).
189. *See* EST. § 113.052.
190. *Id.* §§ 113.151, 113.052; *see* David F. Johnson, *Account Litigation in Texas*, FIN. APP. VOICE 1, 44, https://www.txfiduciarylitigator.com/files/2015/10/Joint-Account-Litigation.pdf (last visited Oct. 18, 2021) [https://perma.cc/QV7Y-UL57].
191. EST. §§ 112.001, 112.253.

of the surviving spouse, as long as the agreement is in writing, is signed by both spouses, and contains language creating the survivorship.[192] Note, the distinction here from other multi-party accounts is that both spouses must sign the agreement.[193] 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, making a designation of joint tenancy insufficient to create a right of survivorship in community property.[194] 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."[195]

In addition, any agreement that "otherwise meets the requirements of this chapter" will create a right of survivorship.[196]

The creation of a right of survivorship does not affect the management rights of the property between the spouses.[197] Therefore, sole or joint management community property will remain so regardless of a right of survivorship.[198]

2. Default Estate Planning by Financial Institutions

For estate planners, multi-party accounts with survivorship features can be frustrating.[199] 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.[200] Many people have household checking accounts or other accounts with relatively small balances that are intended to pass outright to the surviving account holder.[201] Survivorship features on these accounts generally do not cause a problem, so long as the account holder understands

192. *See id.* §§ 112.051, 112.052.
193. *See id.*
194. *Id.* § 112.052(d); Holmes v. Beatty, 290 S.W.3d 852, 862 (Tex. 2009).
195. EST. § 112.052(b).
196. *Id.* § 112.052(c).
197. *See id.* § 112.151
198. *See id.* § 113.251.
199. Author's original thought.
200. *See Bank Accounts*, RUSSELL W. HALL & ASSOC. P.C., https://bellaireprobate.com/client-resources/bank-accounts (last visited Sept. 29, 2021) [https://perma.cc/T5SF-EVFF].
201. *See id.*

that the account will pass outright to the survivor, and not under the account holder's will.[202]

In a typical estate plan that involves trust planning or multiple beneficiaries, however, it is generally best if accounts are held in a form without survivorship features.[203] Otherwise, trusts can become unfunded or underfunded, or the property may pass to a single beneficiary when the decedent intended to benefit more than one beneficiary.[204] Many practitioners have 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 share the account with the rest of Child A's siblings.[205]

Unfortunately, many advisors at banks and other financial institutions promote 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.[206] After death, it may not be possible to remedy these accounts, even by disclaimer, as discussed further below.[207] Even with disclaimer as an option, the added expense and hassle may frustrate clients.[208] Since most clients are naïve regarding these issues, it is vital to advise them how to title their accounts correctly.[209]

3. Changing Multi-Party Accounts to Remove Survivorship Features

Many clients are unaware of how their accounts are held, and accordingly, it is prudent to advise the client to review the account designations in connection with the estate planning process.[210] Bank or brokerage statements may indicate survivorship language on their account statements.[211] Joint accounts often list two names, followed by the designation "JTWROS," "Jt. w/ Surv.," or with some other indication of survivorship.[212] The account may also list one name, followed by the

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202. *See What Happens to Your Bank Account After the Death of Your Spouse?*, MUTUAL OMAHA (June 15, 2018), https://www.mutualofomaha.com/advice/tackle-my-finances/what-happens-to-your-bank-account-after-the-death-of-your-spouse [https://perma.cc/R9VR-T5UG].

203. *See Bank Accounts*, *supra* note 200.

204. *See Think Twice Before You Change Ownership of a Bank Account*, LACY KATZEN LLP, https://www.lacykatzen.com/article.cfm?ArticleNumber=81 (last visited Sept. 29, 2021) [https://perma.cc/65VY-RYJ6].

205. Author's original thought.

206. *See Think Twice Before You Change Ownership of a Bank Account*, *supra* note 204.

207. *See infra* notes 217–35 and accompanying text.

208. *See Bank Accounts*, *supra* note 200.

209. *See id.*

210. *See* Mary Randolph, *What Happens to Bank Accounts at Your Death*, NOLO, https://www.nolo.com/legal-encyclopedia/what-happens-bank-accounts-your-death.html (last visited Sept. 29, 2021) [https://perma.cc/E9BL-8PWN].

211. *See* TEX. EST. CODE ANN. § 113.151.

212. *See Bank Accounts*, *supra* note 200.

designation P.O.D., T.O.D., or some other indication of survivorship.[213] However, not all accounts with survivorship features are so clearly labeled.[214] 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).[215] The terms of the account agreement or signature card, and not the names listed on the account statement, establish survivorship.[216]

If necessary as part of the estate plan, the financial institution should be contacted to eliminate any survivorship designation.[217]

Some financial institutions have proven uncooperative in altering these designations due to policy or precedent.[218] 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.[219] 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.[220] With regard to a community property survivorship account between spouses, 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.[221] Accordingly, if a written order to a financial institution is made for such an account, both spouses should sign the document.[222]

Presumably, sending the letter to the financial institution by certified mail, return receipt requested, would satisfy any burden of proof with respect to this receipt requirement.[223] The return receipt and copy of the letter should be retained by the client with the client's other estate planning documents.[224]

Most account agreements contain a provision regarding governing law or choice of law.[225] 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.[226] However, if an account agreement directs that the laws of a state other than Texas control, the client may find it difficult

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213. *See id.*
214. *See id.*
215. *See* Dickerson v. Brooks, 727 S.W.2d 652, 654 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
216. *See id.*
217. *See Bank Accounts*, *supra* note 200.
218. *See* Stauffer v. Henderson, 801 S.W.2d 858, 868 (Tex. 1990) (Ray, J., dissenting).
219. TEX. EST. CODE ANN. § 113.157.
220. *Id.*
221. *Id.* § 112.054.
222. *See id.* §§ 112.002, 112.052(a).
223. TEX. CIV. PRAC. & REM. CODE ANN. § 136.001.
224. *Id.*
225. *See* EST. § 111.054.
226. *See* TEX. BUS. & COM. CODE ANN. § 4.102(c).

or impossible to remove survivorship provisions from multi-party accounts.[227] This is especially true with the proliferation of online banking.[228]

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."[229] 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."[230] 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.[231] Anecdotally, I have also been told that GE Capital Bank account agreements have similar provisions concerning joint accounts.[232]

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.[233] 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.[234] Of course, clients attracted to a specific financial institution due to their interest rates or convenience may resist such a change.[235] Attorneys need to advise clients of the impact of these issues on their estate plans.[236]

4. Alternative to Accounts with Survivorship Features

If a client would like one or more friends or family members named on the client's 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.[237] A convenience account allows an account holder to name someone to sign on the account but gives no right of ownership or

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227. *See id.* § 4.102(b).

228. *See* TJ Porter, *What happens to a bank account when someone dies?*, BANKRATE (Sept. 16, 2020), https://www.bankrate.com/banking/what-happens-to-your-bank-account-after-death/ [https://perma.cc/5DHB-DLP7].

229. *Ally Bank Deposit Agreement and Disclosures*, ALLY BANK DEPOSIT AGREEMENT & DISCLOSURES 3 (Apr. 25, 2021), https://www.ally.com/resources/pdf/bank/ally-bank-deposit-agreement-upcoming.pdf [https://perma.cc/CSB4-9QUA].

230. *Id.*

231. *See* BUS. & COM. § 4.102(c).

232. *See, e.g.*, *Your Deposit Account Agreement & General Terms & Conditions, Electronic Transfers, Funds Availability*, US BANK 4 (May 10, 2021), https://www.usbank.com/pdf/Deposit-Account-Agreement.pdf [https://perma.cc/25VK-7W6J].

233. *See* Porter, *supra* note 228.

234. *See id.*

235. *See id.*

236. *See id.*

237. *See Bank Accounts*, *supra* note 200.

right of survivorship to the convenience signer.[238] In addition to not establishing a right of survivorship with the convenience signer, and in contrast to other multi-party accounts, the convenience account prevents the convenience signer from pledging the account for the convenience signer's debts.[239] When the owner dies, the owner's interest in the account passes under the owner's will or pursuant to the laws of intestate succession.[240] If properly styled as a convenience account, an account does not give rise to the problems associated with accounts with survivorship features.[241] Unfortunately, not every financial insitution provides this option.[242]

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.[243] Section 111.052 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.[244] In other words, the contract controls, rather than the statutes.[245]

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.[246] 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

238. *See* TEX. EST. CODE ANN. §§ 113.105, 113.106, 113.154.

239. *See id.* § 113.251(b).

240. *See id.* § 101.001.

241. *See* 3 RONALD R. CRESSWELL, TEXAS PRACTICE: WILLS, TRUSTS AND ESTATE PLANNING § 10:181 (2020).

242. *See id.*

243. EST. § 111.052.

244. *Id.*

245. *See id.* § 113.001. Financial institutions are defined in Texas Estates Code Section 113.001 to include brokerage firms, raising questions as to whether the earlier mentioned provisions of the Texas Estates Code apply to these types of accounts when *securities* rather than cash are held in the accounts and what provisions apply when both *cash and securities* are held in these accounts. *See id.* Unfortunately, no clear answers exist. *See id.; see generally* Glenn M. Karisch, *Multi-Party Accounts and Other Non-Probate Assets in Texas*, KARISCH LAW FIRM, PLLC (June 2016), http://texasprobate.com/download-cle-articles/multi-party%20accounts%202016-06-07.pdf [https://perma.cc/6FZ7-D6TX] (discussing the issues and case law that has seemingly ignored the cash and security accounts).

246. *See* Karisch, *supra* note 245, at 15.

any other institution responsible for the administration of a non-probate asset requiring a beneficiary designation.[247]

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.[248] 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.[249] For example, the sponsoring company will frequently require that the beneficiary designation be made on the company's form and delivered to the company on a timely basis.[250]

Accordingly, for every asset that passes according to a beneficiary designation, a change of beneficiary form should be obtained from the sponsoring company.[251]

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.[252] The contracts of sponsoring companies vary greatly, and accordingly, disposition of non-probate assets in the absence of a beneficiary designation vary as well.[253] In many cases, the client's estate becomes the default recipient of property if no beneficiary has been named.[254] 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.[255]

2. Naming Contingent Beneficiaries

In many cases, it is prudent to recommend that the client name both a primary and a contingent (secondary) beneficiary of each non-probate asset for which a beneficiary designation is required.[256] This is because

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247. *See supra* Section III.B.
248. *See supra* Section III.B.; EST. § 113.151.
249. *See* EST. § 113.151.
250. Author's original example.
251. *See* EST. § 113.053.
252. *See id.* § 113.052.
253. *See id.*
254. *See id.*
255. *See id.*
256. *See How to Make Beneficiary Designations For Non-Probate Assets*, FREEWILL (Sept. 17, 2021), https://www.freewill.com/learn/beneficiary-designations-for-non-probate-assets [https://perma.cc/FHF3-5QJQ].

(i) something could happen to both the client and the named primary beneficiary, in which case the contingent beneficiary would 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.[257]

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.[258] 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.[259]

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.[260] In discussions with clients, attorneys often refer to "naming a trust" as the beneficiary as a form of shorthand.[261] However, trusts are not legal entities that can hold title.[262] Accordingly, the trustee of the trust should be named on each beneficiary designation form.[263] 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.[264] However, when clients attempt to submit beneficiary designation forms with this language, they sometimes run into trouble.[265] This Article lists some of the commonly encountered problems, and possible solutions are listed below.[266]

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.[267] Rather, they insist on

257. *See id.*
258. *See* EST. § 113.153.
259. *See id.* § 113.151(b).
260. *See How to Make Beneficiary Designations For Non-Probate Assets*, *supra* note 256.
261. Author's original thought.
262. *See* TEX. PROP. CODE ANN. §§ 112.005, 112.008.
263. *See id.* § 112.008.
264. *See id.* § 113.052.
265. *See id.*
266. *Infra* Sections IV.B.3.a–e.
267. *See Naming A Trustee May Be One Of The Most Important Decisions Of Your Life*, RITZHOLMAN CPAS (Aug. 13, 2019), https://ritzholman.com/information-hub/naming-a-trustee-may-be-one-of-the-most-important-decisions-of-your-life/ [https://perma.cc/2FVX-WYTF].

having the actual name of the trustee listed.[268] While the client's estate planning documents may 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 will be serving as the trustee.[269] 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.[270] As an alternative to the generic designation recommended to the client whose estate planning is through a will, the client may designate the client's primary trustee by name, as the trustee in the client's will, followed by "(or his/her successor)."[271] For example, John Doe has named Jane Doe as the primary trustee in his will.[272] Therefore, he would word his beneficiary designation as follows: "Jane Doe, Trustee under the will of John Doe (or her successor)."[273]

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.[274] If required, it is generally not a problem to include the date of the will.[275] However, the attorney should advise clients that the beneficiary designation should be updated each time a new will or other estate planning document impacting the non-probate asset is signed.[276]

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 be paid to the trustee under the will only if the will is probated within a certain number of months.[277] Generally, this is fine; the client's family or other people involved

268. *See id.*
269. *See id*
270. *See id.*
271. *See id.*
272. *See id.*
273. *See id.*
274. Mark Henricks, *Out-Of-Date Beneficiary Designations Are a Common and Costly Mistake*, CNBC (Apr. 17, 2018, 11:29 AM), https://www.cnbc.com/2018/04/16/out-of-date-beneficiary-designations-are-a-common-and-costly-mistake.html [https://perma.cc/4FZM-Q6M5].
275. *See id.*
276. *See id.*
277. *See Guidelines for Individual Executors & Trustees*, ABA, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/guidelines_for_individual_executors_trustees/ (last visited Oct. 14, 2021) [https://perma.cc/4J5X-BK8Z].

in the client's estate plan will need to be sure that the will is probated within the specified time period.[278]

d. The Sponsoring Company Asks for Additional Beneficiary Information

Some sponsoring companies also want additional information regarding the named beneficiary, such as a current address, relationship, social security number, date of birth, etc.[279] If the client is naming their spouse or any other individual as a beneficiary, the requested information should be included.[280] However, if the client is naming the trustee in the client's will as a beneficiary, this information is primarily inapplicable.[281] This may be indicated on the form by entering "N/A" where appropriate.[282]

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).[283] These forms then have a second section entitled either "Contingent Beneficiary" or "Secondary Beneficiary," followed by a space to list the name(s).[284] 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).[285] 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.[286] If the client is unable to determine how to complete a form, however, the client should reach out to the attorney for assistance.[287] This Article discusses an attorney's participation in completing the paperwork to coordinate non-probate assets below.[288]

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278. *See id.*
279. *See Naming a beneficiary: What you need to know*, SECURIAN FIN., https://www.securian.com/insights-tools/articles/naming-a-life-insurance-beneficiary.html (last visited Oct. 14, 2021) [https://perma.cc/B5GM-ZFUK].
280. *See id.*
281. *See id.*
282. *See id.*
283. *See* Henricks, *supra* note 274.
284. *See id.*
285. *See id.*
286. *See id.*
287. *See id.*
288. *Infra* Part IV.

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.[289]

a. Online Submission

Many sponsoring companies now allow beneficiary designation forms to be submitted online.[290] If a form is returned to a sponsoring company in this manner, the client should print and retain a copy of the confirmation page or page indicating the revised beneficiary designations with the client's other estate planning documents.[291] If the form is submitted via email, the email should request written confirmation of receipt.[292]

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.[293] The return receipt or confirmation of delivery and copy of the letter transmitting the completed beneficiary designation should be retained by the client with the client's other estate planning documents.[294] If a beneficiary designation form is sent via fax, a copy of the fax transmission sheet should be retained in the same manner.[295] 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.[296]

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.[297] Once written confirmation is received from the sponsoring

289. *See* Henricks, *supra* note 274.
290. *See id.*
291. *See id.*
292. *See id.*
293. *See* Christine Riddle Butts & Mike Riddle, *Coordinating Beneficiary Designations—Has Your World Changed in the Last Five Years?*, 24 ANN. WILLS & PROB. INST. 7 (2009), https://riddlebutts.com/wp-content/uploads/2019/01/coordinating-beneficiary-designations.pdf [https://perma.cc/B94T-NETM].
294. *See id.*
295. *See id.*
296. Author's original thought; *see id*.
297. *See* Butts & Riddle, *supra* note 293, at 7.

company, the client should retain it along with the client's other estate planning documents.[298]

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.[299] Often, beneficiary designations can be viewed online.[300] 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.[301]

C. Real Property Held with Survivorship Features

Before 2015, it was relatively uncommon for real property in Texas to be held with survivorship features.[302] 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 subsequently, nontestamentary transfers of real property in Texas have become more common.[303]

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. [304] Accordingly, if the client owns real property in a state other than Texas or 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.[305]

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298. *See id.*

299. *See id.*

300. *See id.*

301. *See id.*

302. *See* Ann Latimer, *Transfer on Death Deed in Texas*, TEX. L. BLOG (Oct. 2, 2020), http://texaslawblog.law/2020/10/transfer-on-death-deed-in-texas/ [https://perma.cc/53Z3-FVMJ].

303. *See* TEX. EST. CODE ANN. §§ 114.001–.106.

304. REAL PROP. TRANSFER ON DEATH ACT (UNIF. L. COMM'N 2009). In addition to Texas, some version of URPTODA has been enacted in Mississippi, Montana, Utah, Maine, South Dakota, Washington, Alaska, West Virginia, New Mexico, Virginia, Nebraska, North Dakota, Illinois, Hawaii, Oregon, and Nevada. *See id.* URPTODA has also been enacted in the District of Columbia and the U.S. 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. *See id.*

305. *See* David J. Willis, *Co-Ownership of Property in Texas*, LONESTARLANDLAW.COM (2019), https://lonestarlandlaw.com/co-ownership-of-property-in-texas/ [https://perma.cc/C87F-5TLV].

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.[306]

A TODD only affects interests in the real property at the death of the transferor.[307] 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.[308] 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.[309] 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 any form of public assistance, and the property will not be subject to the claims of the beneficiary's creditors.[310]

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.[311] The deed must have been executed and acknowledged on or after September 1, 2015 (the effective date of the Act).[312] The transferor must execute the deed; the deed may not be created through the use of a power of attorney.[313]

When enacted, Subchapter D of Chapter 114 contained a statutory form TODD, which was subsequently revised in 2017.[314] However, the statutory form was frequently criticized for being confusing, and in 2019, Subchapter D of Chapter 114 was repealed by House Bill 2782.[315] The repeal of the

306. *See* EST. § 114.051.
307. *See id.*
308. *Id.* §§ 114.101(1), (4).
309. *Id.* §§ 114.101(2), (3).
310. *Id.* §§ 114.101(4), (7), (8).
311. *Id.* § 114.055.
312. *Id.* § 114.053.
313. *Id.* § 114.054.
314. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 841, § 1, sec. 114.151, 2015 Tex. Gen. Laws 2691, 2695 (repealed 2019).
315. *See id.*; Act of May 27, 2019, 86th Leg., R.S., ch. 1141, § 47(2).

statutory form did not affect the validity of transfer on death deeds.[316] 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."[317] 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.[318] 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.[319] The Probate Forms Task Force has now been tasked with not only creating the form TODD but also with creating instructions and revocation for the form.[320] I am a member of the Probate Forms Task Force and can confirm that those items are on the Task Force's current agenda.[321] However, it is likely to take quite some time before the documents are drafted, approved by the Court, and made available to the public.[322]

b. Revocation

A TODD can still be revocable regardless of whether the deed or another instrument contains a contrary provision.[323] However, a TODD cannot be revoked or superseded by a will.[324]

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.[325] In either case, the revoking document must have been acknowledged by the transferor after the acknowledgment 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.[326] If a TODD was made by joint owners with right of survivorship, it might only be revoked by all of the living joint owners, unless the transferor is the last surviving joint owner.[327]

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316. *See* Act of May 27, 2019, 86th Leg., R.S., ch. 1141, § 47(2).
317. *Id.*
318. Act of May 17, 2019, 86th Leg., R.S., ch. 337, § 3(2).
319. *Id.*; *Order Creating Probate Forms Task Force*, SUP. CT. TEX. (Jan. 21, 2016), https://www.txcourts.gov/media/1281191/16-9003.pdf [https://perma.cc/G3UV-APJ5].
320. *See Order Creating Probate Forms Task Force*, *supra* note 319.
321. *See id.*
322. *See id.*
323. TEX. EST. CODE ANN. § 114.052.
324. *Id.* § 114.057(b).
325. *Id.* § 114.057(a).
326. *Id.*
327. *Id.* §§ 114.057(e), 114.103(c).

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.[328]

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.[329]

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.[330]

c. Effect of 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.[331] If the transferor is survived by one or more other joint owners with rights of survivorship, the property belongs to the surviving joint owners.[332]

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.[333] If the beneficiary fails to survive the transferor (including failure to survive by 120 hours), that beneficiary's share lapses 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.[334] 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.[335] In that case, the descendants of a deceased beneficiary become substitute takers.[336] Subject to the anti-lapse

328. *Id.* § 114.057(c).
329. *Id.* § 114.102.
330. *Id.* § 114.057(d).
331. *Id.* § 114.103(b).
332. *Id.*
333. *Id.* § 114.103(a)(1).
334. *Id.* § 114.103(a)(2).
335. *Id.* § 255.153.
336. *Id.*

rule, concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship.[337]

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.[338]

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.[339] 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.[340] The claim is then subject to the claims procedures prescribed by Texas Estates Code Section 114.104.[341]

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 as if it were part of the probate estate.[342] 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 ninety days of the demand for payment, then a creditor, distributee of the estate, surviving spouse of the decedent, guardian or another appropriate person on behalf of a minor child or incapacitated adult child of the decedent, or any taxing authority may bring a proceeding to enforce the liability.[343]

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.[344] Tenancy

337. *Id.* § 114.103(a)(3).
338. *Id.* § 114.104(a); *see* TEX. PROP. CODE ANN. § 13.001.
339. EST. § 114.104(b).
340. *Id.* §§ 355.151, 114.104.
341. *Id.* §§ 355.151, 114.104.
342. *Id.* § 114.106(a).
343. *Id.* § 114.106(c).
344. States that recognize tenancy by the entirety include the following (all statutes are current through 2021) Alaska (ALASKA STAT. § 34.15.140), Arkansas (*see* Ford v. Felts, 624 S.W.2d 449, 450 (Ark. Ct. App. 1991)), Delaware (*see* Citizens Sav. Bank, Inc. v. Astrin, 61 A.2d 419, 421 (Del. Super. Ct. 1948)), Florida (FLA. STAT. § 655.79), Hawaii (HAW. REV. STAT. § 509-2), Illinois (750 ILL. COMP.

by the entirety is a type of shared ownership of property available only to married couples.[345] Generally, spouses who own property as tenants by the entirety each owns an undivided interest in the property, each has full rights to occupy and use the property, and each has 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.[346]

3. Evaluating Real Property Survivorship Features

The attorney must make several considerations when advising clients regarding real property subject to a transfer on death deed, held in tenancy by the entirety, or with other survivorship features.[347] 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.[348] However, the attorney must weigh tax advantages and trust protections against the benefits of holding real property in a manner that provides a survivorship feature.[349] 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.[350] 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.[351] If the client has concerns about creditors, it may be prudent to maintain the real property in a tenancy by the entirety.[352]

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, 490 (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 (N.Y. 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, 292 (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, 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, 822 (Va. 1999)), Wyoming (WYO. STAT. ANN. § 34-1-140), and the District of Columbia (*see* Travis v. Benson, 360 A.2d 506, 509 (D.C. 1976)).

345. *Tenancy by the Entirety*, LEGAL INFO. INST., https://www. law.cornell.edu/wex/tenancy_by_the_entirety (last visited Sept. 23, 2021) [https://perma.cc/2F96-7FPX].

346. *Id.*

347. *See supra* Sections IV.C.1–2.

348. Author's original thought.

349. *See generally* GERRY W. BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 59.1–60.9 (4th ed. 2020) (discussing survivorship features).

350. *See id.*

351. *See* 11 U.S.C. § 522.

352. *See id.*

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.[353] 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.[354] If local counsel does not prepare the document, local counsel should at least review the document before it is filed.[355]

D. Motor Vehicles Held with Survivorship Features

It is now relatively easy to pass title to a Texas vehicle in a nontestamentary manner.[356] 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.[357]

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.[358] 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).[359]

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

353. James Chen, *Tenancy by the Entirety*, INVESTOPEDIA (Aug. 30, 2021), https://www.investioPedia.com/terms/t/tenancy-by-the-entirety.asp [https://perma.cc/PH83-4GYP].

354. *See id.*

355. *See id.*

356. *See* TEX. EST. CODE ANN. §§ 115.001–.006.

357. *Beneficiary Designation for a Motor Vehicle*, TEX. DEP'T MOTOR VEHICLES 1, https://www.txdmv.gov/sites/default/files/form_files/VTR-121.pdf (last visited Sept. 23, 2021) [https://perma.cc/PW5F-MY8U].

358. TEX. TRANSP. CODE ANN. § 501.031(a) (this survivorship agreement on the title is mandated by Texas Transportation Code Section 501.031(a)).

359. *See Rights of Survivorship Ownership Agreement for a Motor Vehicle*, TEX. DEP'T MOTOR VEHICLES 1, https://www.txdmv.gov/sites/default/files/form_files/VTR-122.pdf (last visited Sept. 23, 2021) [https://perma.cc/5JHH-PGTG].

Agreement for a Motor Vehicle.[360] Upon completion of the Form VTR-122, two options are available.[361]

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.[362] In addition to the remark, up to two names can be printed as survivors on the Texas title.[363] If there are more than two survivors, "Multiple Survivors" is printed.[364] 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.[365]

Alternatively, the original Form VTR-122 can be retained, and after the 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.[366]

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.[367] 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.[368]

2. Beneficiary Designation

Prior to 2017, the non-probate transfer of vehicles was only available to parties who owned the vehicle jointly during life.[369] 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.[370] If joint owners with right of survivorship own a motor vehicle that is the subject of

360. *See id.*
361. *Id.*
362. *Id.* at 2.
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. TEX. TRANSP. CODE ANN. § 501.031(d).
368. *See Rights of Survivorship Ownership Agreement for a Motor Vehicle*, *supra* note 359, at 2.
369. *See id.*
370. TEX. EST. CODE ANN. § 115.002(a).

a beneficiary designation, the beneficiary designation must be made by all of the joint owners.[371]

The beneficiary designation can be made by completing a Texas Department of Motor Vehicles Form VTR-121.[372] 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.[373] The Texas Transportation Code provides explicitly that a beneficiary designation or a change or revocation of a beneficiary designation made on an application for the 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.[374] 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.[375]

The beneficiary designation may be changed or revoked at any time without the consent of the designated beneficiary.[376] However, if joint owners made the designation with rights of survivorship, the beneficiary designation may only be revoked by all of the joint owners or by the last surviving joint owner.[377] 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.[378]

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.[379]

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371. *Id*. §115.003(a).
372. *See Beneficiary Designation for a Motor Vehicle*, *supra* note 357, at 1.
373. *See id.*
374. TEX. TRANSP. CODE ANN. § 501.0315(e).
375. *See Beneficiary Designation for a Motor Vehicle*, *supra* note 357, at 2.
376. EST. §115.002(b)(1).
377. *Id.* § 115.003(b).
378. *See Beneficiary Designation for a Motor Vehicle*, *supra* note 357, at 1–2.
379. EST. § 115.004.

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 joint owners own the vehicle, the last surviving owner's death, as applicable, along with the death certificate of the owner(s).[380]

3. Evaluating Motor Vehicle Survivorship Features

Even without survivorship features, in Texas the transfer of a vehicle after death is relatively simple.[381] However, in circumstances in which the client knows the person to whom the client would like the vehicle to pass (e.g., the surviving spouse or a child who uses the vehicle), the foregoing nontestamentary transfers are useful.[382] 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.[383] Accordingly, having the vehicle pass via right of survivorship or beneficiary designation will generally not thwart the estate plan.[384] 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.[385]

V. ESTATE PLANNING THROUGH A REVOCABLE TRUST

A discussion about non-probate assets would be incomplete without addressing revocable trusts.[386] Technically, any trust that can be revoked is a revocable trust.[387] 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 the client's lifetime, and the terms of the trust instrument dictate the passage of assets at the client's death.[388] 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

380. *See* TEX. TRANSP. CODE ANN. § 501.0315(d); *Beneficiary Designation for a Motor Vehicle*, *supra* note 357, at 1–2.

381. *See* EST. §§ 114.051–.057.

382. *See* Sam A. Moak, *Vehicle Right of Survivorship in Texas*, ITEM (Apr. 16, 2018), https://www.itemonline.com/news/local_news/vehicle-right-of-survivorship-in-texas/article_409f5677-b86f-5e6b-a4d7-2e4bf0de486b.html [https://perma.cc/9NF3-3PNR].

383. *See id.*

384. *See id.*

385. *See Beneficiary Designation for a Motor Vehicle*, *supra* note 357, at 2.

386. *See infra* Section V.A.

387. *See* RESTATEMENT (THIRD) OF TRS. § 63 (AM. L. INST. 2003).

388. *See* RESTATEMENT OF TRS. § 57 (AM. L. INST. 1935).

cumbersome and costly.[389] Nevertheless, revocable trust planning can still be beneficial to many clients.[390]

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.[391] 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.[392]

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.[393] In Texas, this may not be a driving factor, but in other jurisdictions probate can be an expensive and cumbersome proposition.[394] 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.[395] 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.[396] Similarly, for mobile clients who are based in Texas but frequently move, implementing estate planning through a revocable trust can minimize the need for an overhauled estate plan after each move.[397]

2. Privacy

The desire for privacy is also frequently cited as a reason for revocable trust planning.[398] Once filed for probate, a will becomes a public record and is often immediately available for viewing by anyone who has access to a

389. *See* TEX. EST. CODE ANN. §§ 114.051–.057.

390. *See id.*

391. *See* Brette Sember, *Create a Living Trust in Texas*, LEGAL ZOOM (Aug. 3, 2021), https://www.legalzoom.com/articles/create-a-living-trust-in-texas [https://perma.cc/2C8T-H6AE].

392. *See id.*

393. *Id.*

394. *See id.* (making a note of Texas's lack of estate tax).

395. *See* Ansherina M., *Ancillary Probate Texas*, HAILEY-PETTY L. FIRM, PLLC (Sept. 3, 2020), https://haileypettylaw.com/ancillary-probate-texas/ [https://perma.cc/Z7HF-UN5H].

396. *See id.*

397. *See id.*

398. Curtis C. Howell, *Choosing a Living Trust for Estate Planning*, CPA J. ONLINE (Aug. 1994), http://archives.cpajournal.com/old/15703003.htm [https://perma.cc/P963-BJAL].

computer.[399] In contrast, a revocable trust remains private with respect to uninterested parties.[400] 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.[401]

If a decedent's estate is probated, the personal representative of the estate must prepare a detailed inventory of all estate property.[402] The default rule is that the inventory must be filed with the court, and many clients and beneficiaries balk at the idea of such personal information becoming public record.[403] However, since 2011, it has been possible for a personal representative to avoid filing the inventory in Texas.[404] 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.[405] 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 in the will, or has waived the right to receive the inventory, then the independent executor does not need to provide the inventory to the beneficiary before an affidavit in lieu of inventory is filed.[406] The availability of the affidavit in lieu of inventory has alleviated some privacy concerns, but it is not always available.[407] Accordingly, revocable trust planning remains the best method to ensure privacy.[408]

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.[409] Even with respect to joint accounts, once

399. Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 557 (2008).

400. *Understanding the Basics of Revocable Living Trusts*, KAISER L. FIRM 3 (2017), https://eforms.com/images/2017/06/understanding-the-basics-of-a-minnesota-living-trust.pdf [https://perma.cc/N25Y-CV7J].

401. Foster, *supra* note 399, at 564–65.

402. TEX. EST. CODE ANN. § 309.051(a).

403. Bradley E.S. Fogel, *Trust me? Estate Planning with Revocable Trusts*, 58 ST. LOUIS L.J. 805, 815 (2014).

404. EST. § 309.056(b).

405. *Id.* § 309.056(a).

406. *Id.* § 309.056(b-1).

407. *See* Fogel, *supra* note 403, at 816 (if the personal representative is still negotiating with creditors at the time the inventory is due).

408. *See id.*

409. *Understanding the Basics of Revocable Living Trusts*, *supra* note 400, at 2.

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 their funds until a personal representative is appointed.[410] Once an application to probate a will has been filed with the court, a hearing may not be held for at least ten days.[411] Even after that statutory waiting period has lapsed, it can take weeks or even months before the court has availability for the hearing.[412] However, if assets are held in a revocable trust, then at the decedent's death the assets of the trust remain available to the trustee or become immediately available to the successor trustee of the trust.[413]

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.[414] Although a revocable trust can be contested on similar grounds to a will, it may be more difficult for a disgruntled family member or another party to prove they have standing to challenge the trust.[415] 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.[416] Additionally, since a revocable trust does not have to be filed at the decedent's death as 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.[417]

5. Management Vehicle on Incapacity

Planning through a revocable trust may also be a good option if a client has early signs of incapacity or would simply rather have someone else manage the client's financial affairs.[418] In that case, a revocable trust that has been funded can serve as an effective management vehicle and can avoid the

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410. Gus G. Tamborello, *Ten Pesky Probate Problems*, 2017 HARRIS CNTY. PROB. CT. NO. 4 CONTINUING LEGAL EDUC. PRESENTATION 8, https://probatecrt4.harriscounty.tx.gov/documents/tamborello_ten%20probate%20problems_court%20_cle.pdf [https://perma.cc/7USW-JQJ9].

411. *See* EST. § 51.053(b).

412. Christine Bartsch, *The Probate Timeline – A Simple Walkthrough for a Complex Process*, HOMELIGHT (Mar. 21, 2018), https://www.homelight.com/blog/probate-timeline/ [https://perma.cc/5WCV-Q2SF].

413. *See id.*

414. *Understanding the Basics of Revocable Living Trusts*, *supra* note 400, at 4.

415. John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 73–74 (1978).

416. *See id.*

417. *See* UNIF. TR. CODE § 105 cmt. (UNIF. L. COMM'N 2000) ("[S]ubsection (b)(8) allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust.").

418. Fogel, *supra* note 403, at 817–18.

need for a court-created guardianship.[419] Even if the client has executed a power of attorney naming an agent to manage the client's affairs, it is often easier for a trustee to access and manage property than it is for an agent acting under a power of attorney.[420]

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.[421] Of course, probate can be avoided only if all of the client's probate-type assets are funded into the trust before the client's death.[422] Transferring some assets into the trust may not pose a problem.[423] However, other assets may require deeper consideration.[424]

1. Transfer of Real Property

The attorney must also evaluate several issues that are unique to real property in connection with a transfer of the property to a revocable trust.[425]

a. Homestead Issues

In Texas, homesteads are afforded special treatment.[426] Subject to some exceptions, the Property Code provides that homesteads are exempt from seizure or forced sale for the claims of creditors or debts.[427] Additionally, Section 11.13 of the Texas Tax Code provides for a property tax reduction for a homestead.[428] 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."[429] However, the definitions of a "qualifying trust" differ slightly in each of those statutes.[430]

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419. *Id.*
420. *Id.*
421. *Understanding the Basics of Revocable Living Trusts*, *supra* note 400, at 6.
422. Fogel, *supra* note 403, at 812.
423. *Id.*
424. *Id.*
425. *Infra* Sections V.B.1.a–f.
426. *See* Wesley E. Wright & Molly Dear Abshire, *Trusts Affect Texas' Homestead Exemption*, HOUS. CHRON. (May 9, 2014), https://www.wrightabshire.com/wp-content/uploads/sites/1601388/2020/10/Publications-Trusts-Affect-Texas-Homestead-Exemption.pdf [https://perma.cc/EN53-9T98].
427. *See* TEX. CONST. art XVI, § 50; TEX. PROP. CODE ANN. § 41.001.
428. TEX. TAX CODE ANN. § 11.13.
429. PROP. § 41.0021(a); TAX § 11.13(a), (j).
430. PROP. § 41.0021(a); TAX §11.13(a), (j).

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 the 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 (i) for 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.[431]

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."[432]

Recently there has been a flurry of discussion on this particular topic because of a 2019 bankruptcy case.[433] 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 Texas 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.[434]

However, the debtor subsequently appealed to the district court.[435] 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.[436]

Even though *In re Cyr* was reversed, if a homestead is being transferred to a revocable trust, it is a good practice to make sure that the trust agreement contains language necessary to make it a "qualifying trust" under both the Tax Code and the Property Code.[437] Including language providing that the grantor may use and occupy the principal residence "at no cost, or rent free

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431. PROP. § 41.0021(a).
432. TAX § 11.13(j)(3)(A).
433. *In re* Cyr, 605 B.R. 784, 804 (Bankr. W.D. Tex. 2019).
434. *Id.*
435. Cyr v. SNH NS MTG Props. 2 Trust, No. 19-CV-0911, 2020 WL 7048603, at *1 (W.D. Tex. 2020).
436. *Id.* at *3.
437. *See In re Cyr*, 605 B.R. at 804.

and without charge" and referencing both relevant statutes should cover those bases.[438]

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 borrower transfers the property to a third party.[439] With respect to a loan secured by a lien on residential real 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.[440] 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.[441] 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.[442]

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.[443] 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.[444] 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.[445] 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 discuss 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.[446]

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

438. *See Cyr*, 2020 WL 7048603, at *1.

439. *See* Eunice A. Eichelberger, Annotation, *What Transfers Justify Acceleration Under "Due-on-sale" Clause of Real-Estate Mortgage*, 22 A.L.R. 4th 1266 § 1(a) (1983); 12 U.S.C. § 1701j-3(a)(1).

440. 12 U.S.C. § 1701j-3(d).

441. *Id.*

442. *Id.*

443. *Understanding the Basics of Revocable Living Trusts*, *supra* note 400, at 9.

444. *Id.*

445. *See* 7d Nichols Cyc. Legal Forms §§ 181.40, 3.13(a)–(b).

446. *See*, *e.g.*, *In re* Mullin, 433 B.R. 1, at *10–11, 14 (Bankr. S.D. Tex. 2010).

refinanced to make the transfer.[447] If the client is concerned about continuing to own the property outright for a period of time, the client can sign a transfer on death deed with respect to the property, providing that at the death of the client the property will pass to the trustee of the revocable trust.[448]

c. Property Outside of Texas

If the client owns real property outside of Texas, the client should consult local counsel 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.[449] In states that impose a state inheritance or estate tax, while transferring real property to a revocable trust may avoid the need for probate in that state, it may not avoid the imposition of such a tax.[450] In such 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.[451]

d. Method of Transfer

Real property located in Texas can be transferred to the revocable trust by deed.[452] A "deed" is a written instrument, duly executed and delivered, conveying real property from one party to another.[453] No particular form is required to convey title to land.[454] Under the Texas Property Code, the only requirements for a deed are that it be in writing, signed by the grantor, and delivered to the grantee.[455] If the intention to pass the title can be inferred, the courts will give effect to it and construe the words accordingly.[456] However,

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447. *Do I Need Bank or Lender Permission to Transfer Mortgaged Real Estate by Deed?*, DEEDCLAIM, https://www.deedclaim.com/bank-lender-permission-deed-real-estate/ (last visited Sep. 29, 2021) [https://perma.cc/J6GN-8U7J].

448. TEX. EST. CODE ANN. § 114.051; *see also id.* § 114.101 ("[A] transfer on death deed does not . . . constitute a transfer triggering a 'due on sale' or similar clauses.").

449. *See* Fogel, *supra* note 403, at 418.

450. *See* Robert E. Mannheimer, *The Revocable Trust*, 5 LAW NOTES GEN. PRAC. [xxiii] (1969).

451. *See* Julia Dennis, *Titling Real Property: The Benefits of Using LLCs and Revocable Trusts*, SHUFFIELD LOWMAN (July 24, 2013), https://www.shuffieldlowman.com/tiltling-real-property-the-benefits-of-using-llcs-and-revocable-trusts/ [https://perma.cc/F8WN-FPPH] (stating general estate planning benefits and advantages).

452. *See* Sean Green, *Funding Your Revocable Living Trust*, GREEN L. BLOG (Jan. 27, 2015), https://www.greenlawtexas.com/blog/funeling-your-revocable-living-trust/ [https://perma.cc/3KCG-CMNC].

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

454. *See* David J. Willis, *Deeds in Texas*, LONE STAR L. (2021), https://www.lonestartlawlaw.com/deeds-in-texas/ [https://perma.cc/4A43-4TRH]; *see also* TEX. PROP. CODE ANN. § 5.022(a) (providing a standard form for conveyance).

455. *See* PROP. § 5.022.

456. Harlowe v. Hudgins, 19 S.W. 364, 365 (Tex. 1892).

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.[457]

Several types of deeds are commonly used in Texas.[458] 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.[459] Texas Property Code Section 5.022(b) expressly states that a covenant of warranty is not required in a conveyance, but warranties are commonly made in deeds.[460] Whether the deed contains a general warranty, special warranty, or no warranty, the actual conveyance itself is not affected.[461] The warranty does not constitute a part of the conveyance nor strengthen or enlarge the title conveyed.[462] 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.[463]

i. 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).[464] 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.[465] Accordingly, if any defect in title is later discovered, a grantor or the grantor's heirs or successors are liable to the grantee or any later owner of the property.[466]

Texas Property Code Section 5.022 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

457. 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).

458. *See* Willis, *supra* note 454.

459. *See id.*

460. PROP. § 5.022(b).

461. *See* Flanniken v. Neal, 4 S.W. 212, 214 (Tex. 1887).

462. City of Beaumont v. Moore, 202 S.W.2d 448, 453 (Tex. 1947).

463. *Id.* at 455.

464. *See generally* Rusty Adams, *Seller Beware: Understanding the General Warranty Deed*, TEX. REAL EST. RSCH. CTR. TEX. A&M UNIV. (Nov. 15, 2016), https://www.recenter.tamu.edu/articles/tier ta-grande/seller-beware [https://perma.cc/FG8N-VCLV] (explaining express and general warranty chain of title guarantee).

465. *See Flanniken*, 4 S.W. at 214.

466. *See id.*

premises unto the said grantee, his heirs, and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof."[467]

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.[468]

ii. Special Warranty Deed

A special warranty in a deed also guarantees good title to the property, but not back to the sovereignty.[469] The warranty covers only the period of time during which the grantor owns the land.[470] 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."[471] 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 the client has good title to the property.[472]

iii. Deed Without Warranty

A deed without warranty is just what it sounds like—it does not contain any warranty of clear title.[473] 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."[474]

Although this type of deed is not common, it may be used if uncertainty exists about a grantor's title to the property.[475] Because quitclaim deeds are

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467. TEX. PROP. CODE ANN. § 5.022.

468. *See* Willis, *supra* note 454.

469. *See generally How a Texas Special Warranty Deed Works*, DEEDCLAIM, https://www.deedclaim.com/texas/special-warranty-deed/ (last visited Sept. 29, 2021) [https://perma.cc/NV82-EPBX] (explaining that a special warranty deed is limited and applies to period of previous ownership).

470. *See* Owen v. Yocum, 341 S.W.2d 709, 710 (Tex. App.—Fort Worth 1960, no writ).

471. *See* Willis, *supra* note 454.

472. *See generally* Scott Steinbach, *General Warranty Deed vs Special Warranty Deed*, TEX. PROP. DEEDS, http://www.texaspropertydeeds.com/general-warranty-deed-vs-special-warranty-deed/ (last visited Sept. 29, 2021) [https://perma.cc/RSZ4-GDN2] (stating generally seller and buyer preference of special or general warranty deed).

473. *See What is a Deed Without a Warranty?*, STEPHENS DOMNITZ MEINEKE PLLC (Feb. 22, 2021), https://www.yourtexasattorney.com/what-is-deed-without-warrant/ [https://perma.cc/NY8G-XPF5].

474. *See No Express or Implied Warranty Sample Clauses*, L. INSIDER, https://www.lawinsider.com/clause/no-express-or-implied-warranty (last visited Sept. 29, 2021) [https://perma.cc/ZW5C-DGTJ] (providing example warranty clauses).

475. *See Deed Without Warranty*, SILBERMAN L. FIRM PLLC, https://www.silblawfirm.com/deed-without-warranty-texas/ (last visited Sept. 29, 2021) [https://perma.cc/JDP4-NXBL].

generally viewed unfavorably in Texas, deeds without warranty may be used where quitclaim deeds might otherwise be used.[476]

iv. 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.[477] A grantor who executes a quitclaim deed may or may not have a valid interest in title or to the real property.[478]

It has been held that a recipient of a quitclaim deed takes with notice of all defects in title and equities of third persons.[479] 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.[480] 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.[481] Accordingly, a practitioner should be wary 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.[482]

v. 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.[483] 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 acknowledgments or oaths, as applicable.[484]

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476. *See generally* Ronna L. DeLoe, *Quitclaim Deeds vs. Warranty Deeds in Texas*, LEGALZOOM (June 28, 2019), https://www.legalzoom.com/articles/quitclaim-deeds-vs-warranty-deeds-in-texas [https://perma.cc/Q42V-N6ND] (describing the use of quitclaim deeds in Texas).

477. *See* Cook v. Smith, 174 S.W. 1094, 1095 (Tex. 1915).

478. *See* Carl F. Thorne, *Quitclaim Deed in Texas*, 18 BAYLOR L. REV. 618, 619 (1966).

479. *See* Hall v. Tucker, 414 S.W.2d 766, 769 (Tex. App.—Eastland 1967, writ ref'd n.r.e.).

480. *See* Houston Oil Co. of Tex. v. Niles, 255 S.W. 604, 610 (Tex. Comm'n. App. 1923).

481. *See generally Texas Quitclaim Deed Form*, DEEDCLAIM, https://www.deedclaim.com/texas/quitclaim-deed/ (last visited Sept. 29, 2021) [https://perma.cc/2KKY-KF8W] (explaining general disfavor for quitclaim deeds).

482. *See* DeLoe, *supra* note 476.

483. *See* TEX. PROP. CODE ANN. § 12.001.

484. *See id.* § 12.001(b).

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.[485] 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.[486] If mineral interests are transferred to the revocable trust, the issuance of new division orders will also likely be required.[487]

f. Interests in Closely Held Businesses

A minefield of issues can arise when transferring closely held business interests.[488] 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.[489] 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.[490] Transfers may also trigger buyout, buy/sell, or other similar clauses.[491] If these types of issues exist, amendments to the governing documents may be necessary in connection with the transfer.[492] 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.[493] While some of these

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485. *See* Fogel, *supra* note 403.

486. *See* Wright & Abshire, *supra* note 426; TEX. TAX CODE ANN. § 11.13.

487. *See generally Minerals and Estate Planning*, RUSSELL W. HALL & ASSOCS. P.C., https://www.bellaireprobate.com/2019/03/minerals-and-estate-planning (last visited Sept. 29, 2021) [https://perma.cc/EW2L-KZM4] (advising to avoid probate, trustee may enable division orders).

488. *See* Fogel, *supra* note 403, at 418.

489. *See Funding Your Revocable Trust – Business Interests*, CDM L. FIRM, https://www.cdmlawfirm.com/funding-your-revocable-trust-business-interests/ (last visited Sept. 14, 2021) [https://perma.cc/3KK4-JURD].

490. *See generally* Julie Garber, *What Assets Can Go Into a Revocable Living Trust?*, THE BALANCE (June 20, 2020), https://www.thebalance.com/what-types-of-assets-can-go-into-a-revocable-living-trust-3505289 [https://perma.cc/M4ZL-KJMG] (advising to check any operating agreements for restriction on transfer).

491. *See Transferring Business Interests to a Trust: Is it Always a Good Idea?*, VIRTUS L. (Jan. 25, 2019), https://www.virtuslaw.com/2019/01/25/transferring-business-interests-to-a-trust-is-it-always-a-good-idea/ [https://perma.cc/P7ZY-KDFB].

492. *See generally Transferring Assets to Your Trust – Funding Instructions*, ELDERLAWANSWERS, https://www.attorney.elderlawanswers.com/transferring-assets-to-your-trust---funding-instructions-1322 (last visited Sept. 29, 2021) [https://perma.cc/Q7H9-7WTB] (explaining how closely held corporations placing stock into a trust may need appropriate corporate records to permit such a transfer).

493. *See* Fogel, *supra* note 403, at 418.

requirements may be a mere formality, it is important that they are followed.[494]

2. Transfer of Other Assets

Other than the transfer of real property and closely-held business interests, in many cases, clients can work independently to fund assets into the trust.[495]

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.[496] Although it is 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.[497] Unless such an account is held with survivorship features, however, the account will be subject to probate at the client's death.[498]

In most instances, financial institutions will request a copy of the trust agreement when establishing accounts for the trust.[499] 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.[500]

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.[501] If a penalty or a forfeiture of interest would be imposed

494. *See supra* notes 487–91 and accompanying text.

495. *See* Fogel*, supra* note 403, at 418.

496. *See generally* Paul T. Czepiga, *Transfer of Assets to the Trustee of a Revocable Trust and Operation of the Trust*, CZEPIGA DALY POPE & PERRI, https://www.czepigalaw.com/transfer-of-assets-to-the-trustee-of-a-revocable-trust-and-opera.html (last visited Oct. 18, 2021) [https://perma.cc/7KFU-QHDG] (describing steps clients should take to transfer a bank account or other assets to a revocable trust).

497. *See generally* Fraser Sherman, *Should I put my Personal Account Into my Family Trust?*, ZACKS FIN., https://finance.zacks.com/accounts-need-included-revocable-trust-1431.html (last visited Sept. 19, 2021) [https://perma.cc/D2F6-MC9E].

498. *See Transferring Business Interests to a Trust: Is it Always a Good Idea?, supra* note 491.

499. *See* Czepiga, *supra* note 496.

500. *See* TEX. PROP. CODE ANN. § 114.086.

501. *Transferring Assets to Your Trust – Funding Instructions*, *supra* note 492.

because of the transfer, then to avoid financial loss, the client can wait until the certificate matures and transfer the funds at that time.[502]

b. Stocks and Bonds

With respect to stocks and bonds held in a brokerage account, the transfer will be handled much the same as for a bank account.[503] For other publicly traded stocks or bonds, it will be necessary to work through a stockbroker or transfer agent to effectuate the transfer.[504]

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.[505]

c. Promissory Notes

If the client is the holder of a promissory note or debt instrument, the client can generally endorse the note over to the trustee of a revocable trust.[506] 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 appropriate paperwork to be prepared and filed.[507]

d. Retirement Accounts and Life Insurance

Retirement funds are typically not transferred into the revocable trust during the participant's lifetime.[508] Likewise, there is no need to transfer the ownership of life insurance policies to the revocable trust while the insured is alive.[509] However, the trust can be named as a primary or contingent beneficiary of these assets if appropriate.[510] After weighing the considerations influencing the most appropriate disposition of non-probate assets (as discussed in Section II of this Article), the attorney may recommend that the trustee of the revocable trust be named as a primary or contingent beneficiary of these types of assets.[511]

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502. *See id.*
503. *See id.*
504. *See id.*
505. *See id.*
506. *See id.*
507. *See id.*
508. *See id.*
509. *See id.*
510. *See id.*
511. *See id.*

e. Personal Effects and Collectibles

Generally, we do not recommend a documented transfer of household goods and personal effects to a revocable trust during the client's lifetime.[512] 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 transferred to the revocable trust through a bill of sale or specific assignment.[513]

VI. THE ATTORNEY'S ROLE

So what is the role of an attorney preparing a client's estate plan in all of this?[514] How far must the attorney go to ensure that non-probate assets are appropriately coordinated with the estate plan?[515] Certainly, an attorney should ask about the client's non-probate assets and educate and advise clients regarding the disposition of these assets.[516] 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 the attorney's client and should be addressed in the engagement agreement between them.[517]

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.[518] A helpful way to request this information is to ask that a client complete a data-gathering form.[519] The data-gathering form can request 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 understand better the client's goals regarding the disposition of the client's estate.[520] The data-

512. *See id.*
513. *See id.*
514. Author's original hypothetical.
515. Author's original hypothetical.
516. *See* Jane Haskins, *What Assets Need to be Listed for Probate?*, LEGALZOOM (Feb. 3, 2021), http://www.legalzoom.com/articles/what-assets-need-to-be-listed-for-probate [https://perma.cc/Y6X4-J7T4].
517. *See Engagement Letters a Guide for Practitioners*, ACTEC (2017), http://www.actec.org/assets/1/6/ACTEC_297_engagement_letters.pdf?hsse=1 [https://perma.cc/CC36-6EH8].
518. *See* Haskins, *supra* note 516.
519. Author's original thought.
520. *See* Ronald T. Charlebois, *Estate Planning: An Overview*, LORMAN (Oct. 3, 2018), http://www.lorman.com/resources/estate-planning-an-overview-17359 [https://perma.cc/3F2Z-JKXW].

gathering form should also request information about the client's assets which will assist the attorney in identifying any non-probate assets.[521]

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.[522] Rather, it 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 their life).[523] 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?).[524]

In addition to requesting information about the client's assets, a data-gathering form should inquire about circumstances that may influence the way non-probate assets are handled.[525] 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.[526] A client may be subject to a buy-sell agreement that requires the ownership of life insurance.[527] It is important to identify each source of such an obligation and review the document imposing the obligation.[528]

B. Educating the Client About Non-Probate Assets

Even if a client has completed a beneficiary designation form with regard to a non-probate asset, the client may not understand that signing a will or revocable trust does not direct the disposition of all of the client's assets.[529]

The attorney must take the time to educate the client regarding what assets in the client's 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.[530]

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521. *See id.*
522. *See id.*
523. *See id.*
524. Author's original thought.
525. Author's original thought.
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527. Author's original thought.
528. Author's original thought.
529. Author's original thought.
530. Author's original thought.

C. Participation in Coordination of Non-Probate Assets

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.[531] 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.[532] 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.[533] Any work done in connection with funding a revocable trust is generally handled similarly.[534]

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 the attorney's participation.[535] 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 advise the client that the client will be responsible for doing so.[536]

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.[537] Often, the financial advisor will have direct access to financial institutions and will be familiar with the forms and paperwork required.[538] If the client consents, the attorney should communicate with the financial advisor so that the financial advisor can take an active role.[539]

D. Providing Clients with Tools to Coordinate Non-Probate Assets

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

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531. *See Engagement Letters a Guide for Practitioners*, *supra* note 517.
532. Author's original thought.
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538. Author's original thought.
539. Author's original thought.

own to the extent possible.[540] After clients leave our offices, their assets seldom remain static.[541] For example, a client may acquire new life insurance policies, rollover an employer-sponsored retirement plan to an IRA, or inherit an IRA.[542] 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.[543]

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.[544] 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.[545] 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.[546] The memorandum contains some of the information set out in this Article, 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.[547] If necessary, included with the memorandum is a chart specific to the client showing recommended beneficiary designations.[548] Charts such as these should not be generic, but rather should be tailored to meet each client's needs.[549]

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.[550]

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.[551]

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544. Author's original thought.
545. Author's original thought.
546. Author's original thought.
547. *See supra* Part IV.
548. Author's original thought.
549. Author's original thought.
550. Author's original thought.
551. *See* Julie Garber, *Using a Memorandum to Trust to Simplify Estate Plans*, BALANCE (Mar. 8, 2021), https://www.thebalance.com/your-affidavit-or-memoradum-of-trust-35051. 88 [https://perma.cc/C6BK-9RZP].

Providing these written recommendations and instructions to the client is the best practice for an estate planning attorney.[552] 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.[553]

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

Hopefully, at a person's death, all of the person's non-probate assets will have been perfectly coordinated with the person's overall estate plan.[554] However, many times, this will not be the case.[555] If at a person's death, the person's 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.[556]

A. Scrutinize Account Agreements

If a multi-party account is at issue, the account agreement or signature card governing the account should be scrutinized.[557] 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.[558] As a result, the language on the account agreement or signature card may be insufficient to create a right of survivorship.[559]

If that is the case, the decedent's portion of the account may pass as part of the decedent's probate estate.[560] 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.[561] 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

552. Author's original thought.

553. Author's original thought.

554. *See How Non-Probate Assets Can Affect Your Estate Plan: A Few Cautionary Tales*, WARD & SMITH, P.A. (June 1, 2016), https://www.wardandsmith.com/articles/how-non-probate-assets-can-affect-your-estate-plan-a-few-cautionary-tales [https://perma.cc/FK3W-VPLH].

555. *See generally id.* (outlining scenarios in which non-probate assets impact disposition of property).

556. *See id.*

557. *See* Holmes v. Beatty, 290 S.W.3d 852, 856 (Tex. 2009).

558. *See id.*; TEX. EST. CODE ANN. § 113.151.

559. *See Holmes*, 290 S.W.3d at 856.

560. *See In re* Est. of Dellinger, 224 S.W.3d 434, 436–38 (Tex. App.—Dallas 2007, no pet.).

561. *See id.* at 438.

acknowledged the estate's ownership.[562] However, some financial institutions are not as easy to reason with.[563] 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.[564]

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), the person may have an option to disclaim (i.e., renounce) the person's right to receive the property or any portion of the property.[565]

If an asset or any portion of an asset is disclaimed, it will pass as if the disclaiming party predeceased the decedent.[566] Accordingly, before the attorney recommends a disclaimer, the attorney should make a determination regarding what would happen and who would receive the disclaimed asset as a result of the disclaimer.[567] Successive disclaimers might need to be made by multiple parties if necessary to obtain the desired disposition of the property.[568]

A disclaimer is a complete renunciation of property, which in Texas must be made per Chapter 240 of the Texas Property Code in order to be valid.[569] 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.[570] Prior to 2015, the Texas disclaimer rules were largely based on federal tax law.[571] 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.[572] The Texas disclaimer laws are now significantly different from the federal disclaimer laws, so each should be reviewed at the time of disclaimer to ensure full compliance with both.[573]

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562. Author's original thought.
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565. *See* TEX. PROP. CODE ANN. § 240.006.
566. *See id.* § 240.002.
567. *See id.* § 240.051.
568. *See id.*
569. *See id.* § 240.009.
570. I.R.C. § 2518.
571. *See In re* Wombie, 289 B.R. 836, 848 (Bankr. N.D. Tex. 2003).
572. TEX. EST. CODE ANN. § 122.002.
573. *See id.*

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.[574]

For a disclaimer to be qualified under Section 2518 of the Internal Revenue Code, the following requirements must be met:[575]

1. The disclaimer must be in writing.[576]
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.[577] 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.[578]
3. The disclaimant must not have previously accepted the interest or any of the benefits of the property.[579]
4. The disclaimed property must generally pass in a manner that the disclaiming party will not benefit from the property.[580] 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.[581]
5. The disclaimed property must pass without direction or control of the disclaiming party.[582] 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.[583] If the trust contains unduly broad powers, other family

574. *Id.* § 240.009.
575. I.R.C. § 2518.
576. *Id.* § 2518(b)(1).
577. *Id.* § 2518(b)(2).
578. *See id.* § 2518(b).
579. *See id.* § 2518(b)(3).
580. *See id.* § 2518(b)(4).
581. *See id.* § 2518(b)(4); Treas. Reg. §§ 25.2518-2(e)(5), Examples (4)–(6).
582. I.R.C. § 2518(b)(4).
583. *See generally id.* § 2518(b)(4) (discussing the passing of an interest to the decedent's spouse without direction from the person making the disclaimer).

members or a professional trustee may serve as trustee.[584] This restriction also prevents a trust beneficiary from retaining a power of appointment over the trust property.[585]

C. Equalization by Beneficiaries

A recipient of a non-probate asset may be altruistic enough to voluntarily distribute the proceeds of the asset among others if the recipient believes that was the decedent's intent.[586] Similarly, if there are debts, expenses, or taxes payable by the estate, the recipient may desire to pay their "share."[587] 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.[588]

If any amount is given outright to another person, it will be a gift from the original recipient for federal gift tax purposes.[589] If the original recipient pays debts, expenses, or taxes that the recipient is not obligated to pay, the amount paid will be deemed a gift to the people from whose share the amounts should have been paid.[590]

The federal transfer tax system imposes a tax on the right to transfer assets by gift.[591] 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.[592] This $15,000-per-donee amount is referred to as the "annual exclusion."[593] 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 of the annual exclusion will reduce the person's lifetime gift tax exemption ($11.7 million for 2021), 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%.[594]

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584. *See* Treas. Reg. §§ 25.2518-2(e)(2), (e)(5), Examples (4)–(6).
585. *See* Treas. Reg. § 25.2518-2(e).
586. *See* I.R.C. § 2501.
587. *See id.*
588. *See id.* § 2501(a)(1).
589. *See id.*
590. *See id.* § 2503.
591. *Id.* § 2501(a)(1).
592. *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. This is scheduled to increase to $16,000 in 2022.).
593. *See* LA. REV. STAT. ANN. 9:1937 (2021).
594. *See* I.R.C. § 1402 (this amount is subject to an inflation adjustment each year through 2025 when it will return to $5 million (indexed for inflation beginning in 2011)).

VIII. CONCLUSION

Our clients can achieve the best result when they coordinate their non-probate assets with their overall estate plan.[595] 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.[596]

Additionally, the attorney should put into place purposeful policies and practices in order to facilitate the collection of information about clients' non-probate assets, set clear guidelines regarding responsibilities for coordination of non-probate assets, and ensure best practices in the practical actions involved in the coordination of the non-probate assets if they are engaged to do so.[597]

If non-probate assets are not properly coordinated, some post-mortem actions can be taken to align the non-probate assets with the overall estate plan.[598] 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 with the estate plan at the outset.[599]

595. *See supra* Part II.
596. *See supra* Part II.
597. *See supra* Part VI.
598. *See supra* Part VII.
599. *See supra* Part VII.