

Family Protections in Probate

A look at exemptions and allowances under the Texas Estates Code.

BY ELIZABETH BRENNER

The purpose of this article is to detail protections available under the Texas Estates Code for members of the decedent's family through exemptions and allowances. The surviving spouse, minor children, adult children living at home at the time of death of a parent, and incapacitated adult children all have, to varying degrees, a potentially valuable set of protections that can impact both the administration process and the distribution of the estate. These protections can be especially significant for a less moneyed surviving spouse.

Creditor Exemptions

Following death, both the homestead and certain personal property of the decedent is exempt from and therefore passes free from most creditor claims. If the decedent is survived by a spouse, minor child, or adult child living in the home, his or her homestead and up to \$100,000 in personal property specified under the Texas Property Code Section 42.002(a)¹ passes free from claims of general creditors of the estate.² In the event the home is sold, the proceeds of the sale also pass free from claims of general creditors.³

Set-Asides in Estate Administration

Certain property must be set aside for use by family of the deceased. In an independent administration, it is the executor's responsibility to set aside such property upon request. In a dependent administration, the responsibility falls to the court upon application by the individual seeking the exemption.

The Right to Use the Homestead for Life

Upon death, the homestead is set aside for use by minor children of the deceased and the surviving spouse.⁴ The surviving spouse has the exclusive right to occupy the homestead for his or her life—even if the home is the separate property of the decedent and gifted to someone other than the surviving spouse.⁵ Though the surviving spouse has certain responsibilities with respect to the property, including routine maintenance and care and payment of property taxes and mortgage interest, by virtue of being a surviving spouse, he or she has the exclusive right to occupy the home for as long as he or she desires as long as these responsibilities are maintained.⁶

Personal Property

In an independent administration, the executor, or the court in a dependent administration, must also set aside certain personal property for use by the surviving spouse, adult incapacitated children, or unmarried adult children remaining with the decedent's family.⁷ This property is set aside for use until administration of the estate is complete. At that time, if the estate is solvent, the property then passes to the heirs

or, if there is a will, in accordance with the will.⁸ However, if the estate is insolvent, the surviving spouse or child keeps the set-aside property, even if such property is gifted to someone else by will or intestacy.⁹

Allowance in Lieu of Exempt Property or Homestead

If the estate does not include a homestead, the surviving spouse can request an allowance from the estate of up to \$45,000.¹⁰ While a surviving spouse generally cannot elect between the homestead and the allowance,¹¹ an allowance in lieu of homestead may be authorized when there is insubstantial equity in the home.¹²

In addition, for *any* or *all* exempt personal property specified under the Texas Property Code that is not among the decedent's possessions, the surviving spouse or children (including minor children, adult children living at home, and incapacitated adult children) can request a reasonable allowance.¹³ If the estate property is insufficient to cover the allowance, the personal representative of the estate may make use of property devised to someone else to pay the allowance. If necessary, this includes bank accounts that pass by beneficiary designation.¹⁴

The Family Allowance

In addition to the exemptions outlined above, the surviving spouse, minor children, and adult incapacitated children of the decedent may be entitled to a family allowance in an amount necessary for maintenance for a *full year* after the date of the decedent's death.¹⁵ In fact, the Texas Estates Code *requires* the provision of a family allowance upon a showing of a need.¹⁶ The individual seeking the allowance has the burden of showing the amount of family allowance needed for the year. If the individual is the surviving spouse, he or she also has to show he or she does not have adequate *separate* property for maintenance for the year.¹⁷ Assets that were community property at the time of death, such as wages of the surviving spouse, life insurance inherited from the deceased spouse, or retirement benefits inherited from the deceased spouse are not considered for the purpose of determining the need or amount of family allowance.¹⁸ In the case of minor children, no family allowance is provided if the minor child has adequate property of his or her own for one year's maintenance. Likewise, an adult incapacitated child is not entitled to a family allowance if he or she has enough property of his or her own or if he or she was not being supported by the decedent at the time of death.¹⁹

The family allowance is given priority over most other claims against the estate and paid before any other claim except funeral expenses and expenses of the decedent's last illness.²⁰ If there are insufficient funds from which to pay the

family allowance, the court must order sale of estate property, including property gifted to others, to pay the family allowance.²¹ As in the case of the allowance in lieu of exempt property, if there are insufficient estate assets, the executor may reach into a non-probate bank account to pay the family allowance.²²

In short, exemptions and allowances under the Texas Estates Code provide a potentially robust set of benefits and protections for the surviving family of the deceased. Not only do these benefits and protections impact the administration process, but they can also impact gifts from the decedent's estate such that a gift intended by the decedent for someone else can be subsumed by an exemption or allowance. Moreover, the personal representative may be able to reach into a non-probate asset to satisfy an allowance. Attorneys for the personal representative and the beneficiaries should therefore be cognizant of exemptions and allowances through the course of the administration of the estate. **TBJ**

Notes

1. The set aside personal property is detailed in Section 42.002(a) of the Property Code and includes the following:
 - (1) home furnishings, including family heirlooms;
 - (2) provisions for consumption;
 - (3) farming or ranching vehicles and implements;
 - (4) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;
 - (5) wearing apparel;
 - (6) jewelry not to exceed 25 percent of the aggregate limitations prescribed by Section 42.001(a);
 - (7) two firearms;
 - (8) athletic and sporting equipment, including bicycles;
 - (9) a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not

- hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;
- (10) the following animals and forage on hand for their consumption:
 - (A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each;
 - (B) 12 head of cattle;
 - (C) 60 head of other types of livestock; and
 - (D) 120 fowl; and
- (11) household pets.
2. Tex. Est. Code § 102.004; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Olson*, 920 S.W.2d 458, 461 (Tex.App.—Austin 1996, no writ).
3. *Butler v. Summers*, 253 S.W.2d 418, 421 (1952).
4. Tex. Est. Code §§ 102.004, 353.051.
5. *See id.* §§ 102.005, 353.152.
6. *Hill v. Hill*, 623 S.W.2d 779, 781 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.).
7. Tex. Est. Code § 353.051(a)(2).
8. *Id.* § 353.152.
9. *Id.* § 353.153.
10. *Id.* § 353.053.
11. *Barnett v. Barnett*, 985 S.W.2d 520 (Tex. App.—Houston 1998), aff'd in part, rev'd in part, 67 S.W.3d 107 (Tex. 2001).
12. *Ward v. Braun*, 417 S.W.2d 888 (Tex. Civ. App.—Corpus Christi 1967, no writ); *Cooper v. Cooper*, 168 S.W.2d 686 (Tex. Civ. App.—Galveston 1943).
13. *Id.*; *Estate of Rhea*, 257 S.W.3d 787 (Tex. App.—Fort Worth 2008, no writ.).
14. Tex. Est. Code §§ 353.055, 113.252.
15. *Id.* § 353.101.
16. *Id.* § 403.001
17. *Id.* § 353.102; *Estate of Wolfe*, 268 S.W.3d 780 (Tex. App.—Fort Worth 2008, no writ.).
18. *Estate of Wolfe*, 268 S.W.3d at 780-784.
19. Tex. Est. Code § 353.101.
20. *Id.* § 353.104.
21. *Id.* § 353.107.
22. *Id.* § 113.252.



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