

Table of Contents

CHAPTER 1. OVERVIEW OF FUNDAMENTAL CONCEPTS

I. INTRODUCTION

- § 1:1 Overview
- § 1:2 Estate defined
- § 1:3 Estate planning; lifetime and end of life
- § 1:4 —Lifetime planning for personal benefit of client
- § 1:5 —End of life planning for distribution of property to others
- § 1:6 Estate planning; major considerations

II. GOALS OF ESTATE PLANNING

- § 1:7 End of life desires; generally
- § 1:8 Transfer to desired beneficiaries
- § 1:9 —Preventing transfers to unintended persons
- § 1:10 —Ineffective transfers
- § 1:11 —Minor or disabled beneficiaries
- § 1:12 Protecting assets
- § 1:13 —Through effective management
- § 1:14 ——During lifetime
- § 1:15 ——On death
- § 1:16 —Tax minimization
- § 1:17 —Claims by to third parties
- § 1:18 —Loss to third parties—Spouses and creditors
- § 1:19 ——For client
- § 1:20 ——Beneficiaries of client's estate
- § 1:21 ——Special needs; Medicaid
- § 1:22 Control of assets
- § 1:23 —Control of management and investment of property
- § 1:24 ——During client's lifetime
- § 1:25 ——After client's death
- § 1:26 ——Selection of trustee
- § 1:27 ——Control of business
- § 1:28 —Control over access
- § 1:29 —Control over distribution
- § 1:30 Constraints

III. PROPERTY ISSUES

- § 1:31 Community property system

- § 1:32 —Generally; definitions
- § 1:33 —Disposition of community property at death
- § 1:34 —Community property with right of survivorship
- § 1:35 —Spousal agreements for separate property conversion; effects
- § 1:36 Claims for reimbursement
- § 1:37 Qualified plans and IRAs
- § 1:38 —Qualified plans
- § 1:39 ——Designation of beneficiary by participant
- § 1:40 ——Designation of beneficiary by nonparticipant spouse
- § 1:41 —Individual retirement accounts
- § 1:42 ——Designation of beneficiary by owner
- § 1:43 ——Designation of beneficiary by nonparticipant spouse
- § 1:44 Fraud on the spouse doctrine
- § 1:45 Interaction of community property and common-law estates
- § 1:46 —Migrant client considerations
- § 1:47 —Conflicts of law principles for property characterization
- § 1:48 —Character of property
- § 1:49 —Forced heirship
- § 1:50 —Tenancy by entirety in other jurisdictions
- § 1:51 —Maintaining or changing domicile
- § 1:52 Valuation

IV. COORDINATION OF END OF LIFE PLAN

- § 1:53 Failure to fully dispose of property
- § 1:54 Probate and nonprobate property
- § 1:55 —Probate assets
- § 1:56 —Nonprobate assets
- § 1:57 Business transfer planning

V. PROBATE

- § 1:58 In general
- § 1:59 Probate defined
- § 1:60 Purpose of probate process
- § 1:61 Testate disposition
- § 1:62 —Proceeding to probate a will
- § 1:63 Intestate disposition—Intestacy defined
- § 1:64 —Descent and distribution
- § 1:65 ——Separate property
- § 1:66 ——Where decedent leaves no spouse

TABLE OF CONTENTS

- § 1:67 ——Where decedent survived by spouse only
- § 1:68 ——Where decedent survived by spouse and children
- § 1:69 ——Community property
- § 1:70 ——Where decedent survived by spouse only
- § 1:71 ——Where decedent survived by spouse and children
- § 1:72 —Escheat

VI. LEGAL CAPACITY OF CLIENT TO ACT

- § 1:73 Applicable standards
- § 1:74 Capacity presumptions
- § 1:75 Effect of determination of lack of capacity

VII. DOMICILE

- § 1:76 Effect and importance of domicile
- § 1:77 Domicile defined
- § 1:78 Ties to state for determining domicile
- § 1:79 Actions for client to take in establishing domicile
- § 1:80 —Use of address
- § 1:81 —Declaration of domicile
- § 1:82 —Homestead property
- § 1:83 —Use of safe deposit boxes and bank accounts
- § 1:84 —Register to vote
- § 1:85 —Time spent in state
- § 1:86 Other relevant factors
- § 1:87 —Differently priced homes
- § 1:88 —Location of possessions
- § 1:89 Texas law on domicile status

VIII. PROFESSIONAL RESPONSIBILITY

- § 1:90 Overview of attorney-client relationship
- § 1:91 Profession malpractice claims
- § 1:92 Claims related to estate planning

CHAPTER 2. MANAGING THE ATTORNEY-CLIENT RELATIONSHIP

I. GENERAL CONSIDERATIONS

- § 2:1 Overview
- § 2:2 —Ethical challenges
- § 2:3 —Practical challenges

- § 2:4 Regulation of attorney conduct
- § 2:5 —Primary source—Texas Disciplinary Rules of Professional Conduct
- § 2:6 —Old law; Code of Professional Responsibility
- § 2:7 —Construing Texas Disciplinary Rules of Professional Conduct
- § 2:8 —New Disciplinary Rules of Professional Conduct 1.16
- § 2:9 —Additional ethical sources and guides for probate attorneys
- § 2:10 —Ethical guides for legal assistants
- § 2:11 Impact of technology on the modern practice
- § 2:12 Other considerations
- § 2:13 —Today's clients expect more service
- § 2:14 —Attorney as counselor
- § 2:15 —Dealing with emotional issues—Depression and grief
- § 2:16 —Multiple representation of clients common

II. ETHICAL CONSIDERATIONS

- § 2:17 Conflicts of interest
- § 2:18 —No representation of opposing parties to same litigation
- § 2:19 —No representation of persons in related matters if interests adverse
- § 2:20 —No representation if representation adversely limited by duties to another client
- § 2:21 —Exceptions to nonlitigation conflicts
- § 2:22 —Reasonable belief that each client will not be materially affected
- § 2:23 —Full disclosure and informed consent
- § 2:24 —Post consent issues
- § 2:25 Who is client
- § 2:26 General duties owed by a lawyer to client
- § 2:27 —Lawyer shall exercise independent professional judgment
- § 2:28 —Lawyer shall not disclose client's confidential information
- § 2:29 —Definition—Confidential information
- § 2:30 —To whom confidential information prohibited
- § 2:31 —Confidential information may not be otherwise used
- § 2:32 —Exceptions allowing lawyer to disclose confidential information pursuant to the Texas Disciplinary Rules of Professional Conduct
- § 2:33 —Exceptions allowing lawyer to disclose confidential information pursuant to the Texas Rules of Evidence

TABLE OF CONTENTS

§ 2:34	— — Exceptions allowing lawyer to disclose unprivileged client information
§ 2:35	— Lawyer owes client loyalty
§ 2:36	General duties owed by lawyer to a nonclient
§ 2:37	— No false statement of material facts
§ 2:38	— No duty to disclose material facts
§ 2:39	— Lawyer may not claim to be disinterested to unrepresented person
§ 2:40	Multiple-client representation
§ 2:41	— Representing multiple clients—The lawyer as intermediary
§ 2:42	— — — Lawyers allowed to act as intermediaries under strict circumstances
§ 2:43	— — — Lawyers acting as intermediaries must consult with each client
§ 2:44	— Common issues in estate planning situations
§ 2:45	— Common issues with trusts
§ 2:46	Competence
§ 2:47	— Defining competence
§ 2:48	— Determining competence
§ 2:49	— — Specialized training not required
§ 2:50	— Exceptions to general rule of lawyer's required competence
§ 2:51	— — Associated in exception
§ 2:52	— — Limited emergency exception
§ 2:53	— Implied exception for additional study and preparation
§ 2:54	Subsequent responsibilities to each client
§ 2:55	— Duty to maintain competence
§ 2:56	— Duty to reasonably communicate with clients
§ 2:57	— — Duty to keep client reasonably informed
§ 2:58	— — Duty for reasonable explanations to client
§ 2:59	— — Special estate planning communication issues
§ 2:60	— — — Withholding or delaying information
§ 2:61	— — — Clients under disabilities
§ 2:62	Timely performance
§ 2:63	— Duty not to neglect legal matter
§ 2:64	— Duty to be diligent

III. PRACTICAL CONSIDERATIONS

§ 2:65	Basis for fee—Hourly, fixed, or both
§ 2:66	— — Illegal or unconscionable fee
§ 2:67	— — Fee shall be communicated to client
§ 2:68	— — Ethical factors in determining reasonableness of fee

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 2:69 Representation agreements—Written form
- § 2:70 ——Types of attorney-client representation agreements
- § 2:71 ——Classifying agreements for conflicts of interest evaluation
- § 2:72 Formation of attorney-client relationship
- § 2:73 Fee division between attorneys
- § 2:74 Engagement letter
- § 2:75 Fee letter agreement for coexecutors with conflicts disclosure
- § 2:76 Terminating or continuing the relationship
- § 2:77 —Ethical issues
- § 2:78 —Letter declining representation
- § 2:79 —Letter withdrawing from representation
- § 2:80 Client communications
- § 2:81 —Basic client communication
- § 2:82 —Tips on keeping clients happy
- § 2:83 File retention
- § 2:84 —No clear ethical solutions
- § 2:85 —Suggestions
- § 2:86 Tickler systems and client action reminders
- § 2:87 Oversight and implementation
- § 2:88 —Oversight protection needs checklist
- § 2:89 —Implementing

IV. FORMS

- § 2:90 Engagement letter
- § 2:91 Fee agreement with disclosure language
- § 2:92 Letter declining representation
- § 2:93 Letter withdrawing representation

CHAPTER 3. CLIENT INFORMATION GATHERING AND COUNSELING

I. GENERAL CONSIDERATIONS

- § 3:1 Client counseling
- § 3:2 Attorney's ethical duties; Texas Disciplinary Rules of Professional Conduct
- § 3:3 Construing the Texas Disciplinary Rules of Professional Conduct
- § 3:4 Additional ethical sources and guides for estate planning attorneys
- § 3:5 Information gathering

TABLE OF CONTENTS

- § 3:6 —Attorney's staff; legal assistants
- § 3:7 —Client
- § 3:8 —Attorney
- § 3:9 Client interviews
- § 3:10 —Who should be present
- § 3:11 —What is source of information
- § 3:12 —Level of certainty and verification
- § 3:13 —Participation of family members
- § 3:14 —Participation of client advisors
- § 3:15 ——Professional tax advisors
- § 3:16 ——Financial planning professionals
- § 3:17 ——Other professionals
- § 3:18 —Goal of interaction is to implicitly test testamentary capacity

II. CLIENT ASSETS AND LIABILITIES

- § 3:19 Need for list of client's assets
- § 3:20 —Value of gross estate
- § 3:21 —Legal title only
- § 3:22 —Excludable cemetery lot
- § 3:23 —Beneficiary designations
- § 3:24 ——Legal status of beneficiaries
- § 3:25 ——Obtaining information concerning current beneficiary designations
- § 3:26 ——Retirement plans; qualified plan benefits
- § 3:27 ——Individual retirement accounts (IRAs)
- § 3:28 ——Life insurance
- § 3:29 ——Payable on death accounts
- § 3:30 ——Pension plans
- § 3:31 Asset inventory questionnaire
- § 3:32 —Purpose
- § 3:33 —Format and contents
- § 3:34 Need for list of client's liabilities

III. CLIENT FAMILY RELATIONSHIPS AND PERSONAL INFORMATION

- § 3:35 Identification of family members
- § 3:36 Special needs considerations of intended beneficiaries
- § 3:37 —Creditors
- § 3:38 —Marital problems
- § 3:39 —Maturity
- § 3:40 —Wealth
- § 3:41 —Disability

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 3:42 Potential sources of dissension
- § 3:43 Multiple marriages
- § 3:44 Modern family relationships; alternative lifestyles
- § 3:45 Citizenship status of clients and beneficiaries

IV. DISPOSITIVE GOALS

- § 3:46 Who is to receive property
- § 3:47 —Primary beneficiaries
- § 3:48 ——Contingent beneficiaries
- § 3:49 ——Charitable beneficiaries
- § 3:50 Timing and structure of transfers

V. EDUCATING THE CLIENT

- § 3:51 Generally
- § 3:52 Estate, gift, and generation-skipping transfer taxation
- § 3:53 —Types of federal taxes affecting estate
- § 3:54 ——Federal estate taxes
- § 3:55 ——Federal gift taxes
- § 3:56 ——Generation-skipping tax transfers

VI. OBTAINING CLIENT DECISIONS

- § 3:57 Chronologically projected and tickled for action
- § 3:58 —Tickler systems and client action reminders
- § 3:59 ——Pre-probate actions
- § 3:60 ——Probate
- § 3:61 ——Administrative activities

VII. CHECKLISTS

- § 3:62 Checklist—Asset inventory for probate assets or property
- § 3:63 —Asset inventory for nonprobate assets or property
- § 3:64 —Liabilities inventory for probate property
- § 3:65 —Asset inventory for nonprobate property liabilities
- § 3:66 —Identification of family members
- § 3:67 —Preparation of family member power of attorney

VIII. FORMS

- § 3:68 Form—Beneficiary designation for corporate employee life/accident insurance
- § 3:69 Uniform Single-Party or Multiple-Party Account (Tex. Estates Code Section 113.052)

TABLE OF CONTENTS

CHAPTER 4. WILLS

I. ETHICAL CONSIDERATIONS

- § 4:1 Texas Rules of Professional Conduct
- § 4:2 —Competency
- § 4:3 —Conflicts of interests
- § 4:4 —Conflicts arising from joint representation
- § 4:5 —Conflicts arising from attorney preparing will that benefits attorney
- § 4:6 —Conflicts arising from source of payment
- § 4:7 Statutory considerations
- § 4:8 —Bequests to drafting attorney
- § 4:9 —Bequests to witnesses
- § 4:10 Privity

II. BASIC REQUIREMENTS OF A WILL

- § 4:11 Definition of will
- § 4:12 —Common law
- § 4:13 —Statutory definition
- § 4:14 —Definition of codicil
- § 4:15 Overview of types of wills
- § 4:16 —General requirements
- § 4:17 —Attested wills
- § 4:18 —Holographic wills
- § 4:19 —Contractual agreements effecting wills
- § 4:20 —Contractual wills
- § 4:21 —Contract to make will
- § 4:22 —Contractual wills executed after September 1, 1979
- § 4:23 ——Written Agreements
- § 4:24 ——By will provisions
- § 4:25 ——Contractual wills executed before September 1, 1979
- § 4:26 ——Revocation of contractual wills and remedy for breach
- § 4:27 —Self-proved wills
- § 4:28 ——Presumption of proper execution
- § 4:29 ——Attachment of affidavit by testator and witnesses
- § 4:30 Who may execute will
- § 4:31 —Required age
- § 4:32 —Required mental state
- § 4:33 —Undue influence
- § 4:34 ——Elements of undue influence

- § 4:35 ——Factors considered by court
- § 4:36 —Incarcerated persons
- § 4:37 Interests that may pass under will
- § 4:38 —Assets subject to disposition by will
- § 4:39 —Assets not subject to disposition by will
- § 4:40 ——Life insurance and similar assets
- § 4:41 ——Homestead
- § 4:42 —Disposition of assets not required
- § 4:43 —Legacy of personal property
- § 4:44 —Definition of contents

III. WILL EXECUTION REQUIREMENTS

- § 4:45 Attested will
- § 4:46 —Statutory requirements
- § 4:47 ——Writing requirement
- § 4:48 ——Purpose of writing requirement
- § 4:49 ——Interlineations
- § 4:50 ——Testator's signature requirement
- § 4:51 ——Signature of testator
- § 4:52 ——Mark of testator
- § 4:53 ——Signed at direction of testator
- § 4:54 ——Rubber stamp
- § 4:55 ——Typewritten signature
- § 4:56 ——Signature on self-proving affidavit
- § 4:57 ——Witness requirement
- § 4:58 ——Number of witnesses
- § 4:59 ——Witnesses must be credible
- § 4:60 ——Beneficiary as subscribing witness
- § 4:61 ——Executor as subscribing witness
- § 4:62 ——Proof of witness' credibility
- § 4:63 ——Location of witnesses' signatures
- § 4:64 ——Attestation clause
- § 4:65 ——No publication requirement
- § 4:66 —Order of signing
- § 4:67 ——Where testator must sign will
- § 4:68 ——Where witnesses must execute will
- § 4:69 —Conscious presence
- § 4:70 —Self-proving affidavit
- § 4:71 ——When self-proving affidavit must be signed
- § 4:72 ——Form of self-proving affidavit
- § 4:73 ——Effect of self-proving affidavit
- § 4:74 Holographic will
- § 4:75 —Statutory requirements
- § 4:76 ——Signed by testator

TABLE OF CONTENTS

§ 4:77	— — —Initials versus signature
§ 4:78	— — —Location of signature
§ 4:79	— — —Date not required
§ 4:80	— — —Witnesses not required
§ 4:81	— — —Interlineations
§ 4:82	— — —Form of self-proving affidavit
§ 4:83	Testamentary intent
§ 4:84	— — —No requirement testator aware making a will
§ 4:85	— — —Intent to prepare will or codicil in future insufficient
§ 4:86	— — —Extrinsic evidence allowed to show testamentary intent
§ 4:87	Testamentary capacity
§ 4:88	— — —Age requirement
§ 4:89	— — —Sound mind requirement
§ 4:90	— — —Definition
§ 4:91	— — —Lucid intervals
§ 4:92	— — —Effect of prior adjudication of incapacity
§ 4:93	— — —Effect of subsequent adjudication of incapacity
§ 4:94	— — —Insane delusion
§ 4:95	— — —Testamentary compared to contractual capacity
§ 4:96	— — —Will executions involving possible incapacity
§ 4:97	— — —Testator who has physical or mental disability
§ 4:98	— — —Testator who is hospitalized

IV. BASIC WILL PROVISIONS

§ 4:99	Generally
§ 4:100	Common introductory provisions
§ 4:101	— — —Exordium clause
§ 4:102	— — —Identify testator
§ 4:103	— — —Identify testator's domicile
§ 4:104	— — —Identify property to be disposed of under will
§ 4:105	— — —Declare and publish will
§ 4:106	— — —Revoke prior wills
§ 4:107	— — —Sample language
§ 4:108	— — —Funeral instructions
§ 4:109	— — —Identification of family
§ 4:110	— — —Name spouse
§ 4:111	— — —Name children
§ 4:112	— — —Sample language
§ 4:113	Common definitions
§ 4:114	— — —Issue and children
§ 4:115	— — —Scope of children
§ 4:116	— — —Degree
§ 4:117	— — —Inclusion of all children

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 4:118 ——Include any limitations
- § 4:119 ——Provide whether to include illegitimate issue
- § 4:120 ——Provide whether to include after-born issue
- § 4:121 ——Inclusion of after-born children
- § 4:122 ——Exclusion of after-born and posthumous children
- § 4:123 ——Provide whether to include adopted issue
- § 4:124 —Survival period
- § 4:125 ——Provisions of will override statutory survival period
- § 4:126 —Prior death of beneficiary
- § 4:127 ——Effect of lapse; generally
- § 4:128 ——Anti-lapse exception
- § 4:129 ——Overriding anti-lapse rule
- § 4:130 —Definition of personal and household effects
- § 4:131 —Definition of heirs
- § 4:132 Attestation clause
- § 4:133 —Sample attestation clause
- § 4:134 —Effect of attestation clause
- § 4:135 Self-proving affidavit
- § 4:136 Fiduciary appointments
- § 4:137 —Executor
- § 4:138 ——Applicable law
- § 4:139 ——Standard of care
- § 4:140 ——Failure to exercise care
- § 4:141 ——Persons entitled to appointment
- § 4:142 ——Persons appointed in will
- § 4:143 ——Persons entitled to serve when no appointment in will
- § 4:144 ——Corporate fiduciaries
- § 4:145 ——Qualification requirement
- § 4:146 ——Incapacitated persons
- § 4:147 ——Convicted felon
- § 4:148 ——Nonresident of state of Texas
- § 4:149 ——Corporation without Texas trust powers
- § 4:150 ——Unsuitable persons
- § 4:151 ——Express waiver of conflict of interest
- § 4:152 ——Number of persons who can serve
- § 4:153 ——Sole executor
- § 4:154 ——Co-executors
- § 4:155 ——Appointment of alternate and successor executors
- § 4:156 ——Succession to prior rights, powers and duties
- § 4:157 ——Continuation of former administration
- § 4:158 ——Sample language

TABLE OF CONTENTS

§ 4:159	— —Independent versus dependent administration
§ 4:160	— — —Statutory requirements
§ 4:161	— — —Advantages
§ 4:162	— — —Disadvantages
§ 4:163	— — —Presumption if will ambiguous
§ 4:164	— — —Sample language
§ 4:165	— —Bond
§ 4:166	— — —Waiver in will
§ 4:167	— — —No waiver in will
§ 4:168	— — —Sample language
§ 4:169	—Compensation
§ 4:170	— —Compensation set by will
§ 4:171	— —Compensation not set by will
§ 4:172	— — —Statutory compensation
§ 4:173	— — —Request for amounts in excess of statutory formula
§ 4:174	—Powers of executor
§ 4:175	— —Possess estate property
§ 4:176	— —Defend will
§ 4:177	— —Powers authorized by will
§ 4:178	— — —Sales of real property
§ 4:179	— — —Contingency fees in excess of one-third
§ 4:180	— —Powers of dependent representative
§ 4:181	— — —Actions requiring court authority
§ 4:182	— — —Actions not requiring court authority
§ 4:183	— —No delegation of powers or duties
§ 4:184	— —Restrictions on self-dealing by executor
§ 4:185	— — —General rule
§ 4:186	— — —Modification by terms of will
§ 4:187	—Trustee
§ 4:188	— —Who can serve
§ 4:189	— — —No statutory requirements
§ 4:190	— — —General considerations
§ 4:191	— — —Surviving spouse appointed as trustee
§ 4:192	— — —Attorney appointed as trustee
§ 4:193	— — —Beneficiary appointed as trustee
§ 4:194	— —Number of persons who can serve
§ 4:195	— — —Sole trustee
§ 4:196	— — —Co-trustees
§ 4:197	— — —Delegation of duties between co-trustees
§ 4:198	— — —Sample provision
§ 4:199	— — —Appointment of ancillary trustees
§ 4:200	— —Resignation of trustees
§ 4:201	— — —Appointment of alternative or successor trustees

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 4:202 — — — Naming alternatives and successors
- § 4:203 — — — Sample provision
- § 4:204 — — — Failure to appoint successor trustees
- § 4:205 — — Bond
- § 4:206 — — — Statutory requirements
- § 4:207 — — — Increasing Bond
- § 4:208 — — — Deposit of Bond
- § 4:209 — — — Sample provision
- § 4:210 — — Provisions for removal
- § 4:211 — — — Removal by beneficiary
- § 4:212 — — — Removal may result in loss of compensation
- § 4:213 — — — Removal by trustee or third party
- § 4:214 — — Compensation
- § 4:215 — — Powers of trustees
- § 4:216 — — — General statutory powers
- § 4:217 — — — Implied powers
- § 4:218 — — — Limitations imposed by will
- § 4:219 — — — Restrictions of self-dealing
- § 4:220 — — — General statutory rule prior to September 1, 2007
- § 4:221 — — — General statutory rule on or after September 1, 2007
- § 4:222 — — — Modification by terms of will
- § 4:223 — — — Guardian for children
- § 4:224 — — — Surviving parent natural guardian
- § 4:225 — — — Last surviving parent may appoint guardian in will
- § 4:226 — — — Who can serve
- § 4:227 — — — Effect of designation
- § 4:228 — — Bond

V. DISPOSITIVE PROVISIONS

- § 4:229 Identification of beneficiary
- § 4:230 — Individual beneficiaries
- § 4:231 — Charitable beneficiaries
- § 4:232 — Trustees as beneficiaries
- § 4:233 — Children's trusts
- § 4:234 — Contingent trusts
- § 4:235 — Corporate entities as beneficiaries
- § 4:236 — State agencies as beneficiaries
- § 4:237 — Animals
- § 4:238 — Beneficiaries defined as a class
- § 4:239 — — Named individuals
- § 4:240 — — Per stripes versus per capita

TABLE OF CONTENTS

§ 4:241	— — —Per stirpes
§ 4:242	— —Per stirpes versus per capita—Per capita
§ 4:243	— — —Presumption
§ 4:244	Types of interests which may be gifted
§ 4:245	—Fee simple
§ 4:246	— —Presumption of fee simple
§ 4:247	— —Abolishment of rule in Shelly's Case
§ 4:248	—In trust
§ 4:249	— —QTIP trust
§ 4:250	— —Generation-skipping transfer tax considerations
§ 4:251	—Conditional bequest
§ 4:252	—Conditions are generally strictly construed
§ 4:253	—Conditions void against public policy will not be enforced
§ 4:254	—Life estate
§ 4:255	—Remainder interest
§ 4:256	Restraints on alienation
§ 4:257	Bequests, devise, and legacies
§ 4:258	—Meaning of bequest, devise, and legacy
§ 4:259	—Categories of bequests, devises, and legacies
§ 4:260	—Rule of ejusdem generis
§ 4:261	—Specific bequests
§ 4:262	— —Drafting specific bequests and devises
§ 4:263	— —Specific devise of real property
§ 4:264	— — —Drafting considerations
§ 4:265	— —Specific devise of real property involving unsevered mineral estate
§ 4:266	— —Specific devise of real property—Specific devise of residence
§ 4:267	— — —Insurance and debts on real property
§ 4:268	— — —Personal property located on real property
§ 4:269	— — Specific devise of securities
§ 4:270	— — —Texas Estates Code Sections 255.251-.253
§ 4:271	— — —Cash dividends declared before testator's death
§ 4:272	— — —Sales prior to death
§ 4:273	— — Pecuniary legacies
§ 4:274	— — —Definition of cash
§ 4:275	— — —Definition of money
§ 4:276	— — —Intestacy exception
§ 4:277	— — —Drafting considerations
§ 4:278	— — —Interest on pecuniary legacies
§ 4:279	— — —Tax effect
§ 4:280	— —Effect on residuary estate
§ 4:281	—Demonstrative bequests

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 4:282 —Residuary bequests
- § 4:283 ——Purpose
- § 4:284 ——Property covered by residuary clause
- § 4:285 ——Power of appointment
- § 4:286 ——Tax effect
- § 4:287 Selection of marital deduction formula
- § 4:288 —Fractional share formula clause
- § 4:289 —Pecuniary formula clause
- § 4:290 ——Pecuniary date of distribution
- § 4:291 ——Simple to fund
- § 4:292 ——Flexibility when funding
- § 4:293 ——Appreciation or depreciation during administration will affect residue
- § 4:294 ——Gain on funding
- § 4:295 ——Income in respect of decedent problems
- § 4:296 ——Pecuniary minimum worth marital gift
- § 4:297 ——Flexibility when funding
- § 4:298 ——No gain on funding
- § 4:299 ——Possibility of over-funding marital bequest
- § 4:300 ——Conflicts among beneficiaries
- § 4:301 ——Fairly representative or Revenue Ruling 64-19 funding
- § 4:302 ——Complex funding
- § 4:303 ——Revaluation
- § 4:304 ——IRD problem
- § 4:305 ——Default rule; Texas Estates Code Section 124.052
- § 4:306 —Selecting the lead bequest; marital or credit shelter
- § 4:307 —Estate with fair market value equal or less than \$5,250,000
- § 4:308 —Estate with fair market value of more than \$5,250,000
- § 4:309 —Selecting form of bequest and formula
- § 4:310 Anatomical gifts
- § 4:311 Forfeiture clauses
- § 4:312 —Recognition by Texas courts
- § 4:313 —Exception: Probate of later dated will
- § 4:314 —Exception: Actions held not to be contests
- § 4:315 —When to use
- § 4:316 —Effect

VI. ADMINISTRATIVE PROVISIONS

- § 4:317 Purpose of administration provisions
- § 4:318 —Management powers
- § 4:319 ——Incorporation of Texas Estates Code

TABLE OF CONTENTS

- § 4:320 — —Incorporation of Texas Trust Code
- § 4:321 — —Self-dealing
- § 4:322 Payment of debts and expenses
- § 4:323 —Purpose
- § 4:324 —Will should not impose duty to pay debts
- § 4:325 —Provision for payment of debts does not include death taxes
- § 4:326 —Modification by terms of instrument
- § 4:327 Apportionment of death taxes
- § 4:328 —Generally
- § 4:329 — —Texas Estates Code Section 322A
- § 4:330 — —IRC section 2206
- § 4:331 — —IRC section 2207
- § 4:332 — —IRC section 2207A
- § 4:333 — —IRC Section 2603(b)
- § 4:334 —Tax apportionment pursuant to governing instrument
- § 4:335 —Tax apportionment pursuant to statute
- § 4:336 — —Pro rata share of death taxes
- § 4:337 — —Exception for bequests to spouses and charities
- § 4:338 —Right to mortgage probate assets to provide for payment of death taxes

VII. DOCTRINES WHICH MAY AFFECT WILL PROVISIONS

- § 4:339 Incorporation by reference
- § 4:340 —Requirements
- § 4:341 — —Will requirements
- § 4:342 — — —Clearly identify document
- § 4:343 — — —Indicate a clear intent to incorporate
- § 4:344 — — —Requirements of extrinsic document
- § 4:345 — — —Writing
- § 4:346 — — —Document must exist on date will executed
- § 4:347 — — —Document must have legally binding effect
- § 4:348 —Burden of proof
- § 4:349 Integration
- § 4:350 Facts of independent significance
- § 4:351 Conditional wills
- § 4:352 —Conditional will pursuant to antenuptial agreements
- § 4:353 Widow's election
- § 4:354 —Effect of widow's election on community property
- § 4:355 Statutory homestead and exempt right
- § 4:356 —Set aside of property

- § 4:357 —Allowance in lieu of property
- § 4:358 Family allowance
- § 4:359 Rule against perpetuities
- § 4:360 —General rule
- § 4:361 —Doctrine of *cy-pres*
- § 4:362 —Perpetual public charitable trust
- § 4:363 Construction
- § 4:364 —Applicable law
- § 4:365 —Rules and canons of construction
- § 4:366 ——Testamentary intent
- § 4:367 ——Adherence to language of instrument
- § 4:368 ——Consideration of consequences of construction
- § 4:369 ——Law favors first taker
- § 4:370 ——Ascertaining testator's intent
- § 4:371 ——Mandatory versus precatory words
- § 4:372 ——Ambiguous words
- § 4:373 ——Latent ambiguity
- § 4:374 ——Patent ambiguity
- § 4:375 —Aids to construction
- § 4:376 ——Presumptions
- § 4:377 ——Extrinsic evidence
- § 4:378 —Application of common usage
- § 4:379 —Court construction of instrument
- § 4:380 —Declaratory judgment

VIII. SUBSEQUENT EVENTS WHICH MAY AFFECT WILL PROVISIONS

- § 4:381 Divorce
- § 4:382 —Effect on fiduciary appointment
- § 4:383 —Subsequent remarriage
- § 4:384 After-born or pretermitted children
- § 4:385 —Effect when testator makes no provision for any child in will
 - § 4:386 ——Children born prior to date of will
 - § 4:387 ——No children born prior to date of will
 - § 4:388 —Effect when testator makes provisions for one or more children in will
 - § 4:389 —Effect of nonprobate provisions for after-born child
 - § 4:390 —Adopted children
 - § 4:391 ——Wills executed prior to September 1, 1989
 - § 4:392 ——Wills executed subsequent to September 1, 1989
 - § 4:393 ——Illegitimate children
 - § 4:394 —Posthumous children
 - § 4:395 Death of beneficiary

TABLE OF CONTENTS

§ 4:396	—Death prior to execution of will
§ 4:397	— —Descendant of the testator's parent
§ 4:398	— —Beneficiary not descendant of testator's parents
§ 4:399	— —Class gifts
§ 4:400	—Death following execution of will
§ 4:401	— —Prior to death of testator
§ 4:402	— —Following death of testator
§ 4:403	— — —Statutory survival
§ 4:404	— — —Survival period under terms of will
§ 4:405	—Anti-lapse statutes
§ 4:406	— —Terms of will can override anti-lapse statute
§ 4:407	Bequests to attorney preparing will
§ 4:408	—Wills drafted prior to September 1, 1997
§ 4:409	—Wills drafted on or after September 1, 1997
§ 4:410	— —Attorney not related to testator
§ 4:411	— —Attorney related to testator
§ 4:412	Advancement
§ 4:413	—Statutory requirements—Intestate
§ 4:414	— —Testate
§ 4:415	—Evidence of intent to treat as advancement
§ 4:416	— —Testator
§ 4:417	— —Beneficiary
§ 4:418	Abatement
§ 4:419	—Generally
§ 4:420	—Statutory order of abatement
§ 4:421	—Terms of will can override statutory order of abatement
§ 4:422	Ademption
§ 4:423	—Generally
§ 4:424	—Ademption by extinction
§ 4:425	—Ademption by satisfaction
§ 4:426	—Presumption against ademption
§ 4:427	—Property under contract at testator's death

IX. RIGHT TO REVOKE

§ 4:428	Revocation; generally
§ 4:429	Time during which will may be revoked; time revocation effective
§ 4:430	Exclusive nature of statutory provisions
§ 4:431	—Reservation by testator of right to revoke
§ 4:432	Effect of revocation
§ 4:433	How issue of revocation is raised
§ 4:434	Presumption that will not revoked; presumption of continuity

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 4:435 Effect of multiple revoking documents
- § 4:436 Contract to make testamentary disposition
- § 4:437 —Joint and mutual wills
- § 4:438 Conditional wills
- § 4:439 Questions of law and fact
- § 4:440 Ways to revoke; subsequent writing
- § 4:441 —Court cannot prohibit revocation
- § 4:442 Like formalities
- § 4:443 —No requirement that revoking instrument be offered for probate
- § 4:444 —Void will
- § 4:445 —Proof necessary; testamentary capacity
- § 4:446 Physical act
- § 4:447 —Statutory requirements
- § 4:448 Declaration in writing
- § 4:449 —Revocation clause in subsequent will
- § 4:450 —Codicil
- § 4:451 Implied revocation
- § 4:452 —Scope of implied revocation; partial implied revocation
- § 4:453 —Proof of revocation by lost will
- § 4:454 Definition of destruction
- § 4:455 Alteration or obliteration of will or provisions thereof
- § 4:456 Mistaken belief of destruction or obliteration
- § 4:457 Sufficiency of particular acts
- § 4:458 —Revocation of codicil
- § 4:459 Presumed revocation; burden generally on proponent of will
- § 4:460 —Presumption of will last seen in testator's possession
- § 4:461 ——Will not located
- § 4:462 ——Mutilated will
- § 4:463 —Sufficiency of evidence to rebut presumption of revocation
- § 4:464 ——Will last seen in adverse person's possession
- § 4:465 ——Will left with testator's attorney
- § 4:466 ——Standard and burden of proof
- § 4:467 Revival of revoked will
- § 4:468 Requirements to revive revoked will; re-execution
- § 4:469 —Republication by subsequent instrument
- § 4:470 Dependent relative revocation
- § 4:471 Duplicate wills; revocation of one duplicate revokes all
- § 4:472 —Evidence sufficient to rebut presumption of revocation

TABLE OF CONTENTS

- § 4:473 Safekeeping will prior to testator's death; deposit with county clerk
- § 4:474 —Effect of deposit of will
- § 4:475 —Issuance of certificate of deposit; numbering of certificates and wills
- § 4:476 —Index of deposited wills
- § 4:477 —Procedure to deposit; sealed wrapper
- § 4:478 —Fee to be paid to deposit will
- § 4:479 —Procedure to withdraw will during testator's lifetime
- § 4:480 —Procedure upon death of testator; delivery to persons named on wrapper
- § 4:481 —Delivery to other persons; opening of wrapper and inspection of will
- § 4:482 Other methods of safekeeping; leaving will with drafting attorney
- § 4:483 —Safe deposit box

X. CHALLENGES TO VALIDITY OF WILLS

- § 4:484 What constitutes will contest
- § 4:485 Standing to bring contest
- § 4:486 —Persons interested in estate
- § 4:487 ——Heirs, beneficiaries, and relatives
- § 4:488 —Named executor
- § 4:489 ——Creditors
- § 4:490 ——Persons who have accepted benefits
- § 4:491 ——Assignees
- § 4:492 ——Grantee of deed from devisee or heir-at-law
- § 4:493 —Asserting status as interested person
- § 4:494 Necessary parties to will contest
- § 4:495 —Persons with pecuniary interest in testator's estate
- § 4:496 —Named executor
- § 4:497 —Named trustee of testamentary trust
- § 4:498 —Temporary administrator
- § 4:499 —Beneficiary of joint wills
- § 4:500 Filing requirements
- § 4:501 Statutes of imitations
- § 4:502 Statutes of Limitations—Contest prior to will admitted to probate
- § 4:503 —Contest after will admitted to probate
- § 4:504 ——Fraud
- § 4:505 ——Minors
- § 4:506 Grounds for contest; generally
- § 4:507 —Revocation

- § 4:508 ——Revocation by physical act
- § 4:509 ——Subsequent instrument
- § 4:510 ——Lack of testamentary capacity
- § 4:511 ——Proponent's evidence of capacity
- § 4:512 ——Contestant's evidence of incapacity
- § 4:513 ——Alcoholism; drug use; addictions and addictive disorders
- § 4:514 ——Prior adjudication of incapacity
- § 4:515 ——Insane delusion
- § 4:516 ——Lack of due execution
- § 4:517 ——Undue influence
- § 4:518 ——Evidence of undue influence
- § 4:519 ——Relation in time of influence and execution of will
- § 4:520 ——Circumstantial evidence
- § 4:521 ——Fraud
- § 4:522 ——Mistake
- § 4:523 Defenses to will contest
- § 4:524 ——Limitations of actions
- § 4:525 ——Fraud discovered
- § 4:526 ——Disability removed
- § 4:527 ——Defenses to limitations; tolling of limitations
- § 4:528 ——Estoppel
- § 4:529 ——Acceptance of benefits
- § 4:530 Effect of contest or appeal of order admitting will or granting letters
- § 4:531 ——Persons with standing to appeal
- § 4:532 ——Effect on appeal on appointment of personal representative
- § 4:533 ——Presumption favoring validity of will
- § 4:534 ——Effect of determination of contest

XI. FORMS

- § 4:535 Form—Self-proving affidavit (attested two-step)
- § 4:536 ——Self-proving affidavit (one-step simultaneous execution)
- § 4:537 ——Self-proving affidavit (holographic)
- § 4:538 ——Appointment of agent to control disposition of remains
- § 4:539 ——Disclaimer will; contingent trusts
- § 4:540 ——Simple will, no tax planning
- § 4:541 ——Will with credit shelter bypass trust and QTIP residuary trust
- § 4:542 ——Will with QTIP lead and residuary credit shelter bypass trust

TABLE OF CONTENTS

§ 4:543 —Will with outright marital and residuary credit
shelter bypass trust

Table of Contents

CHAPTER 5. TRUSTS

I. ETHICAL CONSIDERATIONS

- § 5:1 Texas Disciplinary Rules of Professional Conduct
- § 5:2 Competence of lawyer
- § 5:3 Client
 - § 5:4 —Clearly identify client
 - § 5:5 —Confidentiality and disclosure
 - § 5:6 —Recognize divided loyalties
 - § 5:7 ——Someone who pays fee for client
 - § 5:8 ——Someone who is a client referral source
 - § 5:9 —Multiple clients
 - § 5:10 ——Conflicts of interest
 - § 5:11 ——Spouses
 - § 5:12 ——Parents and children
 - § 5:13 ——Cotrustees
 - § 5:14 ——Cobeneficiaries
 - § 5:15 —Single individual with multiple roles
 - § 5:16 ——Which capacity represented
 - § 5:17 ——Settlor also beneficiary
 - § 5:18 ——Settlor also trustee
 - § 5:19 ——Trustee also beneficiary
 - § 5:20 —Conflicts of interest
 - § 5:21 —Advise nonclients of nonrepresentation
 - § 5:22 —Clearly identify capacity in which represented
 - § 5:23 Fees and agreements
 - § 5:24 —Written agreement or verbal agreement
 - § 5:25 —Basis for fee charged
 - § 5:26 —Scope and terms of service
 - § 5:27 —Timely performance of services
 - § 5:28 —Completion of services and termination of lawyer-client relationship
 - § 5:29 —Future reminders to review planning
 - § 5:30 —Future advice of changes in law

II. DEVELOPMENT OF MODERN TRUSTS

- § 5:31 History and development of trust law

III. GOVERNING AUTHORITY AND LAW

- § 5:32 Terms of trust

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 5:33 Texas Trust Code
- § 5:34 —Application on or after January 1, 1984
- § 5:35 —Application before January 1, 1984
- § 5:36 Texas Trust Act
- § 5:37 Common law
- § 5:38 Other trust laws which may be applicable
- § 5:39 Section-142 court created trusts
- § 5:40 Section 1301 Management Trusts
- § 5:41 Medicaid aspects
- § 5:42 Special needs trusts
- § 5:43 Other trust laws which may be applicable—Employees' Trust; Texas Property Code § 121.001
 - § 5:44 —Nonapplication of rule against perpetuities
 - § 5:45 —Accumulation of income
 - § 5:46 —Death benefits under employees' trusts
 - § 5:47 ——Payment of death benefit to trustee
 - § 5:48 ——Validity of trust declaration
 - § 5:49 ——Unclaimed benefits
 - § 5:50 ——Exemption from taxes and debts
 - § 5:51 ——Commingling of assets permitted
 - § 5:52 ——Prior designations not affected
 - § 5:53 ——Construction
 - § 5:54 —Charitable remainder trust; Internal Revenue Code § 664

IV. TRUST BASICS

- § 5:55 What is a fiduciary relationship
- § 5:56 —Definition
- § 5:57 —Nature of relationship
- § 5:58 —Formally created
- § 5:59 —Arising informally
- § 5:60 What is a trust
- § 5:61 —Definition
- § 5:62 —Inter vivos trust
- § 5:63 —Testamentary trust
- § 5:64 What is a settlor and synonyms, including grantor and trustor
- § 5:65 What is a trustee
- § 5:66 What is a beneficiary
- § 5:67 —Distinctions among beneficiaries
- § 5:68 ——Current beneficiary
- § 5:69 ——Remainder beneficiary
- § 5:70 ——Vested and contingent beneficiaries
- § 5:71 ——Discretionary beneficiary

TABLE OF CONTENTS

§ 5:72	Separation of legal and equitable title
§ 5:73	Other important definitions and concepts
§ 5:74	—Person
§ 5:75	—Interested person
§ 5:76	—Interest
§ 5:77	—Property
§ 5:78	—Terms of trust or trust terms
§ 5:79	—Transaction
§ 5:80	—Affiliate
§ 5:81	—Inventory value
§ 5:82	—Relative
§ 5:83	—Court
§ 5:84	Revocable trust or irrevocable trust
§ 5:85	—Definitions
§ 5:86	—Terms of trust
§ 5:87	—Revocable default under Texas law
§ 5:88	—Distinction can be critical
§ 5:89	Spendthrift trust
§ 5:90	—Definition
§ 5:91	—Policy considerations
§ 5:92	— —Protecting debtor beneficiaries
§ 5:93	— —Inform settlor of option of spendthrift protection
§ 5:94	— —Drafting spendthrift provisions
§ 5:95	—Beneficiary also settlor
§ 5:96	— —Support trust
§ 5:97	— —Discretionary trust
§ 5:98	Classifications of trusts
§ 5:99	—Private versus charitable
§ 5:100	—Express versus implied
§ 5:101	— —Constructive trust
§ 5:102	— —Resulting trust
§ 5:103	— — —Situations from which resulting trusts may arise
§ 5:104	—Executed versus executory
§ 5:105	—Active versus passive
§ 5:106	—Donative trusts
§ 5:107	—Pension and employees' trust
§ 5:108	—Real estate investment trusts
§ 5:109	Trusts distinguished from arrangements with similar appearances
§ 5:110	—Contract
§ 5:111	—Debt
§ 5:112	—Bailment
§ 5:113	—Option
§ 5:114	—Agency

- § 5:115 —Executorship
- § 5:116 —Trust account; Texas Estates Code § 113.004(5)
- § 5:117 —Guardianship
- § 5:118 —Receivership
- § 5:119 —Power
- § 5:120 —Texas Uniform Transfers to Minors Act (TUTMA)

V. GENERAL DRAFTING PRINCIPLES

- § 5:121 Precision and accuracy
- § 5:122 Readability
- § 5:123 —Avoid legalese
- § 5:124 —Personalize document
- § 5:125 —Consistency
- § 5:126 —Definition of terms
- § 5:127 Make purpose of trust clear and explicit

VI. TERMS OF THE TRUST

- § 5:128 Substantive correctness
- § 5:129 Completeness
- § 5:130 —Provision for completion of cycle from creation through termination
 - Plan for reasonably foreseeable contingencies
 - Minor or incapacitated beneficiary
 - Relationships
 - Changes in circumstances of beneficiary
 - Premature death of beneficiary
 - Size and nature of assets
 - Exhaustion of trust assets; economic desire to terminate small trusts
 - Beneficiary's desire to change trustee
 - Charitable beneficiaries
 - Resignation of trustee
 - Feasibility
 - Trust plan reasonably calculated to succeed
 - Trustee reasonably able to operate within terms of trust
 - Flexibility
 - Mandatory versus discretionary terms
 - Excessive restrictions may frustrate trust plan
 - Plan for reasonably foreseeable contingencies
 - Recognize change inevitable over time

VII. TRUST CREATION

- § 5:149 Creation of express trusts

TABLE OF CONTENTS

§ 5:150	Statutory methods
§ 5:151	—By declaration of property owner
§ 5:152	—By inter vivos transfer of property
§ 5:153	—By testamentary transfer of property
§ 5:154	—By exercise of power of appointment
§ 5:155	—By promise to create trust
§ 5:156	Statutory requirements
§ 5:157	—Intention to create trust
§ 5:158	—Written
§ 5:159	—Trust property
§ 5:160	—Consideration
§ 5:161	Validity of trust
§ 5:162	—Legal purposes
§ 5:163	—Contrary to statute
§ 5:164	—Contrary to public policy
§ 5:165	—Fraudulent purposes
§ 5:166	—Transfer in fraud of creditors
§ 5:167	—Transfer in fraud of spouse
§ 5:168	—Merger of equitable and legal interests
§ 5:169	—Rule against perpetuities
§ 5:170	—Trusted that potentially violate rule; fertile octogenarian
§ 5:171	Acceptance of trust
§ 5:172	—Acceptance by trustee
§ 5:173	—Signature
§ 5:174	—Exercise of power
§ 5:175	—Refusal to accept
§ 5:176	Refusal to accept trust by beneficiary—Disclaimer statutes
§ 5:177	Operative authority
§ 5:178	—Terms of trust
§ 5:179	—Texas Trust Code
§ 5:180	—Judicial authority
§ 5:181	—Court order as protection from liability
§ 5:182	Investments
§ 5:183	—Original property contributed to trust
§ 5:184	—Additional property contributed to trust
§ 5:185	—Property must be acceptable to trustee
§ 5:186	—Environmental concerns; CERCLA and related state legislation creating liability
§ 5:187	—Property acquired by trustee
§ 5:188	—Retention of contributed property
§ 5:189	—Diversification of property
§ 5:190	—Investment standard—See the discussion of the

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

Uniform Prudent Investor Act beginning at section
5.307

- § 5:191 Property management—Business entities
- § 5:192 —Real estate
- § 5:193 ——Court's powers with respect to real estate
- § 5:194 ——Beneficiary approval of real estate transactions
- § 5:195 ——Mortgage of property
- § 5:196 ——Transfers of real estate
- § 5:197 ——Leases
- § 5:198 ——Options
- § 5:199 ——Repairs
- § 5:200 ——Sale or conveyance
- § 5:201 —Minerals
- § 5:202 —Insurance
- § 5:203 —Securities
- § 5:204 —Cash
- § 5:205 —Tangible personal property
- § 5:206 —Underproductive property
- § 5:207 ——Definition of value, net proceeds and net investment
- § 5:208 —Worthless property
- § 5:209 —Claims
- § 5:210 —Common trust funds
- § 5:211 Trust accounting
- § 5:212 —Demand for accounting
- § 5:213 ——Demand by beneficiary
- § 5:214 ——Demand by interested person
- § 5:215 —Contents of accounting
- § 5:216 —Trustee allocates receipts and expenditures to income or principal
 - § 5:217 ——Importance of allocations as among beneficiaries
 - § 5:218 ——Terms of trust
 - § 5:219 ——Texas Trust Code; income definitions
 - § 5:220 ——Texas Trust Code; principal definitions
 - § 5:221 ——Reasonable allocation
- § 5:222 —Receipts
 - § 5:223 ——Allocated to income
 - § 5:224 ——Allocated to principal
- § 5:225 —Expenditures
- § 5:226 ——Allocated to income
- § 5:227 ——Allocated to principal
- § 5:228 —Corporate distributions
- § 5:229 —Reserves
- § 5:230 ——Business and farming operations
- § 5:231 ——Natural resources

TABLE OF CONTENTS

§ 5:232	— — Timber
§ 5:233	— — Other property subject to depletion
§ 5:234	— Allocations of income versus principal
§ 5:235	— — Income allocations
§ 5:236	— — Principal allocations
§ 5:237	Distributions
§ 5:238	— When beneficiary's right to income arises
§ 5:239	— Accumulation of income
§ 5:240	— Mandatory distributions
§ 5:241	— — Mandatory distributions of income
§ 5:242	— — — Mandatory distributions to income beneficiaries
§ 5:243	— Discretionary distributions
§ 5:244	— — Discretionary distributions of income
§ 5:245	— — — Inability to handle income
§ 5:246	— — — Excess of income
§ 5:247	— — — Set standard for distribution
§ 5:248	— Distributions of principal
§ 5:249	— — Distribution at stated ages
§ 5:250	— — Distribution in stages
§ 5:251	— — Invasion provision
§ 5:252	— — — Distinguished from right of access to principal
§ 5:253	— — — Consideration of other resources
§ 5:254	— — — Single versus multiple invasion provisions
§ 5:255	— — — Application by trustee rather than direct payment
§ 5:256	— — — Need for invasion provision
§ 5:257	— — — Standard of invasion
§ 5:258	— — — Emergency needs
§ 5:259	— — — Support
§ 5:260	— — — Standard of living
§ 5:261	— — — Education
§ 5:262	— — — Type of education
§ 5:263	— — — Related expenses
§ 5:264	— — — Avoid incentive for beneficiary to prolong studies
§ 5:265	— Standard for distributions
§ 5:266	— — Ascertainable standard
§ 5:267	— — Other standard
§ 5:268	— — — Relationship to duty of impartiality
§ 5:269	— Distributions to minor or incapacitated beneficiary
§ 5:270	— — Terms of trust
§ 5:271	— — Trust Code § 113.021
§ 5:272	Introduction

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 5:273 Uniform Prudent Investor Act of Texas, New Chapter 117 of the Code
- § 5:274 Uniform Principal and Income Act, Chapter 116 of the Code
- § 5:275 Issues Affecting Trusts Holding Real Estate or Real Estate Investments
- § 5:276 Disbursements from Entities, Partnerships and Corporations
- § 5:277 Some, Hopefully, Practical Observations

VIII. TRUST MODIFICATION

- § 5:278 Terms of trust
- § 5:279 —Revocable trust
- § 5:280 —Irrevocable trusts
- § 5:281 Decanting as an alternative to judicial modification and requirements if judicial modification is necessary
- § 5:282 Terms of trust—Judicial modification—Grounds for modification
 - § 5:283 —Judicial reformation
 - § 5:284 —Judicial modification and reformation—Jurisdiction
 - § 5:285 —Venue
 - § 5:286 ——Necessary parties
 - § 5:287 ——Notices
 - § 5:288 ——Pleadings and judgments
 - § 5:289 ——Guardian ad litem
 - § 5:290 Amendment of charitable trust
 - § 5:291 Division of trusts
 - § 5:292 —Allocation of trust property on division
 - § 5:293 —Combination of trusts
 - § 5:294 ——Testamentary trusts

IX. TRUST TERMINATION

- § 5:295 Terms of trust
- § 5:296 —Revocable trust
- § 5:297 Consent of parties
- § 5:298 Agreement of beneficiaries
- § 5:299 Termination on merger of interests
- § 5:300 Judicial termination
- § 5:301 —Grounds for termination
- § 5:302 —Jurisdiction
- § 5:303 —Venue
- § 5:304 —Necessary parties
- § 5:305 —Notices

TABLE OF CONTENTS

- § 5:306 —Pleadings and judgments
- § 5:307 —Guardian ad litem
- § 5:308 Rule against perpetuities
- § 5:309 Effect of termination
- § 5:310 Distributions on termination of trust
- § 5:311 Termination provision
- § 5:312 —Flexibility
- § 5:313 —Costs of administration
- § 5:314 —Financial stability
- § 5:315 —Divorce
- § 5:316 —Religion
- § 5:317 —Discretion of trustee
- § 5:318 —Powers of appointment
- § 5:319 —Allows consideration for changing circumstances
- § 5:320 —Right to distribute property at death

X. THE SETTLOR AND SYNONYMS, INCLUDING GRANTOR AND TRUSTOR

- § 5:321 What is settlor
- § 5:322 —Settlor must have legal capacity
- § 5:323 Powers of settlor
- § 5:324 —Powers reserved to settlor in document
- § 5:325 —Modification of revocable trust
- § 5:326 —Revocation of revocable trust
- § 5:327 —Power to alter trustee's responsibilities
- § 5:328 Settlor as trustee
- § 5:329 —Settlor as beneficiary

XI. THE TRUSTEE

- § 5:330 What is trustee
- § 5:331 Who can be trustee
- § 5:332 Who should be trustee
- § 5:333 —Factors to be considered in choosing trustee
- § 5:334 ——Size and complexity of trust
- § 5:335 ——Familiarity with assets
- § 5:336 ——Familiarity with family
- § 5:337 ——Conflicts of interest
- § 5:338 ——Different or cotrustee
- § 5:339 ——Integrity
- § 5:340 ——Diligence
- § 5:341 ——Deep pockets
- § 5:342 ——Personality
- § 5:343 ——Empathy

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 5:344 ——Location and age
- § 5:345 ——Taxes
- § 5:346 ——Expense
- § 5:347 ——Individual trustee
- § 5:348 ——Pros
- § 5:349 ——Cons
- § 5:350 ——Corporate trustee
- § 5:351 ——Pros
- § 5:352 ——Cons
- § 5:353 ——Use of multiple trustees
- § 5:354 ——Multiple trusts; multiple trustees
- § 5:355 ——Noncorporate trustee's bond
- § 5:356 ——Trust Code
- § 5:357 ——Waiver under terms of trust agreement
- § 5:358 Prudent trustee rule
- § 5:359 ——Reasonable investment strategy
- § 5:360 Duties and responsibilities of trustee
- § 5:361 ——Prudence
- § 5:362 ——Loyalty
- § 5:363 ——Impartiality
- § 5:364 ——Good faith
- § 5:365 ——Take possession of trust property
- § 5:366 ——Preserve and protect trust property
- § 5:367 ——Segregate trust property and do not commingle
- § 5:368 ——Effect of commingling
- § 5:369 ——Carry out terms of trust
- § 5:370 ——Keep beneficiaries informed
- § 5:371 ——Account to beneficiaries
- § 5:372 ——Do not delegate duties
- § 5:373 ——Keep accurate books and records
- § 5:374 ——Make trust productive
- § 5:375 ——Review trust investments periodically
- § 5:376 ——Uphold and defend terms of trust
- § 5:377 ——Investigate acts and omissions of prior fiduciaries
- § 5:378 Powers of trustee
- § 5:379 ——Employ and appoint agents
- § 5:380 ——Compromise claims
- § 5:381 ——Payment of taxes
- § 5:382 ——Provide residence and pay funeral expenses
- § 5:383 ——Authority to borrow and lend
- § 5:384 ——Implied powers
- § 5:385 ——Environmental concerns; CERCLA and related state legislation creating liability
- § 5:386 ——Winding up affairs

TABLE OF CONTENTS

§ 5:387	—Granting broader powers
§ 5:388	— —Risks associated with broader powers
§ 5:389	—Specific assets
§ 5:390	—Limitations on statutory powers
§ 5:391	— —Specific direction
§ 5:392	— —Limiting powers for tax purposes
§ 5:393	—Drafting techniques
§ 5:394	— —Restatement of powers
§ 5:395	— — —Advantage
§ 5:396	— — —Disadvantage
§ 5:397	— —Statutory powers not listed
§ 5:398	— — —Advantage
§ 5:399	— — —Disadvantage
§ 5:400	— —Incorporation by reference
§ 5:401	— —General authority only
§ 5:402	Rights of the trustee
§ 5:403	—Compensation
§ 5:404	— —Amount of compensation
§ 5:405	— —Denial of Compensation
§ 5:406	—Exoneration
§ 5:407	— —Statutory exoneration
§ 5:408	— —Exoneration by terms of trust
§ 5:409	— —Reimbursement
§ 5:410	— —Award of costs
§ 5:411	Cotrustees
§ 5:412	—Designation of additional trustees
§ 5:413	— —Limitations on right to add additional trustee
§ 5:414	Prohibited self-dealing by trustee
§ 5:415	—Loans to trustee
§ 5:416	—Sales to trustee or by trustee
§ 5:417	— —Exceptions where purchase or sale by trustee permitted
§ 5:418	—Sales between trusts with common trustees
§ 5:419	—Purchase of trustee's securities
§ 5:420	—Deposits by corporate trustee with itself
§ 5:421	Resignation of trustee
§ 5:422	—Resignation no relief from liability for breach of trust
§ 5:423	Removal of trustee
§ 5:424	—Removal of corporate fiduciary
§ 5:425	— —Tax implications
§ 5:426	Successor trustee
§ 5:427	—Designation of successor trustees
§ 5:428	— —Limited usefulness of naming successors
§ 5:429	— —Trustee chooses successor

- § 5:430 Ancillary trustee
- § 5:431 Liabilities of trustee
- § 5:432 —Liability to beneficiary
- § 5:433 ——Nonliability for loss or failure to make profit
- § 5:434 ——Damages for breach of trust
- § 5:435 ——Measure of damages
- § 5:436 ——Environmental liability
- § 5:437 ——Limitation where person other than trustee in control
- § 5:438 ——Limitation for actions taken before notice or knowledge of facts
- § 5:439 ——Release of liability by beneficiary
- § 5:440 ——Limitation where power exercised by majority

XII. THE BENEFICIARY

- § 5:441 What is beneficiary
- § 5:442 Rights of beneficiary
- § 5:443 —Remedies which may be asserted by beneficiary
- § 5:444 ——Choice of remedies
- § 5:445 ——Injunction
- § 5:446 ——Damages
- § 5:447 ——Recovery of property
- § 5:448 ——Following property
- § 5:449 Liabilities of beneficiary

XIII. THIRD PERSON DEALINGS WITH TRUST

- § 5:450 Payment of money to trustee
- § 5:451 Conveyance by trustee
- § 5:452 Liability of trust property
- § 5:453 Commission of torts
- § 5:454 Contracts of trustee
- § 5:455 —Partnerships

XIV. FIDUCIARY LITIGATION CONSIDERATIONS

- § 5:456 Exculpatory provisions
- § 5:457 In terrorem provision
- § 5:458 Arbitration or mediation provision
- § 5:459 —Distributions in trustee's discretion

XV. SOME SPECIFIC TYPES OF TRUSTS

- § 5:460 By-pass trust
- § 5:461 Marital deduction trust
- § 5:462 —Marital deduction vehicles for U.S. citizen spouses

TABLE OF CONTENTS

§ 5:463	— — Qualified terminable interest property (QTIP) trust
§ 5:464	— — Power of appointment trust
§ 5:465	— — Estate trust
§ 5:466	— — Qualified domestic trust (QDOT)
§ 5:467	Generation-skipping trust (GST)
§ 5:468	— Objective of GST tax
§ 5:469	— Effective dates
§ 5:470	— — Certain wills executed before October 22, 1986
§ 5:471	— — Certain trusts that are irrevocable on September 25, 1985
§ 5:472	— Taxable events
§ 5:473	— — Taxable distribution
§ 5:474	— — Taxable terminations
§ 5:475	— — — Skip person
§ 5:476	— — — Generations
§ 5:477	— — Direct skip
§ 5:478	— Persons responsible for paying tax
§ 5:479	— Tax computation
§ 5:480	Life insurance trust
§ 5:481	— Minimization of federal estate tax
§ 5:482	— Third-party ownership; assignment and control
§ 5:483	— Third-party ownership; beneficiary designation
§ 5:484	— Trust provides mechanism for paying premiums
§ 5:485	— Crummey powers
§ 5:486	— — Crummey notice
§ 5:487	— — Failure to exercise Crummey power
§ 5:488	— — — General power of appointment
§ 5:489	— — — Limited power of appointment
§ 5:490	— — — Hanging power
§ 5:491	— Funding insurance trust by assigning existing policies
§ 5:492	Charitable trusts
§ 5:493	— Lead trusts
§ 5:494	— — Unitrusts
§ 5:495	— — Annuity trusts
§ 5:496	— Remainder trusts
§ 5:497	— — Unitrusts
§ 5:498	— — Annuity trusts
§ 5:499	— Pooled income funds
§ 5:500	Section 1301 trusts and section 142 trusts
§ 5:501	Trusts for minors and other donative trusts
§ 5:502	— Avoiding guardianship
§ 5:503	— — Age of receipt
§ 5:504	— — Designation of trustees

- § 5:505 — Powers of trustees
- § 5:506 — Disposition at death
- § 5:507 — Privacy
- § 5:508 — Expense
- § 5:509 — Custodianship
- § 5:510 — Experience handling money
- § 5:511 — Controlling future disposition
- § 5:512 — Preservation of wealth
- § 5:513 — Creditors
- § 5:514 — Inability to handle money
- § 5:515 — Judgments
- § 5:516 — Divorce
- § 5:517 — Substance abuse
- § 5:518 — Potential creditors
- § 5:519 — Internal Revenue Code § 2503(c)
- § 5:520 — Trusts with annual withdrawal rights; IRC § 2503(b) trusts
- § 5:521 — Trusts that pay all income to trust beneficiary
- § 5:522 — Directed Trusts—Advisors

XVI. FORMS

- § 5:523 — Form—Joint representation statement
- § 5:524 — Representation of multiple generations of the same family engagement letter
- § 5:525 — Small trust provision
- § 5:526 — Successor trustee provisions
- § 5:527 — Removal of trustee
- § 5:528 — In terrorem clause
- § 5:529 — Credit shelter bypass trust
- § 5:530 — QTIP marital deduction trust
- § 5:531 — QDOT trust
- § 5:532 — Irrevocable life insurance trust containing Crummey annual withdrawal powers
- § 5:533 — Charitable remainder annuity trust
- § 5:534 — Application for a standard 142 trust (for a healthy minor)
- § 5:535 — Decree for a standard 142 trust (for a healthy minor)
- § 5:536 — Standard 142 trust (for a healthy minor)
- § 5:537 — Postponement of distribution provision (inter vivos trust)
- § 5:538 — Section 2503(c) trust

Appendix A. Uniform Principal and Income Act

TABLE OF CONTENTS

CHAPTER 6. TRANSFER TAXATION

I. INTRODUCTION AND OVERVIEW OF TAXES

- § 6:1 Taxes affecting estate plan
- § 6:2 Unified federal estate and gift tax system—Imposition of taxes
- § 6:3 —Substance over form
- § 6:4 —Estate tax
- § 6:5 —Gift tax
- § 6:6 Generation-skipping transfer tax
- § 6:7 Texas transfer taxes
- § 6:8 Income tax considerations
- § 6:9 —Basis considerations
- § 6:10 ——Carry-over basis on gifts
- § 6:11 ——Step-up in basis at death
- § 6:12 —Net investment income tax
- § 6:13 —Income taxation of property transferred to trusts

II. FEDERAL TRANSFER TAX SYSTEM

- § 6:14 General rules applying to estate and gift taxes
- § 6:15 —Nature of gift tax
- § 6:16 —Nature of estate tax
- § 6:17 ——Transfers
- § 6:18 —Nature of generation-skipping transfer tax
- § 6:19 Gift tax
- § 6:20 —General principles
- § 6:21 ——Definition of gift
- § 6:22 ——Full and adequate consideration
- § 6:23 ——Valuation of gift
- § 6:24 ——Exception for gifts made within three years of death
- § 6:25 ——Valuation of intrafamily transfers
- § 6:26 ——Transfers with no clear evidence of fair market value
- § 6:27 ——Genuine disputes
- § 6:28 ——Gifts of life estate interests
- § 6:29 ——Business transactions
- § 6:30 ——Legal obligation of support and property settlements
- § 6:31 ——Split gifts
- § 6:32 ——Net gifts
- § 6:33 ——Reporting of gift tax
- § 6:34 ——Filing requirements

- § 6:35 — — —Gifts to QTIP trust
- § 6:36 — — —Split gifts
- § 6:37 — — —Form 709
- § 6:38 — — —Timely filing
- § 6:39 — — —Penalties for late filing
- § 6:40 —Transfers subject to gift tax
- § 6:41 — — —General principles
- § 6:42 — — —Interest-free loans and other rent-free use of property
- § 6:43 — — —Retained income interest
- § 6:44 — — —Gratuitous services
- § 6:45 — — —Exclusions and deductions
- § 6:46 — — —Annual exclusion
- § 6:47 — — —Present versus future interests
- § 6:48 — — —Increases in annual exclusion
- § 6:49 — — —Gifts in trust
- § 6:50 — — —Split gifts
- § 6:51 — — —Powers of appointment and Crummey provisions
- § 6:52 — — —Crummey powers granted to persons who are not beneficiaries of trust
- § 6:53 — — —Lapse of general power of appointment
- § 6:54 — — —Crummey notice
- § 6:55 — — —Time to exercise Crummey power
- § 6:56 — — —Gift for benefit of minors
- § 6:57 — — —Gifts of tuition
- § 6:58 — — —Qualifying educational organization
- § 6:59 — — —“Tuition” defined
- § 6:60 — — —No limit to deductibility
- § 6:61 — — —Qualified tuition programs
- § 6:62 — — —Gifts of medical expenses
- § 6:63 — — —Disclaimers
- § 6:64 — — —Significance of disclaimers
- § 6:65 — — —Qualified disclaimers
- § 6:66 — — —Qualified disclaimers must be in writing
- § 6:67 — — —Delivery of disclaimer
- § 6:68 — — —Timely disclaimers
- § 6:69 — — —No acceptance
- § 6:70 — — —Entire interest or undivided portion of an interest
- § 6:71 — — —Pass without direction to decedent’s spouse or person other than disclaimant
- § 6:72 — — —Reasons for disclaiming property interests
- § 6:73 — — —Nontax reasons to disclaim property
- § 6:74 — — —Tax reasons for disclaiming property
- § 6:75 — — —Unplanned disclaimers

TABLE OF CONTENTS

§ 6:76	—Donee's basis in property received as gift
§ 6:77	—Exemption Equivalent
§ 6:78	—Treatment of gifts made prior to 1976
§ 6:79	—Gift tax rate schedule
§ 6:80	—Calculation of gift tax
§ 6:81	Estate tax
§ 6:82	—Basis of inherited property
§ 6:83	—Property upon which tax is imposed
§ 6:84	—Property located in another country
§ 6:85	—Gifts within three years of death
§ 6:86	—Gift tax exception
§ 6:87	—Gift tax paid by donee
§ 6:88	—Transferee tax liability
§ 6:89	—State gift taxes not included
§ 6:90	—Exception for transfer of life insurance
§ 6:91	—Exception for transfer of retained powers
§ 6:92	—Transfers with retained interests
§ 6:93	—Retained right to possession, enjoyment, or income
§ 6:94	—Chapter 14
§ 6:95	—Transfers not fully effective until death
§ 6:96	—Revocable transfers
§ 6:97	—Prior taxable gifts made after 1976
§ 6:98	—Prior taxable gifts made before 1977
§ 6:99	—Powers of appointment
§ 6:100	—Definition of general power of appointment
§ 6:101	—Limited power not general power of appointment
§ 6:102	—Lapse of general power of appointment
§ 6:103	—Exception to general rule
§ 6:104	—Life insurance
§ 6:105	—Transfers for insufficient consideration
§ 6:106	—Relinquishment of marital rights
§ 6:107	—Retirement plan benefits
§ 6:108	—History
§ 6:109	—Qualified terminable interest property (QTIP) for which an election was made
§ 6:110	—Effect of QTIP election
§ 6:111	—Deductions allowable in determining taxable estate
§ 6:112	—Qualified conservation easement
§ 6:113	—Conservation easement exclusion amount limit
§ 6:114	—Exclusion percentage limit
§ 6:115	—Land which qualifies for conservation easement

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 6:116 ——Funeral, administration expenses and debts
- § 6:117 ——Reasonable funeral expenses
- § 6:118 ——Administration expenses
- § 6:119 ——Costs of conserving property
- § 6:120 ——Executor's commissions
- § 6:121 ——Legal fees
- § 6:122 ——Appraisal fees
- § 6:123 ——Deductibility of expenses incurred in selling property
- § 6:124 ——Debts of decedent, mortgages and liens
- § 6:125 ——Income tax for decedent's final year
- § 6:126 ——Charitable pledges
- § 6:127 ——Marital deduction
- § 6:128 ——History
- § 6:129 ——Pre-1982 wills and transition rules
- § 6:130 ——Interests that qualify for marital deduction
- § 6:131 ——Qualified plan and IRA benefits
- § 6:132 ——Special requirements for gifts to non-U.S. citizens; Qualified Domestic Trust
- § 6:133 ——Family-owned business interests
- § 6:134 ——State death taxes
- § 6:135 ——Credits against tax imposed
- § 6:136 ——Unified credit
- § 6:137 ——Use of unified credit
- § 6:138 ——Credit for state death taxes
- § 6:139 ——Credit for tax on prior transfers
- § 6:140 ——Obtaining prior transfer tax credit
- § 6:141 ——Tax on both estates
- § 6:142 ——No equivalent credit for gift tax
- § 6:143 ——Credit for foreign death taxes
- § 6:144 ——Estate tax treaties
- § 6:145 ——Foreign gift tax credit
- § 6:146 ——Credit for death taxes on remainders
- § 6:147 ——Recovery of taxes claimed as credit
- § 6:148 ——Estates of nonresidents noncitizens
- § 6:149 ——Assets included in estate
- § 6:150 ——When property deemed situated in U.S
- § 6:151 ——Life insurance proceeds
- § 6:152 ——Deductions
- § 6:153 ——Right of recovery where decedent retained interest
- § 6:154 ——Computation of estate tax
- § 6:155 ——Determination of value
- § 6:156 ——Special use valuation
- § 6:157 ——Alternate value
- § 6:158 ——Restrictions on use

TABLE OF CONTENTS

§ 6:159	— —Deductions
§ 6:160	— —Prior taxable gifts
§ 6:161	— —Tentative tax determined
§ 6:162	— —Gross tax determined
§ 6:163	— —Tax credits
§ 6:164	— —Sample computation of estate tax liability
§ 6:165	Generation-skipping transfer tax
§ 6:166	— —Objective of generation-skipping transfer tax
§ 6:167	— —Effective dates
§ 6:168	— —Wills executed before October 22, 1986
§ 6:169	— —Trusts irrevocable on September 25, 1985
§ 6:170	— —Transferor's mental disability for trusts included in transferor's estate
§ 6:171	— —Rate
§ 6:172	— —Taxable events
§ 6:173	— —Direct skip
§ 6:174	— — —Skip person
§ 6:175	— — —Interest in trust
§ 6:176	— — —Taxable distributions
§ 6:177	— — —Taxable terminations
§ 6:178	— — Persons responsible for paying tax
§ 6:179	— — Tax computation
§ 6:180	— — Tax computation for taxable distributions
§ 6:181	— — Transfer subject to both income and GST tax
§ 6:182	— — Tax computation for taxable terminations
§ 6:183	— — Tax computation for direct skips
§ 6:184	— — Credit for state GST
§ 6:185	— — Assignment of persons to generations
§ 6:186	— — Lineal descendants
§ 6:187	— — Nonlineal descendants
§ 6:188	— — Assignments to more than one generation
§ 6:189	— — Assignment of entities to generations
§ 6:190	— — Inclusion ratio
§ 6:191	— — Applicable fraction
§ 6:192	— — Valuation of property for determining inclusion ratio
§ 6:193	— — Charitable lead annuity trust
§ 6:194	— — ETIP period donor-retained interests
§ 6:195	— — —ETIP period; treatment of spousal interests
§ 6:196	— — Qualified severance
§ 6:197	— — Allocation of exemption
§ 6:198	— — Exclusions from coverage
§ 6:199	— — Protecting grandfathered trust
§ 6:200	— — —Additions to trust

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 6:201 — — —Constructive addition through release, exercise, or lapse of power of appointment
- § 6:202 — — —Constructive addition through relief of liability
- § 6:203 — — —Waiver of right of recovery
- § 6:204 — — —Predeceased child rule
- § 6:205 — — —Exemption not limited to grandchildren
- § 6:206 — — —Effective for transfers made after December 31, 1997
- § 6:207 — — —Taxable terminations subject to estate or gift tax
- § 6:208 — — —Transfers which qualify for gift tax exclusion
- § 6:209 — — —Tuition and medical payments
- § 6:210 — — —Exemptions from tax
- § 6:211 — — —\$11.58 Million per grantor exemption
- § 6:212 — — —\$11.58 Million Per grantor exemption amount indexed
- § 6:213 — — —Valuation of transferred property
- § 6:214 — — —Exceptions to valuation rule
- § 6:215 — — —Effective date of allocation
- § 6:216 — — —Timely allocations by donor
- § 6:217 — — —Late allocations by donor
- § 6:218 — — —Timely allocation by personal representative
- § 6:219 — — —Late allocation by personal representative
- § 6:220 — — —Transfers included in donor's gross estate
- § 6:221 — — —Transfers not included in donor's gross estate
- § 6:222 — — —Exception for transfers of ETIP property and charitable lead annuity trust interests
- § 6:223 — — —Deemed allocation during lifetime
- § 6:224 — — —Electing out of deemed allocation rules during lifetime
- § 6:225 — — —Deemed allocation at death
- § 6:226 — — —Electing out of deemed allocation rules at death
- § 6:227 — — —Application of Chapter 13 to nonresident aliens
- § 6:228 — — —Valuation provisions
- § 6:229 — — —Time of valuation for gift, estate, and generation-skipping transfer tax
- § 6:230 — — —Gift tax
- § 6:231 — — —Estate tax
- § 6:232 — — —Alternate valuation for estate tax
- § 6:233 — — —Restrictions on use of alternate valuation
- § 6:234 — — —Generation-skipping transfer tax
- § 6:235 — — —Premium and discount values
- § 6:236 — — —Undivided interests in real estate
- § 6:237 — — —Minority and lack of marketability discounts of business interests

TABLE OF CONTENTS

- § 6:238 — —Control premium
- § 6:239 — —Family limited partnerships
- § 6:240 — —Valuation principles of Chapter 14
- § 6:241 — —Anti-freeze provision
- § 6:242 — —Restrict benefits of common-law GRITS
- § 6:243 — — —Common-law GRITs eliminated
- § 6:244 — — —All other split interest transfers restricted
- § 6:245 — —Buy-sell restrictions ignored
- § 6:246 — —Anti-Harrison Rule
- § 6:247 — —Special use valuation Section 2032A
- § 6:248 — —Qualifying for special use valuation
- § 6:249 — —Penalty for undervaluation

Table of Contents

CHAPTER 7. INCOME TAXATION OF TRUSTS AND ESTATES

I. GENERAL OVERVIEW

- § 7:1 Separate taxpayers
- § 7:2 —General rule—Each estate or trust is separate taxpayer
- § 7:3 —Exception—Multiple trusts
- § 7:4 ——Grantor trusts
- § 7:5 Application of Subchapter J
- § 7:6 Estate election of fiscal or calendar tax year

II. BASIC TERMS AND CONCEPTS

- § 7:7 Generally
- § 7:8 Beneficiary
- § 7:9 Fiduciary
- § 7:10 Gross income
- § 7:11 Adjusted gross income
- § 7:12 —Distribution deduction
- § 7:13 —Application of two percent floor
- § 7:14 —No standard deduction
- § 7:15 —Depreciation, depletion, amortization, etc
- § 7:16 Separate share rule
- § 7:17 Distributable net income
- § 7:18 Income in respect of decedent
- § 7:19 Tentative taxable income
- § 7:20 The 65-day rule
- § 7:21 —Limitations on 65-day rule election
- § 7:22 —Procedure to make 65-day rule election
- § 7:23 Accumulation distribution rules

III. OVERVIEW OF TRUST INCOME TAXATION

- § 7:24 Simple versus complex trusts
- § 7:25 Simple trusts
- § 7:26 —Taxation requirements for simple trust
- § 7:27 —Computing Distributable Net Income of simple trust
- § 7:28 —Effect of simple trust treatment
- § 7:29 ——Limitations on taxability of beneficiaries with respect to income required to be distributed currently

- § 7:30 ——Character of amounts in hands of beneficiaries
- § 7:31 —Income reporting for trust and beneficiary with different taxable years
- § 7:32 Complex trusts
- § 7:33 —Taxation requirements for complex trusts
- § 7:34 —Effect of complex trust treatment
- § 7:35 ——Limitation based on amount of Distributable Net Income
- § 7:36 ——Limitation based on character of Distributable Net Income
- § 7:37 ——Limitation of aggregate inclusion to distributable net income
- § 7:38 ——Income taxation of beneficiaries of complex trust
- § 7:39 ——Distributions of in-kind property
- § 7:40 —Rule where trust and beneficiary have different taxable years
- § 7:41 —Separate shares of different beneficiaries in same trust treated as separate trusts
- § 7:42 —Exclusion of certain gifts or bequests from treatment as taxable distributions
- § 7:43 Unification of tax treatment of revocable trusts and estates

IV. INCOME TAXATION OF TRUST DISTRIBUTIONS

- § 7:44 Type of trust determines taxation
- § 7:45 —Simple trust
- § 7:46 ——Special rule in case of death
- § 7:47 ——Maximum taxability fixed by distributable net income
- § 7:48 ——Non-Utilization of deductions
- § 7:49 Complex trust
- § 7:50 —Two-tier system
- § 7:51 ——First tier
- § 7:52 ——Second tier
- § 7:53 —Special classification of annuities
- § 7:54 ——First tier
- § 7:55 ——Second tier
- § 7:56 —Lack of mutual exclusivity of tiers
- § 7:57 —Amounts used to discharge legal obligations
- § 7:58 —Limitation of aggregate inclusion to distributable net income
- § 7:59 ——Amounts required to be distributed currently
- § 7:60 ——Other amounts distributed
- § 7:61 —Distributions in-kind

TABLE OF CONTENTS

§ 7:62	—Requirements for election
§ 7:63	Non-pro rata distributions
§ 7:64	Termination distributions
§ 7:65	—Termination on stated events
§ 7:66	—Termination on final distribution
§ 7:67	Grantor treated as owner and taxpayer
§ 7:68	—Historical overview
§ 7:69	—Current taxation
§ 7:70	—Grantor trust based on reversionary interests
§ 7:71	—Grantor trust based on retained powers
§ 7:72	—Beneficial enjoyment
§ 7:73	—Administrative powers
§ 7:74	—Revocation
§ 7:75	—Who is adverse party
§ 7:76	—Who is nonadverse party
§ 7:77	—Grantor trust based on retained interests
§ 7:78	—Right to income
§ 7:79	—Ability to discharge obligations of support
§ 7:80	—Consequences of grantor trust status
§ 7:81	Nongrantor treated as owner and taxpayer
§ 7:82	—Historical overview
§ 7:83	—Current taxation
§ 7:84	—Obligations of support
§ 7:85	—Effect of disclaimer
§ 7:86	—Effect of qualified disclaimer
§ 7:87	—Relationship of gift tax and income tax

V. INCOME TAXATION OF ESTATES

§ 7:88	Application of general income tax principles
§ 7:89	Special rules relating to income with respect of decedent
§ 7:90	Deductions in respect of a decedent
§ 7:91	Allocation of income
§ 7:92	—Identify income
§ 7:93	—Allocate income in accordance with will
§ 7:94	—Statutory allocation
§ 7:95	—Allocate estate expenses
§ 7:96	—Allocation of net income
§ 7:97	—Specific bequests
§ 7:98	—Allocation of residuary income
§ 7:99	Allocation of expenses
§ 7:100	—Allocate expenses in accordance with will
§ 7:101	—Statutory allocation
§ 7:102	Taxation of distributions

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 7:103 —Distributable net income
- § 7:104 ——Specific bequest exception
- § 7:105 ——Qualification as specific property or specific sum of money
- § 7:106 ——Determination of three installments
- § 7:107 ——Separate share rule exception
- § 7:108 —Distribution of estate assets in satisfaction of certain formula gifts or debts
- § 7:109 ——Pecuniary gifts
- § 7:110 ——Debts
- § 7:111 ——Section 643(e)(3) election
- § 7:112 —Non-pro rata distributions of estate assets
- § 7:113 Termination distributions
- § 7:114 —Undue prolongation of estate administration

VI. TAX BASIS

- § 7:115 Generally
- § 7:116 Gifts
- § 7:117 Trusts
- § 7:118 —Testamentary trust
- § 7:119 —Inter vivos trust included in deceased's estate
- § 7:120 —Repeal of application of capital gains tax rules
- § 7:121 Decedent's estate
- § 7:122 —Property passing from estate
- § 7:123 Beneficiaries

CHAPTER 8. PLANNING FOR RETIREMENT PLANS

I. BASIC OVERVIEW

- § 8:1 Overview of minimum distribution rules
- § 8:2 The SECURE Act and the SECURE Act 2.0
- § 8:3 General summary of regular minimum distribution rules
- § 8:4 General summary of the minimum distribution rules—Lifetime distributions must commence by required beginning date
- § 8:5 —Required distributions during participant's lifetime
- § 8:6 General summary of the “old” minimum distribution rules—The 1987 Proposed Regulations
- § 8:7 General summary of the “new” minimum distribution Rules 2002
- § 8:8 General summary of the “newest” minimum distribution Rules

TABLE OF CONTENTS

§ 8:9	General summary of the “new” minimum distribution rules—Where spouse is not sole beneficiary
§ 8:10	—Where spouse is sole beneficiary
§ 8:11	—Designated beneficiary
§ 8:12	—Applicable date
§ 8:13	—Post death planning
§ 8:14	—Required distributions upon death of participant
§ 8:15	—Participant’s death before RBD
§ 8:16	—Participant’s death before RBD with surviving Spouse as sole designated beneficiary—Commencement of distributions when participant would have attained 72
§ 8:17	—Participant’s death before RBD with Spouse as sole designated beneficiary—Rollover of qualified plan benefits to IRA rollover in spouse’s name
§ 8:18	—Participant’s death before RBD with surviving Spouse as sole designated beneficiary—Treat participant’s IRA as own
§ 8:19	—Participant’s death before RBD—Surviving spouse is not sole designated beneficiary
§ 8:20	—No designated beneficiary; five-year rule
§ 8:21	—Participant’s death after RBD—No designated beneficiary—Recalculation limitation
§ 8:22	—Participant’s death after RBD with surviving spouse as sole designated beneficiary—Special spousal options
§ 8:23	—Distributions after death of sole designated beneficiary spouse
§ 8:24	—Participant’s death after RBD surviving spouse is not sole designated beneficiary
§ 8:25	—Creation of separate accounts after participant’s death
§ 8:26	—Beneficiary designation wording
§ 8:27	—Failing to obtain separate account treatment
§ 8:28	—Method for division into separate accounts after participant’s death
§ 8:29	Taxation overview
§ 8:30	—Income taxation
§ 8:31	—Special income tax rules
§ 8:32	—Ten-year averaging
§ 8:33	—Capital gain treatment
§ 8:34	—Five-year averaging
§ 8:35	—Rollover by participant
§ 8:36	—Rollover by spouse designated beneficiary
§ 8:37	—Inherited qualified plans
§ 8:38	—Inherited IRAs

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 8:39 ——Five thousand dollar death benefit exclusion
- § 8:40 —Estate taxation
- § 8:41 ——General rule
- § 8:42 ——Transitional rules
- § 8:43 ——Unlimited exclusion
- § 8:44 ——One-hundred thousand dollar exclusion
- § 8:45 ——Estate tax transitional rules not applicable to IRAs
- § 8:46 Penalty taxes
- § 8:47 —Premature distributions
- § 8:48 —Late distributions
- § 8:49 —Elimination of penalty taxes on excess accumulations and distributions
- § 8:50 Spousal rights
- § 8:51 —Two required spousal benefits for certain plans
- § 8:52 ——Qualified joint and survivor annuity
- § 8:53 ——Qualified preretirement survivor annuity
- § 8:54 —Spousal benefit requirements for other plans
- § 8:55 ——Spouse must be beneficiary
- § 8:56 ——No annuity rule
- § 8:57 ——Not a transferee plan
- § 8:58 —Spousal consents and waivers
- § 8:59 ——Participant's waiver
- § 8:60 ——Spousal consent to waiver
- § 8:61 ——General consent
- § 8:62 ——Specific consent
- § 8:63 ——Optional form of benefit identified
- § 8:64 ——Sample language
- § 8:65 ——Consideration to spousal rights
- § 8:66 Community property laws
- § 8:67 —Devisability issue
- § 8:68 ——Qualified plans; no right of disposition
- § 8:69 ——IRAs; Boggs not applicable
- § 8:70 ——Status of IRA rollovers from qualified plans
- § 8:71 —Drafting issues
- § 8:72 ——Participant
- § 8:73 ——To participant with disclaimer option
- § 8:74 ——Documentation of disclaimer by participant
- § 8:75 ——Qualified disclaimer
- § 8:76 ——IRA documentation; implementation of disclaimer
- § 8:77 —Planning ideas to assist nonparticipant spouse in estate planning

TABLE OF CONTENTS

II. OPTIMAL BENEFICIARY DESIGNATIONS

- § 8:78 Married participant—Designate spouse as primary beneficiary
- § 8:79 — Qualifies for estate tax marital deduction
- § 8:80 — — Automatic qualified terminable interest property (QTIP) treatment for survivor annuities
- § 8:81 — — Periodic payment issues
- § 8:82 — — No gift tax issue
- § 8:83 — — Spouse qualifies as sole designated beneficiary
- § 8:84 — — Spouse's options upon death of participant
- § 8:85 — — — IRA rollover option
- § 8:86 — — — Assumption of participant's IRA
- § 8:87 — — — Disadvantage of spousal IRA rollover
- § 8:88 — — — Taking distributions as participant's beneficiary
- § 8:89 — — — Disclaimer option
- § 8:90 Single participant with children—Designate adult children
- § 8:91 — — Multiple beneficiary rule
- § 8:92 — — — Separate accounts or segregated shares— Individual accounts—Contractual restrictions on distributions
- § 8:93 Single participant, no children, charitable intent— Designate charity
- § 8:94 — — Income tax results—Charity not designated beneficiary
- § 8:95 — — — Multiple beneficiary issue
- § 8:96 Single participant, no children, charitable intent; designate charity—Income tax results—Charity not designated beneficiary—How to create separate accounts or segregated shares
- § 8:97 Single participant, no children, charitable intent— Designate charity—Estate tax result—Charitable deduction
- § 8:98 — — Income tax result for charity

III. REASONS FOR DESIGNATING TRUST AS BENEFICIARY OF RETIREMENT PLANS

- § 8:99 Nontax reasons
- § 8:100 Tax reasons

IV. OBTAINING DESIGNATED BENEFICIARY TREATMENT IF TRUST NAMED AS BENEFICIARY OF RETIREMENT PLANS

- § 8:101 Trust itself not designated beneficiary

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 8:102 Trust regulatory requirements—Original proposed regulations
- § 8:103 —Operative wording
- § 8:104 —Problems with original proposed regulations
- § 8:105 —Final regulations—Four trust regulatory requirements
- § 8:106 —Relief with respect to irrevocability requirement
- § 8:107 —Relief with respect to delivery of trust document requirement
- § 8:108 —Relevant trust documentation
- § 8:109 —Relief with respect to delivery of trust document requirement—Plan administrator issue
- § 8:110 Multiple beneficiary rules
- § 8:111 —Regular multiple beneficiary rules
- § 8:112 —General rule—Shortest life expectancy
- § 8:113 —Exception—No designated beneficiary if estate, charity or non-qualifying trust a beneficiary
- § 8:114 —Usual contingent beneficiary rule
- § 8:115 —Death contingency exception
- § 8:116 —Exception for separate accounts and segregated shares
- § 8:117 ——Benefit of separate accounts or segregated shares
- § 8:118 ——Definition of separate account
- § 8:119 ——Definition of segregated share
- § 8:120 ——How to designate separate shares
- § 8:121 ——Special rule for new designated beneficiary after applicable date
- § 8:122 ——Special rule for new beneficiary who is not designated beneficiary
- § 8:123 —MDIB multiple beneficiary rules
- § 8:124 —Multiple beneficiaries—Spouse and others
- § 8:125 —Spouse ceases to be beneficiary after RBD
- § 8:126 ——Death of spouse
- § 8:127 ——Other reasons
- § 8:128 —Spouse ceases to be beneficiary before RBD where irrevocable distributions have commenced
- § 8:129 —Spouse ceases to be spouse
- § 8:130 —Application of multiple beneficiary rules in trust context
- § 8:131 ——When remainder beneficiaries of trust count as beneficiaries for purposes of determining designated beneficiary
- § 8:132 ——Interest not contingent on death of prior beneficiary

TABLE OF CONTENTS

- § 8:133 — — —IRS's interpretation of death contingency exception—Not available where trust accumulates plan benefits
- § 8:134 —Determining designated beneficiary treatment where trust named as beneficiary
- § 8:135 — — —Bypass trust I
- § 8:136 — — —Multiple beneficiary considerations
- § 8:137 — — —MDIB considerations
- § 8:138 — — —Bypass trust II
- § 8:139 — — —Multiple beneficiary problem; distribution commencement date
- § 8:140 — — —Conflict with prior rulings
- § 8:141 — — —Disclaimer within death contingency exception to multiple beneficiary rules
- § 8:142 — — —Effect of possession of power of appointment by trust beneficiary and trust beneficiary treated as designated beneficiary on multiple beneficiary and contingent beneficiary rules
- § 8:143 — — —Effect of power of appointment
- § 8:144 — — —Another trap for the unwary
- § 8:145 Naming trust as beneficiary—Spousal rights requirements
- § 8:146 — — —Participant's waiver of annuity benefit and designation of nonspouse beneficiary
- § 8:147 — — —Spouse's consent to waiver of annuity and alternate beneficiary
- § 8:148 — — —General consent
- § 8:149 — — —Spouse's consent to waiver of annuity and alternate beneficiary
- § 8:150 — — —Naming a trust as beneficiary

V. SPECIAL CONCERNS IN NAMING QUALIFIED TERMINABLE INTEREST PROPERTY TRUST AS BENEFICIARY

- § 8:151 Lump-sum distribution to qualified terminable interest property (QTIP) trust
- § 8:152 —Estate tax marital deduction
- § 8:153 —Income tax issues
- § 8:154 —Income in respect of decedent (IRD)
- § 8:155 — — —No IRD deduction
- § 8:156 —Allocation between principal and income
- § 8:157 —Observation
- § 8:158 Minimum distribution payments to QTIP trust
- § 8:159 —Satisfying qualifying income interest for life requirement

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 8:160 ——Distributions from retirement plans
- § 8:161 ——Alternatives for meeting qualifying income interest requirement
- § 8:162 ——Plan distributions are QTIP
- § 8:163 ——Flow through of income portion of distribution
- § 8:164 ——Conflict between minimum distributions and all income requirement
- § 8:165 ——Principal and income allocation
- § 8:166 ——QTIP election requirement
- § 8:167 ——Trust regulatory requirements
- § 8:168 ——Plan distribution options are satisfactory
- § 8:169 ——Multiple beneficiary rules—Trust accumulation issue
- § 8:170 ——No designated beneficiary
- § 8:171 ——Special spousal commencement date unavailable
- § 8:172 ——Drafting for trust accumulation of plan distributions
- § 8:173 Results if trust named beneficiary
- § 8:174 ——Designated beneficiary issue
- § 8:175 ——QTIP trust does not meet designated beneficiary requirements
- § 8:176 ——Participant dies before RBD—Five-year rule
- § 8:177 ——Participant dies after his RBD—At least as rapidly rule
- § 8:178 ——QTIP trust meets designated beneficiary requirements
- § 8:179 ——Participant's death before RBD
- § 8:180 ——Participant's death after RBD
- § 8:181 ——No spousal rollover option
- § 8:182 Drafting issues
- § 8:183 Drafting issues; form of marital trust; designated beneficiary qualification
- § 8:184 Drafting issues—IRD issue
- § 8:185 ——Specific bequest approach
- § 8:186 ——Fractional share approach
- § 8:187 ——Residuary trust
- § 8:188 ——Estate tax marital deduction issue
- § 8:189 ——Form of benefit
- § 8:190 ——All income requirement
- § 8:191 ——No distributions currently required
- § 8:192 ——Minimum distribution less than income produced
- § 8:193 ——Unproductive assets issue
- § 8:194 ——Post-death requirement; two QTIP elections

TABLE OF CONTENTS

- § 8:195 ——Historical development
- § 8:196 —Principal and income allocation issues
- § 8:197 ——Historical development
- § 8:198 —Remainder beneficiary issues
- § 8:199 ——Individuals
- § 8:200 ——Charities
- § 8:201 —Tax payment issues
- § 8:202 ——Estate taxes
- § 8:203 ——Income taxes and expenses
- § 8:204 —Instructive rulings

VI. SPECIAL CONCERNS IN NAMING QUALIFIED DOMESTIC TRUST AS BENEFICIARY

- § 8:205 Spouse not United States citizen
- § 8:206 Creation of Qualified Domestic Trust (QDOT)
- § 8:207 Rollover to QDOT by noncitizen spouse
- § 8:208 —Private Letter Ruling 96-23-063
- § 8:209 ——QDOT qualification for marital deduction
- § 8:210 ——Income issue
- § 8:211 —Private Letter Ruling 91-09-021
- § 8:212 —Private Letter Ruling 93-21-032
- § 8:213 Annuity as QDOT
- § 8:214 Final QDOT regulations

VII. SPECIAL CONCERNS IN NAMING BYPASS TRUST AS BENEFICIARY

- § 8:215 Lump-sum to bypass trust
- § 8:216 —IRD deduction
- § 8:217 —Principal and income allocation
- § 8:218 Minimum distribution payments to bypass trust
- § 8:219 —IRD reduces estate tax effectiveness
- § 8:220 —Strategies for the participant
- § 8:221 ——Not waiting until age 70 1/2 to take distributions from retirement plans
- § 8:222 ——Not taking merely required minimum distributions upon reaching RBD
- § 8:223 ——Rolling over qualified plan benefits to IRA
- § 8:224 —Complicating factors
- § 8:225 ——Multiple beneficiaries
- § 8:226 ——Power of appointment to charity
- § 8:227 ——Charity potential remainder beneficiary of trust
- § 8:228 ——Trust accumulations; special commencement date option not available

- § 8:229 —Drafting strategies
- § 8:230 ——Beneficiary designations
- § 8:231 ——Simplest method
- § 8:232 ——Method discussing disclaimer
- § 8:233 ——Possibly risky method
- § 8:234 ——Another option
- § 8:235 ——Bypass trust provisions
- § 8:236 ——No power of appointment or specially designed limited power of appointment
- § 8:237 ——Address trust accumulation of plan benefits

VIII. SPECIAL CONCERNS IN NAMING CHARITABLE TRUST AS BENEFICIARY OF RETIREMENT PLANS

- § 8:238 Distinguish from naming charity as beneficiary
- § 8:239 Distinguish from naming QTIP trust with remainder to charity as beneficiary
- § 8:240 —Marital deduction issue
- § 8:241 —Income tax issues
- § 8:242 —Benefits to spouse
- § 8:243 —Benefits to charity
- § 8:244 Disadvantage of naming charitable trust as beneficiary
- § 8:245 —No designated beneficiary
- § 8:246 —Other beneficiaries may suffer because of multiple beneficiary rule
- § 8:247 ——Percentage or fractional share designation
- § 8:248 —Loss of IRD deduction
- § 8:249 Proposed law—Direct rollover of IRA to charity

IX. SPECIAL CONCERNS IN NAMING A GENERATION-SKIPPING TRANSFER TRUST AS BENEFICIARY

- § 8:250 No generation-skipping transfer exemption allocation until participant's death
- § 8:251 GST exemption allocation at death
- § 8:252 —IRD issue
- § 8:253 —Various problems
- § 8:254 —Advantages
- § 8:255 —Potential problems

X. SPECIAL CONCERNS NAMING “THE TRUSTEE” IN GENERAL AS BENEFICIARY

- § 8:256 Naming trustee as beneficiary

TABLE OF CONTENTS

- § 8:257 —Useful for contingent beneficiary
- § 8:258 —Risky as primary designation
- § 8:259 ——No trusts actually created
- § 8:260 ——Community property issues
- § 8:261 —IRD issues

XI. TRUST OR ESTATE NAMED AS BENEFICIARY BUT SPOUSE DESIRES ROLLOVER

- § 8:262 Not a planning technique
- § 8:263 Favorable rulings
- § 8:264 —Sample rulings
- § 8:265 —Most common reason for favorable ruling
- § 8:266 No IRA rollover permitted
- § 8:267 —Sample rulings
- § 8:268 —Reasons for lack of relief

XII. CHECKLISTS

- § 8:269 Checklist—Summary of analysis in obtaining designated beneficiary treatment when trust named as beneficiary of retirement plan benefits
- § 8:270 —Summary of drafting considerations in naming trust as beneficiary of retirement benefits

XIII. FORMS

- § 8:271 Form—Gift of NPS's interest in retirement plans to participant
- § 8:272 —Disclaimer trust
- § 8:273 —Agreement relating to IRA and retirement plan distributions
- § 8:274 —Agreement relating to IRA
- § 8:275 —Addition to beneficiary designation, separate accounts/segregated shares
- § 8:276 —Will provisions: revocable plan benefits trust
- § 8:277 —Possible will provisions relating to retirement plan assets passing to QTIP trust
- § 8:278 —Beneficiary designation for retirement plans and the IRAs of Billy Simple
- § 8:279 —Beneficiary designation for retirement plans and IRAs of Joseph Worthy
- § 8:280 —Beneficiary designation for retirement plans and IRAs of John Hardy
- § 8:281 —Beneficiary designation for retirement plans and IRAs of Doctor Proctor
- § 8:282 —Beneficiary designations for retirement plans and IRAs of I. M. Blest

§ 8:283 —Allocation of IRD to marital deduction amount

CHAPTER 9. LIFETIME PLANNING

I. IN GENERAL

- § 9:1 Management of property, medical, and personal needs if incapacitated
- § 9:2 Favorable tax treatment for lifetime and post-death transfers

II. PLANNING FOR MANAGEMENT OF PROPERTY

- § 9:3 Management of client's property
- § 9:4 —Fiduciary choices and duties
- § 9:5 ——Individual fiduciary
- § 9:6 ——Corporate fiduciary
- § 9:7 ——Fail-safing—Failsafe planning
- § 9:8 —Texas statutory power of attorney—Caution message and overview of statute
- § 9:9 —Durable power of attorney—General Texas statutory requirements; durable power of attorney
- § 9:10 ——Advantages in using property management power of attorney
- § 9:11 ——Property management powers distinguished from medical powers of attorney
- § 9:12 —Types of durable powers of attorney for property management
- § 9:13 ——General durable power of attorney
- § 9:14 ——Special durable power of attorney
- § 9:15 —Drafting requirements
- § 9:16 ——Definition and purpose
- § 9:17 ——Execution and acknowledgment
- § 9:18 —Drafting considerations
- § 9:19 ——When power becomes effective; current or springing
- § 9:20 ——Duration of power
- § 9:21 ——Statutory form language
- § 9:22 ——Specificity in granting powers
- § 9:23 ——Gifts
- § 9:24 ——Defining incapacity for springing purposes
- § 9:25 ——Co-agents and successor agents
- § 9:26 —Revocation
- § 9:27 —Termination
- § 9:28 ——Expressly written
- § 9:29 ——Agent unable to serve

TABLE OF CONTENTS

§ 9:30	— — Marriage between agent and principal dissolved or declared void
§ 9:31	— Advising those acting under a durable power
§ 9:32	— — Construction of powers; generally
§ 9:33	— — Construction of other transaction powers
§ 9:34	— — — Real property transactions
§ 9:35	— — — Tangible personal property transactions
§ 9:36	— — — Stock, bond, and related transactions
§ 9:37	— — — Banking and other financial institution transactions
§ 9:38	— — — Business operation transactions
§ 9:39	— — — Estate, trust, and other beneficiary transactions
§ 9:40	— — — Tax matters
§ 9:41	— — Fiduciary standard of care
§ 9:42	— — Validity and effect of actions taken by agent
§ 9:43	— — Limitations upon power of attorney
§ 9:44	— — Nondelegable power
§ 9:45	— — Notice to third parties; acceptance and reliance
§ 9:46	— — Stand-by management trusts
§ 9:47	— — Designation of guardian of estate
§ 9:48	— — Duties and powers of guardians of estate
§ 9:49	— — Statutory form requirements
§ 9:50	— — Planning for challenges
§ 9:51	— — Nontraditional relationships
§ 9:52	— — Contentious family relationships

III. PLANNING FOR MEDICAL AND PERSONAL NEEDS

§ 9:53	Statutory instruments
§ 9:54	Medical power of attorney
§ 9:55	— Disclosure statement in form
§ 9:56	— Scope and duration of authority
§ 9:57	— Physician's duty to inform principal
§ 9:58	— Persons who may not exercise authority of agent
§ 9:59	— Revocation
§ 9:60	— Execution and witnesses
§ 9:61	— Selection and liability of health care agent
§ 9:62	— Conflict of powers or consents
§ 9:63	— Procedures in absence of medical power of attorney; Consent to Medical Treatment Act
§ 9:64	Declaration for mental health treatment
§ 9:65	— Physician or health care provider's duties; liability limitations

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 9:66 —Who may execute declarations; period of validity
- § 9:67 —Execution
- § 9:68 —Revocation
- § 9:69 —Disregard of declaration
- § 9:70 Directives to physicians
- § 9:71 —Terminal conditions; living wills
- § 9:72 —Written directives—Statutory form
- § 9:73 —Nonwritten directives
- § 9:74 —Effect of directive under Natural Death Act
- § 9:75 —Revocation
- § 9:76 —Consent to medical treatment
- § 9:77 —Who may consent; surrogate decision makers
- § 9:78 —Subject matters of consent
- § 9:79 —Prerequisites for consent
- § 9:80 —Liabilities
- § 9:81 —Do not resuscitate (DNR) directives
- § 9:82 —Do-not-resuscitate (DNR) directives—Form of out-of-hospital DNR order
- § 9:83 —Do not resuscitate (DNR) directives—Nonwritten DNR order
- § 9:84 Designation of guardian of person
- § 9:85 —Duties and powers of guardians of person
- § 9:86 —Statutory form requirements
- § 9:87 Designation of agent to make health care decisions for children
- § 9:88 —Consent by nonparent
- § 9:89 —Consent by child
- § 9:90 —Form of written consent

IV. PLANNING FOR POST DEATH ISSUES

- § 9:91 Disposition of remains
- § 9:92 —Burial instruction; in general
- § 9:93 —Appointment of agent to control disposition of remains
- § 9:94 —Liability
- § 9:95 Anatomical gifts
- § 9:96 —Manner of executing anatomical gift
- § 9:97 —Persons who may execute gift
- § 9:98 —Donees
- § 9:99 Trustee's authority to pay funeral expenses
- § 9:100 Trust-funded prepaid funeral benefits

V. CHECKLISTS

- § 9:101 Checklist—Preparation of power of attorney

TABLE OF CONTENTS

VI. FORMS

- § 9:102 Form—Statutory form for general durable power of attorney (current as of 2020)
- § 9:103 —Short-form special or limited power of attorney (durable)
- § 9:104 —Statutory form for medical power of attorney
- § 9:105 —Statutory form for declaration of mental health treatment
- § 9:106 —Statutory form for directive to physicians (Effective September 1, 2015)
- § 9:107 —Estates Code Declaration Of Guardian In Event Of Later Incapacity Or Need Of Guardian
- § 9:108 —Letter directive for disposition of remains
- § 9:109 —Health and Safety Code Section 711.002 appointment of agent to control disposition of remains

CHAPTER 10. DISPOSITIVE PLANNING

I. DISPOSITIVE PLANNING; GENERALLY

- § 10:1 General considerations
- § 10:2 Minimizing likelihood of conflict
- § 10:3 —Be clear on client's intent
- § 10:4 ——Ask client his or her intent
- § 10:5 ——Avoid ambiguous terms
- § 10:6 ——Use memos or codicils for personal items
- § 10:7 ——Encourage communication with family
- § 10:8 —Reduce effectiveness of conflict
- § 10:9 ——No contest clause
- § 10:10 ——Structure of property dispositions
- § 10:11 ——Communication by client
- § 10:12 —Structure for resolution of conflict
- § 10:13 ——Provide access to information
- § 10:14 ——Conflict resolution body
- § 10:15 ——Mediation or arbitration provision
- § 10:16 —Role of attorneys; ethical considerations
- § 10:17 Preserving flexibility
- § 10:18 —Fiduciaries
- § 10:19 ——Fiduciary duties
- § 10:20 ——Types of fiduciaries
- § 10:21 ——Individual fiduciary
- § 10:22 ——Corporate fiduciary
- § 10:23 ——Blended fiduciaries
- § 10:24 ——Constraints on appointing a fiduciary
- § 10:25 ——Avoiding deadlock

- § 10:26 —Powers of appointment
- § 10:27 Constraints in dispositive planning
- § 10:28 —Client perceptions and understandings
- § 10:29 ——Policy choices
- § 10:30 ——Misunderstandings
- § 10:31 —Cost and complexity
- § 10:32 —Tax considerations
- § 10:33 ——Transfer taxes
- § 10:34 ——Estate and Gift Tax Exclusion Amount
- § 10:35 ——Marital deduction
- § 10:36 ——Generation-skipping transfer tax
- § 10:37 ——Income tax

II. CLIENT'S GOALS

- § 10:38 Assessing goals
- § 10:39 Players involved in dispositive planning
- § 10:40 —Client
- § 10:41 —Beneficiary
- § 10:42 —Estate planning attorney
- § 10:43 —Professional tax advisors
- § 10:44 —Financial planning professionals
- § 10:45 —Life insurance agents
- § 10:46 —Trust officers
- § 10:47 Practicality of proposed plan
- § 10:48 Complete dispositions; primary, secondary, and contingent beneficiaries
- § 10:49 —Comprehensive property dispositions
- § 10:50 Balancing dispositive desires
- § 10:51 —Balancing among different client desires
- § 10:52 —Balancing desires with convenience
- § 10:53 —Balancing desires with expense

III. COORDINATION OF NONPROBATE AND PROBATE ASSETS

- § 10:54 Organizing, categorizing and selecting tools of disposition
- § 10:55 Dispositive documents
- § 10:56 —Wills
- § 10:57 ——Specific disposition of personal property
- § 10:58 ——Specific bequests of cash or specific items
- § 10:59 ——Trusts
- § 10:60 ———Dispositive provisions of trust
- § 10:61 ———Trust powers

TABLE OF CONTENTS

- § 10:62 — — —Appointment of trustees
- § 10:63 — —Disposition of residue
- § 10:64 — —Contingent bequest
- § 10:65 — —Contingent trust or TUTMA provision
- § 10:66 — —Tax and debt allocation clause
- § 10:67 — —Appointment of executor
- § 10:68 — —Testamentary trusts
- § 10:69 — —Purposes
- § 10:70 — — —Tax savings
- § 10:71 — — —Management expertise
- § 10:72 — — —Protection of property for benefit of minor and/or immature beneficiaries
- § 10:73 — — —Protection of property from creditors
- § 10:74 — — —Protection of property from claims of estranged spouses
- § 10:75 — — —Control over disposition of property upon beneficiary's death
- § 10:76 — —Income taxation of testamentary trusts
- § 10:77 — —Revocable living trusts
- § 10:78 — —Use of revocable living trusts in other states
- § 10:79 — —Reasons to use revocable living trust in Texas
- § 10:80 — — —Avoid probate in other states
- § 10:81 — — —Minimize likelihood of will contest
- § 10:82 — — —Avoid possible hassles associated with disability
- § 10:83 — — —Provide privacy regarding nature, size, and disposition of client's estate
- § 10:84 — — —Avoid hassles of probate
- § 10:85 — —Irrevocable inter vivos trusts
- § 10:86 — —Avoiding guardianships
- § 10:87 — —Beneficiary designations and other nonprobate transfers
- § 10:88 — —Funding client's tax plan

IV. PROPERTY INTERESTS

- § 10:89 — Nature and scope
- § 10:90 — Client's property interests
- § 10:91 — —Character of property
- § 10:92 — —Separate property
- § 10:93 — —Community property
- § 10:94 — —Impact on planning
- § 10:95 — — —Tracing
- § 10:96 — — —Adjusting bequests to consider character
- § 10:97 — — —No contest clause for character of property

- § 10:98 ——Acknowledgment of character of property
- § 10:99 —Outright ownership
- § 10:100 —Beneficial interests
- § 10:101 Property interests given to beneficiaries
- § 10:102 —Legal versus equitable
- § 10:103 —Contingent interest
- § 10:104 —Vested interest
- § 10:105 —Present interest
- § 10:106 —Future interest
- § 10:107 —Life estate
- § 10:108 —Remainder
- § 10:109 —Reversion
- § 10:110 —Income interest
- § 10:111 —Interest in principal
- § 10:112 —Annuity
- § 10:113 —Specific interests versus general interests
- § 10:114 —Dollar interests versus percentage interests
- § 10:115 —Undivided interests versus divided interests
- § 10:116 —General and special powers of appointment
- § 10:117 —General power of appointment
- § 10:118 —Special power of appointment

V. PLANNING FOR SPECIFIC BENEFICIARY TYPES

- § 10:119 Relationship to client and other family members
- § 10:120 Planning for spouses
- § 10:121 —Support for spouse
- § 10:122 —Protecting spouse
- § 10:123 —Spouse's own indiscretions
- § 10:124 —Conflict with children
- § 10:125 —Considerations in structuring property dispositions for spouse
 - Understand client's intent
 - Selecting trustee an important decision
 - Spouse as sole trustee
 - Spouse as co-trustee or others as sole trustee
- § 10:130 —Information provided to children
- § 10:131 —Use of trust committee
- § 10:132 —Noncitizen spouse
- § 10:133 Planning for children
- § 10:134 —Minor children
- § 10:135 —Adult children
- § 10:136 —Children of blended families; his, hers, ours
- § 10:137 —Interpersonal considerations

TABLE OF CONTENTS

§ 10:138	— — Considerations in structuring disposition of property
§ 10:139	— — — Character, identity and extent of property
§ 10:140	— — — Portion of property passing under will
§ 10:141	— — — How much of property will remain at surviving spouse's death
§ 10:142	— Protecting the children
§ 10:143	— — Client clear as to his or her intent
§ 10:144	— — Address principal distributions and consider the investment of trust
§ 10:145	— — Select trustee carefully
§ 10:146	— — Consider providing a mechanism for client's children to obtain information and have input
§ 10:147	Planning for grandchildren
§ 10:148	— Interpersonal consideration in structuring gift
§ 10:149	— Tax considerations
§ 10:150	— Form of making gifts to grandchildren
§ 10:151	— — Outright gifts
§ 10:152	— — Gifts in trust for exclusive use of one grandchild
§ 10:153	— — Gifts in trust for a child and children of that child which continue for benefit of grandchildren after child's death
§ 10:154	Planning for disabled and minor beneficiaries
§ 10:155	Significant others and nontraditional relationships
§ 10:156	— Unmarried couples
§ 10:157	— Same sex couples
§ 10:158	— Paramours
§ 10:159	Planning for pets
§ 10:160	Substantial charitable gifts
§ 10:161	General family shared assets

VI. PLANNING FOR PROBATE PROPERTY

§ 10:162	Property subject to probate
§ 10:163	— Title to property
§ 10:164	— Bank accounts and other accounts at financial institutions
§ 10:165	— Statutory and contractual constraints on disposition
§ 10:166	— — Claims of creditors
§ 10:167	— — — Widow's election
§ 10:168	— — — Allowances
§ 10:169	— — — Homestead
§ 10:170	— — Business and other contractual agreements
§ 10:171	— — Coordination with business continuation planning

VII. PLANNING FOR NONPROBATE PROPERTY

- § 10:172 Types of property
- § 10:173 Multiple-party accounts in financial institutions
- § 10:174 —Joint accounts
- § 10:175 ——General rules for all joint accounts, with or without right of survivorship
- § 10:176 ——Joint accounts with no survivorship
- § 10:177 ——Joint account with right of survivorship (JTWROS)
- § 10:178 ——Community property with right of survivorship accounts (CPWROS)
- § 10:179 —Payable on death (P.O.D.) accounts
- § 10:180 —Trust accounts
- § 10:181 —Convenience accounts
- § 10:182 —Planning considerations for multiple-party accounts
 - § 10:183 ——Advantages of multiple-party accounts
 - § 10:184 ——Disadvantages of multiple-party accounts
 - § 10:185 ——Assets are not available to fund testamentary trusts
 - § 10:186 ——Multiple-party accounts may result in unintended inequality of distributions
 - § 10:187 ——Failure to seek professional advice
 - § 10:188 ——No trust provisions when beneficiary a minor
 - § 10:189 ——Not voided by divorce
 - § 10:190 ——Exposure to creditors
- § 10:191 Life insurance
 - § 10:192 —Types of life insurance
 - § 10:193 ——Term life insurance
 - § 10:194 ——Whole life insurance
 - § 10:195 ——Universal life insurance
 - § 10:196 ——Endowment contracts
 - § 10:197 —Tax consequences of receipt of life insurance proceeds
- § 10:198 —Coordinating beneficiary designations with estate plan
 - § 10:199 —Effect of divorce on beneficiary designation
- § 10:200 Tax deferred retirement benefits
 - § 10:201 —Types of plans
 - § 10:202 ——Qualified plans
 - § 10:203 ——Individual retirement accounts
 - § 10:204 ——403(b) Annuities
 - § 10:205 —Estate planning considerations for tax deferred retirement benefits
 - § 10:206 ——Who can be a beneficiary under the plan

TABLE OF CONTENTS

§ 10:207	— — Who should be beneficiary of participant's benefit
§ 10:208	— — — Spouse as beneficiary
§ 10:209	— — — Bypass trust as beneficiary
§ 10:210	— — — QTIP trust as beneficiary
§ 10:211	— — — Charity as beneficiary
§ 10:212	— — How will designated beneficiary affect required minimum distributions from plan
§ 10:213	— — — Impact of designated beneficiary
§ 10:214	— — — Recalculation of life expectancy
§ 10:215	— — — Impact of no designated beneficiary
§ 10:216	— — — Trust as beneficiary
§ 10:217	— — Is special planning necessary for client's community property interest in client's benefits or benefits of his or her spouse
§ 10:218	— — — Designation of beneficiary by participant spouse
§ 10:219	— — — Designation of beneficiary of IRA by nonparticipant spouse
§ 10:220	— — — Nonparticipant spouse cannot designate beneficiary of qualified plan
§ 10:221	— — Effect of divorce on beneficiary designation
§ 10:222	Nonqualified deferred compensation
§ 10:223	Joint tenancy with right of survivorship
§ 10:224	Community property with right of survivorship
§ 10:225	— Proof of community property with right of survivorship agreement
§ 10:226	— Planning considerations
§ 10:227	— — Advantages
§ 10:228	— — Disadvantages
§ 10:229	— — — Adjudication may be required
§ 10:230	— — — No contingent distribution
§ 10:231	— — — Not available to fund testamentary gifts
§ 10:232	— — — Not voided by divorce
§ 10:233	Trusts and beneficial interests
§ 10:234	Annuities
§ 10:235	— Types of annuities
§ 10:236	— Income tax consequences of annuities
§ 10:237	— Estate tax consequences of annuities
§ 10:238	— Estate planning considerations for annuities
§ 10:239	— — Who should be beneficiary of participant's benefit
§ 10:240	— — — Spouse as beneficiary
§ 10:241	— — — Bypass trust as beneficiary
§ 10:242	— — — QTIP as beneficiary

§ 10:243 ——Charity as beneficiary

CHAPTER 11. BUSINESS PLANNING

I. BACKGROUND

- § 11:1 Historical background of techniques currently used
- § 11:2 —Estate freeze through transfer of common stock with no current value while retaining preferred stock
- § 11:3 —Grantor retained income trust (GRIT)
- § 11:4 —Chapter 14

II. CHOICE OF ENTITY

- § 11:5 Overview of considerations
- § 11:6 Business structures
- § 11:7 —Sole proprietorship
- § 11:8 —Corporation
- § 11:9 ——C Corporation
- § 11:10 ——S Corporation
- § 11:11 —Limited Liability Company (“LLC”)
- § 11:12 —Partnership
- § 11:13 ——General partnership
- § 11:14 ——Limited partnership
- § 11:15 Tax considerations
- § 11:16 —Sole proprietorship
- § 11:17 —C Corporation
- § 11:18 —S Corporation
- § 11:19 —Partnership
- § 11:20 —Limited partnership
- § 11:21 —Limited liability company
- § 11:22 Management and control
- § 11:23 —Management upon disability
- § 11:24 ——Sole proprietorship
- § 11:25 ——Corporation
- § 11:26 ——Limited liability company
- § 11:27 ——Partnership
- § 11:28 ——Limited partnership
- § 11:29 —Management upon death
- § 11:30 ——Sole proprietorship
- § 11:31 ——Corporation
- § 11:32 ——Limited liability company
- § 11:33 ——Partnership
- § 11:34 ——Limited partnership
- § 11:35 —Dividing control of business from equity interest

TABLE OF CONTENTS

- § 11:36 Transfer issues
- § 11:37 —Voting control
- § 11:38 —Flow through of profit
- § 11:39 —Valuation of entity—Accuracy and discounts

III. CONVERSIONS

- § 11:40 Corporation to state law partnership
- § 11:41 —Objectives in conversion
- § 11:42 ——Avoid the historical Franchise Tax
- § 11:43 ——Maintain limited liability
- § 11:44 ——Qualify for federal nonrecognition treatment on the conversion
- § 11:45 ——Maintain S Corporation status if already an S Corporation
- § 11:46 ——Avoid title or account transfers
- § 11:47 —New provisions of law or regulations which enable this arrangement
- § 11:48 ——State law conversion statute
- § 11:49 ——“Check the box” regulations
- § 11:50 —Other considerations and possible pitfalls
- § 11:51 ——I.R.C. § 2036(b)
- § 11:52 ——Tax-free reorganization
- § 11:53 ——No second class of stock
- § 11:54 ——Partnership agreement
- § 11:55 —Steps to be taken to convert
- § 11:56 C Corporation to S Corporation

IV. TRUSTS AS OWNERS OF CLOSELY HELD BUSINESSES

- § 11:57 Crummey defective grantor trust
- § 11:58 —Structure of the Crummey defective grantor trust
- § 11:59 —Structure of the business ownership with Crummey defective grantor trust
- § 11:60 —Benefits of Crummey defective grantor trust
- § 11:61 Crummey trust for individual beneficiary other than business owner
- § 11:62 Generation-skipping trust
- § 11:63 Defective grantor trust

V. TRANSFERRING INTERESTS IN CLOSELY HELD BUSINESSES

- § 11:64 Overview of techniques
- § 11:65 Annual exclusion gifts

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 11:66 —Outright to individuals
- § 11:67 —Trust for one individual
- § 11:68 —Generation-skipping trust
- § 11:69 ——Structure of generation-skipping trust
- § 11:70 ——Action taken to transfer business ownership to generation-skipping trust
- § 11:71 ——Benefits of generation-skipping trust
- § 11:72 Grantor-retained annuity trust
- § 11:73 —Structure and requirements
- § 11:74 ——Payment of annuity
- § 11:75 ——Right to withdraw
- § 11:76 ——Time for payment of annuity
- § 11:77 ——Prepayment of the annuity
- § 11:78 ——Payment of annuity with cash or other assets
- § 11:79 ——No payment of annuity with a note
- § 11:80 ——Annuity amount
- § 11:81 ——Fixed amount
- § 11:82 ——Incorrect valuation
- § 11:83 ——Short taxable years
- § 11:84 ——Income in excess of the annuity amount
- § 11:85 ——Additional contributions
- § 11:86 ——Payments to other persons
- § 11:87 ——Term
- § 11:88 ——Tax consequences
- § 11:89 ——Gift tax consequences
- § 11:90 ——Generation-skipping transfer tax
- § 11:91 ——Estate tax
- § 11:92 ——Business owner-grantor survives the term
- § 11:93 ——Business owner-grantor dies during the term
- § 11:94 ——Income tax
- § 11:95 ——Benefits of grantor trust treatment
- § 11:96 ——Section 677
- § 11:97 ——Section 673
- § 11:98 ——Section 675(4)(C)
- § 11:99 ——S Corporation stock owned by GRAT
- § 11:100 ——Community property considerations
- § 11:101 ——Benefits of GRAT
- § 11:102 ——No gift is required
- § 11:103 ——Future appreciation is uncertain or volatile
- § 11:104 ——Business with dramatic appreciation potential but uncertain future
- § 11:105 ——High risk-high return investment
- § 11:106 ——Low risk on revaluation

TABLE OF CONTENTS

- § 11:107 — —Statute of limitations runs on value when adequate disclosure made
- § 11:108 — —Greater long-term certainty in treatment of transaction
- § 11:109 Sales to defective grantor trusts
- § 11:110 —Structure and requirements
- § 11:111 — —Business owner-grantor is taxed on the income
- § 11:112 — — —Nonadverse trustees sprinkling power
- § 11:113 — — —Nonadverse trustees power to add beneficiaries
- § 11:114 — — —Premium payment power
- § 11:115 — — —Payment of income to the grantor's spouse
- § 11:116 — — —Discretionary payment of income to grantor
- § 11:117 — — —Administrative powers
- § 11:118 — — —Trust is structured as a completed gift
- § 11:119 — — —Trust is structured so that the property is not included in the business owner-grantor's estate
- § 11:120 —Tax consequences
- § 11:121 —Benefits of sale to defective grantor trust
- § 11:122 — —Installment sales
- § 11:123 — —Comparison to GRAT
- § 11:124 — — —Benefits retained in the event of grantor-sellers death
- § 11:125 — — —Interest rate is lower
- § 11:126 — — —Greater flexibility in payments
- § 11:127 — — —Transfer-sale can be to a generation-skipping trust

VI. SPECIAL PROVISIONS IMPACTING CLOSELY HELD BUSINESSES

- § 11:128 Qualified Family-Owned Business Interests ("QFOBI")
- § 11:129 Long-term payout of estate taxes
- § 11:130 —Election to use
- § 11:131 —Requirements
- § 11:132 — —Minimum percentage of adjusted gross estate
- § 11:133 — —Interest must be in a closely held business
- § 11:134 —Terms of payout
- § 11:135 —Acceleration of installment payments
- § 11:136 —Benefits
- § 11:137 —Declaratory judgments by tax court
- § 11:138 —Use of redemption coupled with 6166 payout
- § 11:139 —GST tax
- § 11:140 Section 303 redemptions

- § 11:141 —Limitations on application
- § 11:142 —Requirements for qualification
- § 11:143 —Distribution must reduce shareholders ownership of corporation
- § 11:144 —Generation-skipping transfers

VII. BUY-SELL AGREEMENTS

- § 11:145 General considerations
- § 11:146 Requirements in order to fix value
- § 11:147 —Estates obligation to sell
- § 11:148 —Ascertainable and reasonable price
- § 11:149 —Price binding during lifetime
- § 11:150 —Bona fide business arrangement
- § 11:151 —Chapter 14 requirements
- § 11:152 Methods of determining price in buy-sell agreement
- § 11:153 —Appraisal
- § 11:154 —Fixed price
- § 11:155 —Formula
- § 11:156 —Book value but no less than amount of insurance
- § 11:157 —Right of first refusal
- § 11:158 Uses for buy-sell agreements
- § 11:159 —Guarantee business continuity
- § 11:160 —Equalize inheritance among family members
- § 11:161 —Achieve lifetime planning needs
- § 11:162 —Protect owner from changes in co-owner's situation
- § 11:163 —Fix value for estate-tax purposes
- § 11:164 Triggering events
- § 11:165 —Lifetime occurrences
- § 11:166 —Involuntary transfers
- § 11:167 ——Divorce
- § 11:168 ——Business interest as security for debt
- § 11:169 ——Termination of employment
- § 11:170 —Retirement
- § 11:171 —Disability
- § 11:172 —Death
- § 11:173 Use of insurance to fund buy-sell agreement
- § 11:174 —Cross-purchase agreement
- § 11:175 ——Income tax consequences
- § 11:176 ——Estate tax consequences
- § 11:177 ——Creditors claims
- § 11:178 ——Economics
- § 11:179 —Redemption agreement
- § 11:180 ——Income-tax consequences

TABLE OF CONTENTS

§ 11:181 ——Estate tax consequences
§ 11:182 ——Creditors

Table of Contents

CHAPTER 12. TAX PLANNING

I. OVERVIEW OF TAX REDUCTION TECHNIQUES

- § 12:1 Tax-free transfers
- § 12:2 —Annual exclusion
- § 12:3 —Exemption
- § 12:4 —Tuition and medical payments
- § 12:5 —Payment of taxes of others
- § 12:6 Reducing value of assets
- § 12:7 Leveraging
- § 12:8 —Transferring appreciation in assets
- § 12:9 —Combining multiple techniques; most powerful tool

II. OVERVIEW OF TRANSFER TAXES

- § 12:10 In general
- § 12:11 Gift and estate taxes
- § 12:12 —Tax Cut and Jobs Act of 2017 (TCJA) and The One Big Beautiful Bill Act of 2025 (OBBA)
- § 12:13 —Tax rate
- § 12:14 —Unified credit; applicable exclusion amount; exemption equivalent
- § 12:15 —Exclusions from tax
- § 12:16 —Deductions in computing tax
- § 12:17 ——To spouse
- § 12:18 ——To charity
- § 12:19 Generation-skipping transfer tax
- § 12:20 —Exemptions
- § 12:21 —Exclusions

III. FUNDAMENTAL ESTATE PLANNING TECHNIQUES FOR ALL ESTATE PLANS OVER THE ESTATE TAX EXEMPTION AMOUNT

- § 12:22 Bypass trusts
- § 12:23 —Who needs it
- § 12:24 —How much property held in bypass trust
- § 12:25 —Using formula to fund
- § 12:26 ——Types of formulas
- § 12:27 ——Fractional share bypass
- § 12:28 ——Pecuniary bypass amount

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 12:29 — — —Residuary bypass; fractional marital
- § 12:30 — — —Residuary bypass; pecuniary marital
- § 12:31 — — —Funding pecuniary bequests
- § 12:32 — — —Fairly representative
- § 12:33 — — —Date of distribution values
- § 12:34 — — —Advantage to defining bypass with formula
- § 12:35 — — —Advantage to defining bypass as residuary
- § 12:36 — — —Assets used to fund bypass
- § 12:37 — — —Maximizing survivor's control over assets
- § 12:38 — — —Beneficiary
- § 12:39 — — —Trustee
- § 12:40 — — —Five and five power
- § 12:41 — — —Special testamentary power of appointment
- § 12:42 — — —Maximizing benefits from bypass trust
- § 12:43 — — —Discretionary distribution of income
- § 12:44 — — —Taxation of income in trust
- § 12:45 — — —Purchase assets of surviving spouse by bypass trust
- § 12:46 Residence
- § 12:47 — — Survivor's homestead right
- § 12:48 — — Specific bequest of homestead
- § 12:49 — — —Funding bypass
- § 12:50 — — —House to pass to other individuals
- § 12:51 — — —Desirability of undivided interest
- § 12:52 Marital deduction trusts and gifts
- § 12:53 — — Unlimited marital deduction
- § 12:54 — — Advantages and disadvantages of the marital deduction
- § 12:55 — — Outright bequest versus trust
- § 12:56 — — Formula clauses
- § 12:57 — — —Fractional marital share
- § 12:58 — — —Pecuniary marital amount
- § 12:59 — — —Residuary marital; fractional bypass
- § 12:60 — — —Residuary marital; pecuniary bypass
- § 12:61 — — —Funding clauses
- § 12:62 — — —Fractional share formula
- § 12:63 — — —Pecuniary formulas
- § 12:64 — — —Fund using date of distribution values
- § 12:65 — — —Fairly representative of appreciation or depreciation in estate
- § 12:66 — — —Minimum worth (or lower of) using estate tax values or date of distribution values
- § 12:67 — — —Funding the marital share
- § 12:68 — — —Income in respect of a decedent
- § 12:69 — — —Valuation issues

TABLE OF CONTENTS

§ 12:70	— — —Administration expenses
§ 12:71	—Types of marital deduction qualifying interests
§ 12:72	— — —Survival requirement
§ 12:73	— — —Outright bequest
§ 12:74	— — —Other bequests for benefit of spouse
§ 12:75	— — —Estate trust
§ 12:76	— — —Power of appointment trust
§ 12:77	— — —Life estate
§ 12:78	— — —Qualified Terminable Interest Property Trust (QTIP Trust)
§ 12:79	— — —Qualified Domestic Trusts (QDOT)
§ 12:80	— — —Post-mortem action
§ 12:81	— — —Requirements for trust
§ 12:82	— — —Tax treatment of trust
§ 12:83	Testamentary generation-skipping trusts
§ 12:84	—Overview of benefits of generation-skipping trusts
§ 12:85	—Maximizing control of property and benefits from property for client's children
§ 12:86	—Generation-skipping trusts when there are no grandchildren
§ 12:87	—Limitation on amounts held in these trusts
§ 12:88	Irrevocable life insurance trusts
§ 12:89	—Life insurance
§ 12:90	— — —Taxation of life insurance
§ 12:91	— — —Estate tax
§ 12:92	— — —Gift tax
§ 12:93	— — —Income tax
§ 12:94	— — —Life insurance trust as wealth transfer vehicle
§ 12:95	—Use of life insurance trust
§ 12:96	—Structure of trust
§ 12:97	— — —Gift tax
§ 12:98	— — —Present interest requirement
§ 12:99	— — —Gifts in excess of five thousand dollars or 5% of the trust corpus
§ 12:100	— — —Estate tax
§ 12:101	— — —Grantor
§ 12:102	— — —Spouse
§ 12:103	— — —Income tax
§ 12:104	— — —Funding trust
§ 12:105	— — —Funding with insurance policies
§ 12:106	— — —Funding with cash
§ 12:107	— — —Paying the premiums
§ 12:108	— — —Trust administration
§ 12:109	— — —Using generation-skipping trust as an Irrevocable Life Insurance Trust (ILIT)

- § 12:110 — — —Late filed allocation
- § 12:111 — — —No spousal hanging powers over GST trust
- § 12:112 —Advantages
- § 12:113 — — —Total community less than exemption
- § 12:114 — — —Total community over exemption and less than twice exemption
- § 12:115 — — —Total community in excess of twice exemption
- § 12:116 —Use with charitable remainder trust
- § 12:117 Retirement plan considerations

IV. GIFTS AND LIFETIME TRANSFERS

- § 12:118 General considerations
- § 12:119 —Tax planning can be constraint on dispositive desires
- § 12:120 —Balancing trade-offs imposed by client's objectives
- § 12:121 —Tax benefits from gifts
- § 12:122 —Tax reasons not to make lifetime gifts
- § 12:123 — —Step-up in basis at death
- § 12:124 — —Section 303 stock redemptions
- § 12:125 — — —Limitations on application
- § 12:126 — — —Relationship of stock to decedent's estate
- § 12:127 — — —Distribution must reduce shareholder's ownership of corporation
- § 12:128 — — —Additional requirements for distributions made more than four years after decedent's death
- § 12:129 — — —Generation-skipping transfers
- § 12:130 — — —Special use valuation
- § 12:131 — — —Section 6166 extension of time to pay the estate tax
- § 12:132 — — —Closely held business
- § 12:133 — — —Interests in two or more businesses
- § 12:134 —Gifts made within three years of death generally not included in decedent's estate
- § 12:135 — —Exceptions
- § 12:136 — — —Life insurance
- § 12:137 — — —Release of retained life estate
- § 12:138 — — —Release of reversionary interest
- § 12:139 — — —Release of revocable transfer
- § 12:140 — — —Gift tax paid on gift made within three years of death
- § 12:141 Maximum use of annual exclusion
- § 12:142 —Clients fail to use
- § 12:143 —Cumulative effect and compounding
- § 12:144 —Funding IRA for child

TABLE OF CONTENTS

§ 12:145	—Psychological impact of gifts on children
§ 12:146	—Form of making gifts
§ 12:147	— —Qualifying for annual exclusion from gift tax
§ 12:148	— — —Outright gifts
§ 12:149	— — —Gifts of income interests
§ 12:150	— — —Section 2503(c) trusts
§ 12:151	— — —Uniform transfers to minors
§ 12:152	— — —Annual withdrawal trust; Crummey trust
§ 12:153	— — —Gifts to children
§ 12:154	— — —Objective no strings
§ 12:155	— — —Intent to accumulate for future use
§ 12:156	— — —Gifts to more remote descendants
§ 12:157	— — —Primary intent to help children with expenses of grandchildren
§ 12:158	— — —Gifts which qualify for annual exclusion from gift tax and are excluded from generation-skipping transfer tax
§ 12:159	Maximum use of tuition and medical exclusion
§ 12:160	Use of exemption
§ 12:161	—For children or grandchildren
§ 12:162	—For spouse
§ 12:163	—Other considerations in judicious use of exemption
§ 12:164	Split gifts
§ 12:165	—To increase annual exclusion funding of life insurance trust in which spouse is a beneficiary
§ 12:166	—To double annual exclusion
§ 12:167	—Considerations in splitting gifts in excess of annual exclusion
§ 12:168	— —Terminology used in discussion
§ 12:169	— — —Donor spouse and nondonor spouse
§ 12:170	— — —Gift tax paid and gift tax payable
§ 12:171	— — —General rules
§ 12:172	— — —Gift not included in gross estate of donor and made more than three years prior to death
§ 12:173	— — —Impact on donor spouse
§ 12:174	— — —Impact on nondonor spouse
§ 12:175	— — —Gift not included and made less than three years prior to death of donor
§ 12:176	— — —Impact on donor spouse
§ 12:177	— — —Impact on nondonor spouse
§ 12:178	— — —Death of donor within three years and inclusion of gift in donor's gross estate under § 2035
§ 12:179	— — —Impact on donor spouse
§ 12:180	— — —Impact on nondonor spouse
§ 12:181	— — —Inclusion of gift in donor's gross estate not under § 2035, but under another Code section

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 12:182 — — —Impact on donor spouse
- § 12:183 — — —Impact on nondonor spouse
- § 12:184 — — —Impact on spouse with smaller estate
- § 12:185 Net gifts
- § 12:186 —Benefit to donee
- § 12:187 —Benefit to donor
- § 12:188 —Donee's basis
- § 12:189 Leveraging gift
- § 12:190 —Property currently depressed in value
- § 12:191 —Discounted value
- § 12:192 — — Undivided interests in real estate
- § 12:193 — — Real estate subject to an option to lease
- § 12:194 — — Minority interest or lack of marketability
- § 12:195 — — Business interests
- § 12:196 — — Family limited partnerships
- § 12:197 — — Future use of property
- § 12:198 — — Gifts of property on which the donor will be taxed on income
- § 12:199 Dynasty trusts
- § 12:200 —Structure
- § 12:201 — — Smaller estates
- § 12:202 — — Larger estates
- § 12:203 — — Maximizing the benefits from trust
- § 12:204 — — Continue for as long as is permissible under law
- § 12:205 — — Maximum flexibility in the administration of the trust desired
- § 12:206 — — Consider structuring as a grantor trust so that grantor will pay tax on all income earned in trust
- § 12:207 —Funding trust
- § 12:208 — — Annual exclusion
- § 12:209 — — —Smaller estates
- § 12:210 — — —Larger estates
- § 12:211 — — Exemption
- § 12:212 — — Taxable gifts
- § 12:213 — — —Leveraging gift
- § 12:214 — — —Fund with highly appreciating property
- § 12:215 — — —Sell discounted and/or highly appreciating property to trust
- § 12:216 — — —Life insurance
- § 12:217 —Allocation of GST exemption
- § 12:218 — — When is it necessary
- § 12:219 — — —Estate Tax Inclusion Period (ETIP) rules
- § 12:220 — — —All skip persons

TABLE OF CONTENTS

§ 12:221	— — — Skip and nonskip persons
§ 12:222	— — Timely filed
§ 12:223	— — — Form 709, Gift (and Generation-Skipping Transfer Tax) Return
§ 12:224	— — — Form 706, Estate (and Generation-Skipping Transfer Tax) Return
§ 12:225	— — Late filed
§ 12:226	— — — Form 709, Gift (and Generation-Skipping Transfer Tax) Return
§ 12:227	— — — Form 706, Estate (and Generation-Skipping Transfer Tax) Return
§ 12:228	— — Transfers included in gross estate
§ 12:229	— — Transfers not included in gross estate
§ 12:230	— — — Timely allocation
§ 12:231	— — — Late allocation
§ 12:232	— — Allocation after estate tax inclusion period
§ 12:233	— — Allocation to charitable lead annuity trusts

V. LIFETIME TRANSFERS USING SPLIT INTERESTS

§ 12:234	Overview of split interest transactions
§ 12:235	Overview of relevant provisions
§ 12:236	— Gift tax
§ 12:237	— — Application of Section 2702
§ 12:238	— — Section 2512
§ 12:239	— — Estate tax
§ 12:240	— — Section 2033
§ 12:241	— — Section 2036
§ 12:242	— — Section 2037
§ 12:243	— — Section 2038
§ 12:244	— — Section 2039
§ 12:245	— — Section 2043
§ 12:246	Grantor Retained Annuity Trust (GRAT)
§ 12:247	— Requirements
§ 12:248	— — Payment of annuity
§ 12:249	— — — Right to withdraw
§ 12:250	— — — Time for payment of annuity
§ 12:251	— — — Prepayment of annuity
§ 12:252	— — — Annuity amount
§ 12:253	— — — Fixed amount
§ 12:254	— — — Annuity may increase
§ 12:255	— — — Incorrect valuation
§ 12:256	— — — Short taxable years
§ 12:257	— — — Payment of annuity amount

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 12:258 ——Income in excess of annuity amount
- § 12:259 ——Additional contributions
- § 12:260 ——Payments to other persons
- § 12:261 ——Term
- § 12:262 ——Commutation
- § 12:263 ——Tax consequences
- § 12:264 ——Gift tax consequences
- § 12:265 ——Gift of value of remainder
- § 12:266 ——Computation of amount of gift
- § 12:267 ——Generation-skipping transfer tax
- § 12:268 ——Estate tax
- § 12:269 ——Grantor survives term
- § 12:270 ——Grantor's death during term of GRAT
- § 12:271 ——Income taxation of GRAT
- § 12:272 ——Grantor trust treatment desirable
- § 12:273 ——Section 677
- § 12:274 ——Section 673
- § 12:275 ——Intentional grantor trust status
- § 12:276 ——S corporation stock owned by GRAT
- § 12:277 ——Planning considerations
- § 12:278 ——Use percentage or fraction as payout
- § 12:279 ——Funding trust with closely held business stock
- § 12:280 ——Grantor as trustee
- § 12:281 ——Insufficient income to pay annuity amount
- § 12:282 ——Use of multiple GRATs
- § 12:283 ——Use of rolling GRATs
- § 12:284 ——Use term GRAT rather than shorter of term or life GRAT
- § 12:285 ——Increasing annuity payments maximize amount passing to remaindermen
- § 12:286 ——Beneficial situations in which to use GRAT
- § 12:287 ——Grantor in good health with life expectancy in excess of GRAT term
- § 12:288 ——Return 2% or more than current 7520 rate
- § 12:289 ——Assets with depressed value or potential for appreciation
- § 12:290 ——High return—high risk investment
- § 12:291 Sales to defective grantor trust
- § 12:292 ——Benefits
- § 12:293 ——Requirements
- § 12:294 ——Grantor taxed on income
- § 12:295 ——Nonadverse trustee's sprinkling power
- § 12:296 ——Nonadverse trustee's power to add beneficiaries
- § 12:297 ——Premium payment power

TABLE OF CONTENTS

§ 12:298	— — —Payment of income to grantor's spouse
§ 12:299	— — —Discretionary payment of income to grantor
§ 12:300	— — —Administrative powers
§ 12:301	— — —Trust structured as completed gift
§ 12:302	— — —Trust structured so property not included in grantor's estate
§ 12:303	— — —Grantor not retain any interest in trust
§ 12:304	— — —Grantor cannot retain any reversionary interest in trust
§ 12:305	— — —Grantor not retain or possess any prohibitive powers in trust
§ 12:306	— — —Tax consequences
§ 12:307	— — —Gift tax
§ 12:308	— — —Estate tax
§ 12:309	— — —Income tax
§ 12:310	— — —Caveats; risk factors
§ 12:311	— — —If property undervalued, sale results in gift to trust
§ 12:312	— — —All payments received after grantor's death become income in respect of a decedent
§ 12:313	— — —If defective grantor trust has no other assets, transaction becomes riskier
§ 12:314	— — —Planning considerations
§ 12:315	House Grantor Retained Income Trust (GRIT); Personal Residence Trust (PRT) and Qualified Personal Residence Trust (QPRT)
§ 12:316	— — —Benefits
§ 12:317	— — —Personal residence trust
§ 12:318	— — —Qualified personal residence trust
§ 12:319	— — —Taxable estates up to five million dollars
§ 12:320	— — —Large taxable estate; over five million dollars
§ 12:321	— — —General requirements for personal residence trusts and qualified personal residence trusts
§ 12:322	— — —Types of personal residence trusts
§ 12:323	— — —Limit on number of residences
§ 12:324	— — —Definition of residence
§ 12:325	— — —Requirements for personal residence trust
§ 12:326	— — —Mortgage
§ 12:327	— — —Limited right to reinvest proceeds
§ 12:328	— — —Commutation
§ 12:329	— — —Requirements for qualified personal residence trust
§ 12:330	— — —Assets of trust
§ 12:331	— — —General prohibition of owning assets other than residence

- § 12:332 — — — Permitted cash additions
- § 12:333 — — — Period during which cash may be held
- § 12:334 — — — Improvements
- § 12:335 — — — Mortgage
- § 12:336 — — — Insurance
- § 12:337 — — — Sale of residence
- § 12:338 — — — Cessation of use as personal residence
- § 12:339 — — — “Use” defined
- § 12:340 — — — Damage or destruction
- § 12:341 — — — Disposition of assets on cessation
- § 12:342 — — — Tax consequences
- § 12:343 — — — Gift tax
- § 12:344 — — — Computation of the value of remainder interest
- § 12:345 — — — Variables affecting value of gift
- § 12:346 — — — Additions to trust
- § 12:347 — — — Estate tax
- § 12:348 — — — Death during term of trust
- § 12:349 — — — Death after term of trust
- § 12:350 — — — Income tax
- § 12:351 — — — During retained term
- § 12:352 — — — After expiration of retained term
- § 12:353 — — — Miscellaneous tax considerations
- § 12:354 — — — Capital gains exclusion
- § 12:355 — — — Property tax
- § 12:356 — — — Payment of interest and real estate taxes
- § 12:357 — — — Caveats; risk factors
- § 12:358 — — — Planning considerations
- § 12:359 — — — Transfer of fractional interest
- § 12:360 — — — Anticipate possible future move
- § 12:361 — — — Continue as grantor trust

VI. KEY CONCEPTS FOR NON-U.S. CITIZENS AND RESIDENTS

- § 12:362 In general
- § 12:363 Property subject to tax
- § 12:364 — — — Situs of property
- § 12:365 — — — Property generally having U.S. situs
- § 12:366 — — — Property generally having a non-U.S. situs
- § 12:367 — — — Special rules for expatriates
- § 12:368 — — — Tax-motivated loss of citizenship before February 6, 1995
- § 12:369 — — — Tax-motivated loss of citizenship or termination of long-term residence on or after February 6, 1995

TABLE OF CONTENTS

§ 12:370	— — —Loss of citizenship
§ 12:371	— — —Termination of long-term residence
§ 12:372	—Estate tax
§ 12:373	— — —Resident aliens and U.S. citizens
§ 12:374	— — —Nonresident aliens
§ 12:375	—Gift tax
§ 12:376	— — —Resident aliens and U.S. citizens
§ 12:377	— — —Nonresident aliens
§ 12:378	—Generation-skipping transfer tax
§ 12:379	— — —Resident aliens and U.S. citizens
§ 12:380	— — —Nonresident aliens
§ 12:381	— — —Direct skips
§ 12:382	— — —Taxable distributions and taxable terminations
§ 12:383	— — —Trusts funded partially with property subject to generation-skipping transfer tax
§ 12:384	— — —Estate tax inclusion period
§ 12:385	— — —Transitional rule
§ 12:386	—Rates and credits
§ 12:387	— — Rates
§ 12:388	— — Credits
§ 12:389	— — —Estate tax
§ 12:390	— — —Gift tax
§ 12:391	—History of rates and credits
§ 12:392	Deductions
§ 12:393	—Estate tax
§ 12:394	—Gift tax
§ 12:395	Estate tax rules for U.S. citizens or residents, nonresident aliens, and nonresident expatriates

CHAPTER 13. OVERVIEW OF FAMILY LIMITED PARTNERSHIPS

I. OVERVIEW

§ 13:1	General concepts
§ 13:2	General partner
§ 13:3	Limited partner
§ 13:4	FLP benefits—General
§ 13:5	—Creditor protection
§ 13:6	—Valuation discounts—General
§ 13:7	— — Basis of value
§ 13:8	— — Lack of control
§ 13:9	— — Lack of marketability
§ 13:10	—Miscellaneous

II. IRS RULINGS AND JUDICIAL OPINIONS

- § 13:11 The Sham TAMs, *Murphy*, §§ 2703, 2704(b), and *Kerr*
- § 13:12 Gift on formation: *Shepherd, Strangi, Jones*, and *Sendra*
- § 13:13 The § 2036 cases
- § 13:14 *Estate of Reichardt v. Comm'r.*
- § 13:15 *Estate of Schauerhamer v. Comm'r.*
- § 13:16 *Church v. Comm'r.*
- § 13:17 *Estate of Harper v. Comm'r.*
- § 13:18 *Estate of Thompson v. Comm'r.*
- § 13:19 *Estate of Strangi v. Comm'r.*
- § 13:20 *Estate of Stone v. Comm'r.*
- § 13:21 *Kimbell v. United States*
- § 13:22 *Estate of Abraham v. Comm'r.*
- § 13:23 *Estate of Hillgren v. Comm'r.*
- § 13:24 *Estate of Bongard v. Comm'r.*
- § 13:25 *Estate of Bigelow v. Comm'r.*
- § 13:26 *Estate of Korby v. Comm'r.*
- § 13:27 *Estate of Schutt v. Comm'r.*
- § 13:28 *Estate of Rosen v. Comm'r.*
- § 13:29 *Estate of Erickson v. Comm'r.*

III. INITIAL PLANNING CONSIDERATIONS

- § 13:30 Suitability and sufficiency of assets—General
- § 13:31 —Retirement assets
- § 13:32 —Stock options
- § 13:33 —Life insurance
- § 13:34 —Client “nest egg”
- § 13:35 —Personal use assets
- § 13:36 —Subchapter S stock
- § 13:37 —Asset transfer restrictions
- § 13:38 —Minimum size
- § 13:39 Suitability of family demographics and dynamics
- § 13:40 —Minimum number of partners
- § 13:41 —Adult children
- § 13:42 —Minor children—Trusts and custodianships
- § 13:43 —No insurmountable problems with “togetherness”
- § 13:44 Choice of general partner—Individual(s), corporation, or LLC—General
 - § 13:45 —Control after death
 - § 13:46 —Franchise tax
 - § 13:47 —Cost and administrative burden
 - § 13:48 —Creditor protection

TABLE OF CONTENTS

- § 13:49 Income tax aspects—General
- § 13:50 —Diversification—Investment company—General
- § 13:51 ——Definition
- § 13:52 ——Diversified contributions
- § 13:53 ——De minimis diversification
- § 13:54 —Partnership CPA
- § 13:55 Franchise tax aspects

IV. PARTNERSHIP CREATION

- § 13:56 Certificate of limited partnership
- § 13:57 Limited partnership agreement—General

V. PARTNERSHIP FUNDING AND OPERATION

- § 13:58 General
- § 13:59 Partnership EIN
- § 13:60 Required steps
- § 13:61 Partnership operation—Respect the entity
- § 13:62 Transferring limited partnership interests—
 - Appraisers
- § 13:63 —Formula gifts

VI. FORMS

- § 13:64 Certificate of formation—limited partnership
- § 13:65 Limited partnership with partnership manager

CHAPTER 14. *[Reserved]* *Charitable Planning*

CHAPTER 15. POST-MORTEM PLANNING

I. DISCLAIMERS

- § 15:1 In general
- § 15:2 Governing law
- § 15:3 —IRC Section 2518
- § 15:4 —Texas property code chapter 240
- § 15:5 Disclaimers defined
- § 15:6 —Qualified disclaimer per I.R.C. § 2518
- § 15:7 —Effective disclaimer per Texas Property Code Chapter 240
- § 15:8 ——Property passing because of death
- § 15:9 ——Property passing because of event other than death

TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING

- § 15:10 ——Rights of survivorship property
- § 15:11 ——Disclaimer by a trustee
- § 15:12 ——Disclaimer of a power of appointment by non-fiduciary
- § 15:13 ——Disclaimer of appointee pursuant to a power of appointment
- § 15:14 Effect of qualified and effective disclaimers
- § 15:15 Barred or limited disclaimers
- § 15:16 Types of disclaimers
- § 15:17 —Full or total disclaimers
- § 15:18 —Partial disclaimers
- § 15:19 ——Undivided property portions
- § 15:20 ——Nominal interests—Disregarded
- § 15:21 ——Severable property interests
- § 15:22 ——Powers of appointment
- § 15:23 ——Trust interests
- § 15:24 ——Failure to properly partition nonseverable interests
- § 15:25 Certain transfers treated as disclaimers

II. USE OF DISCLAIMERS

- § 15:26 Overview
- § 15:27 Preserve estate tax marital deduction
- § 15:28 —Agreement not to probate will
- § 15:29 —Avoid state death tax
- § 15:30 —Qualifying trust for QTIP treatment
- § 15:31 —Merging life and remainder interests
- § 15:32 Utilize applicable estate tax exclusion amount
- § 15:33 —Spouse disclaims formula amount
- § 15:34 —Spouse disclaims pursuant to intestate succession
- § 15:35 Utilize generation-skipping transfer tax exemption
- § 15:36 Employee benefits—Planning after death
- § 15:37 ——Disclaiming to spouse and children
- § 15:38 ——Disclaiming to trust
- § 15:39 ——Disclaiming to allow benefits to pass
- § 15:40 Post-death charitable planning
- § 15:41 Avoiding creditors
- § 15:42 Using nonqualified disclaimers

III. DISCLAIMER REQUIREMENTS

- § 15:43 General provisions under Texas and federal law
- § 15:44 Writing requirement
- § 15:45 —Federal law
- § 15:46 —Texas law

TABLE OF CONTENTS

§ 15:47	Filing requirements
§ 15:48	—Federal law
§ 15:49	Delivery and receipt requirements
§ 15:50	—Federal law
§ 15:51	—Texas law
§ 15:52	Time requirements
§ 15:53	—Federal law
§ 15:54	— —Inter vivos transfer
§ 15:55	— —Transfer under general power of appointment
§ 15:56	— —Transfer at death
§ 15:57	— —Special powers of appointment
§ 15:58	— —QTIP property
§ 15:59	— —Disclaimed property
§ 15:60	— —Inter vivos transfers to be included in estate at donor’s death
§ 15:61	— —Contingent remainder interests created before 1977
§ 15:62	— —Remainder interests created before 1932— Ordway and subsequent cases
§ 15:63	— —Jointly held property
§ 15:64	— — —Disclaimers made before December 31, 1997
§ 15:65	— — —Disclaimers made after December 31, 1997
§ 15:66	—Texas law
§ 15:67	Lack of acceptance requirement
§ 15:68	—Federal law
§ 15:69	— —Beneficiary serving as fiduciary
§ 15:70	— —Exercising power of appointment
§ 15:71	— —Minor beneficiaries
§ 15:72	— —Residential joint tenancy
§ 15:73	— —Community property disclaimers
§ 15:74	— —Taking delivery
§ 15:75	— —Multiple interests
§ 15:76	— —Payment of taxes on disclaimed property
§ 15:77	—Texas law
§ 15:78	Proper execution requirement
§ 15:79	—Federal law
§ 15:80	— —Disclaimant’s guardian
§ 15:81	— —Attorneys in fact
§ 15:82	— —Attorneys at law
§ 15:83	— —Executors
§ 15:84	— —Trustees
§ 15:85	— —Heirs
§ 15:86	—Texas law
§ 15:87	Irrevocable requirement
§ 15:88	—Federal law

- § 15:89 —Texas law
- § 15:90 Disclaimers by fiduciaries

IV. ELECTIONS

- § 15:91 Commonly used elections
- § 15:92 —Administration expenses
- § 15:93 —Election to deduct on decedent's final income tax return
- § 15:94 ——Medical expenses
- § 15:95 ——Series E and EE interest
- § 15:96 Selecting the tax year end for the fiduciary income tax returns
- § 15:97 Special use valuation
- § 15:98 Closely held businesses
- § 15:99 Conservation easement
- § 15:100 QTIP election
- § 15:101 Alternative valuation
- § 15:102 I.R.C. Sections 754 and 732 Elections
- § 15:103 I.R.C. Section 754 Election
- § 15:104 I.R.C. Section 732 Election
- § 15:105 Portability election

V. CHECKLISTS

- § 15:106 Checklist—Disclaimer

VI. FORMS

- § 15:107 Form—General disclaimer
- § 15:108 —Total disclaimer
- § 15:109 —Partial disclaimer

Table of Laws and Rules

Table of Cases

Index