

CHAPTER 10

When Death Strikes

10-1 Introduction

This chapter deals with the issues a surviving family member—particularly a surviving spouse—may face before contacting an attorney about the probate of the decedent's estate. These issues range from emotional to financial issues, and to other issues that will prepare the survivor to face the future without the decedent. In circumstances where an elderly decedent is survived by an elderly spouse, several Elder Law issues arise. Especially in circumstances where the spouses had been married for several years prior to the decedent's death, the survivor's experience begins with the shock and pain of losing a loved person. This progresses to numbness, and hopefully culminates in relief. The survivor can feel both abandoned and overwhelmed. Yet, he or she must make decisions; he or she must plan or supervise a funeral or memorial service; he or she must inform the decedent's family members and friends. Hence, while dealing with his or her own grief, sorrow, and emotional upheaval, the surviving spouse, as elderly as he or she might be, has to deal with the realities and responsibilities of death.

10-2 Emotional Issues

The loss of a loved one is life's most stressful event, an event that can cause a survivor a major emotional crisis. Mental Health America (formerly known as the National Mental Health Association) states that after the death of a loved one, a survivor experiences "bereavement," a term which literally means "to be deprived by death."¹ According to Mental Health America, when someone loses a loved one to death, the survivor may experience a wide range of emotions, including denial, disbelief, confusion, shock, sadness, yearning, anger, humiliation, despair, and guilt.²

10-2:1 Mourning a Loved One

The person who loses someone to death will both mourn and grieve his or her loved one. Mourning is the natural process someone goes through to accept a major loss.

¹ Mental Health America, *Coping With Loss: Bereavement and Grief*, available at <https://www.mhanational.org/bereavement-and-grief> (last visited May 7, 2020).

² Mental Health America, *Coping With Loss: Bereavement and Grief*, available at <https://www.mhanational.org/bereavement-and-grief> (last visited May 7, 2020).

It may include religious traditions honoring the dead or gathering with friends and family to share the collective loss. Mourning is a personal process that may last weeks, months, or years.

10-2:2 Experiencing Grief

Grieving is the outward expression of one's loss. People experience grief physically, emotionally, and psychologically. For example, someone who loses a loved one to death might cry and may later experience depression; crying is a physical expression of grief; depression is a psychological expression. Regardless of the manner in which one chooses to express grief, it is important that one expresses grief after the loss of a loved one.

Many people report physical symptoms that accompany grief. These include stomach pain, loss of appetite, intestinal upsets, sleep disturbances, and loss of energy. Because grieving can severely test one's natural defense systems, a survivor's existing illnesses may worsen or new conditions may develop.

Meanwhile, the person may develop profound emotional reactions. These include anxiety attacks, chronic fatigue, depression, and thoughts of suicide. The survivor may also demonstrate an obsession with the decedent.

10-2:3 Dealing With a Major Loss

The death of a loved one is always difficult. The survivor's reactions are influenced by the circumstances of the death. Sudden or accidental death is often the most difficult to cope with. The survivor's reaction also depends on his or her relationship with the decedent.

This book is about Elder Law. In the majority of cases, the survivor we are referring to would be an elderly person. The survivor might also be the decedent's spouse. Mental Health America says the following about these two classes of decedents and survivors:

A spouse's death is very traumatic. In addition to the severe emotional shock, the death may cause a potential financial crisis if the spouse was the family's main income source. The death may necessitate major social adjustments requiring the surviving spouse to parent alone, adjust to single life and maybe even return to work.

Elderly people may be especially vulnerable when they lose a spouse because it means losing a lifetime of shared experiences. At this time, feelings of loneliness may be compounded by the death of close friends.³

10-2:4 Living With Grief

That the survivor may move on in life, he or she must learn to live with grief. Like mourning, healthy grieving can be a slow, difficult process that lasts for months or years. Moreover, although the survivor may gradually be able to refocus on his or her

³ Mental Health America, *Coping With Loss: Bereavement and Grief*, available at <https://www.mhanational.org/bereavement-and-grief> (last visited May 7, 2020).

life, the person will probably never “get over it” or stop thinking about the loved one who died.

Initially, a person may feel shock and numbness as the reality of the death sinks in. During that time, the survivor may seem to be handling things well and may be quite competent in managing the funeral and legal matters. After these legal matters are taken care of, though, feelings of sadness, distress, anger, and guilt may become more prominent.

In the year following a spouse's death, 50% of widows develop depression.⁴ Treatment may involve medication, psychotherapy, or both. We note, though, that medication does not take away grief; rather, it helps a grieving person preserve the emotional energy he or she needs to cope with the feelings of depression.

For many of the bereaved, recognizing and expressing the strong emotions associated with grief is an integral part of healing. To achieve that goal, a bereaved person may choose to write about his or her feelings, talk to friends or a spiritual adviser, see a therapist, or join a support group.⁵ Under Medicare hospice programs, bereavement counseling is available for up to 1 year after the death.⁶ Other things survivors can turn to for help include the following:

1. *Group support:* Relatives and friends often cannot understand what a grieving person is going through. The survivors often find uniquely helpful support in discussing their loss with others in a similar situation. For them, bereavement support groups may be the answer.

Bereavement support groups may be general or may focus on a particular disease or type of relationship. They are not meant to be psychotherapy. Some are ongoing; others are time-limited. A local hospice, hospital, or community organization may be able to guide the survivor to a group that is capably led and seems like a good fit for that person.⁷

2. *Individual therapy:* For a variety of reasons, the survivor may not be comfortable speaking in a group setting. Perhaps the survivor's relationship with the deceased was troubled, and he or she has difficulty talking about it. Or maybe the survivor wishes to address unresolved issues from his or her past that the decedent's death has brought to the fore. In any of these cases, the survivor may find that working with a therapist one-on-one may help him or her to get over the grief of losing a loved one.

⁴ Harvard Health Publishing, *Dealing With Grief and Bereavement—The Family Health Guide*, December 2003, available at <https://www.health.harvard.edu/staying-healthy/dealing-with-grief-and-bereavementthe-familyhealth-guide> (last visited May 7, 2020).

⁵ Harvard Health Publishing, *Dealing With Grief and Bereavement—The Family Health Guide*, December 2003, available at <http://www.health.harvard.edu/staying-healthy/dealing-with-grief-and-bereavementthe-familyhealth-guide> (last visited May 7, 2020).

⁶ Center for Medicare Advocacy, *Hospice, What Kind of Care Does Medicare Hospice Care Include*, available at <http://www.medicareadvocacy.org/medicare-info/medicare-hospice-benefit/> (last visited May 7, 2020).

⁷ Harvard Health Publishing, *Dealing With Grief and Bereavement—The Family Health Guide*, December 2003, available at <http://www.health.harvard.edu/staying-healthy/dealing-with-grief-and-bereavementthe-familyhealth-guide> (last visited May 7, 2020).

3. *Not being under pressure to talk*: Research suggests that people who find it difficult to disclose their feelings should not be pressured to do so.⁸ They will open up when they are ready to.

Regardless of what helps the survivor cope with the grief of losing his or her loved one, life must go on. An attorney must be consulted to probate the decedent's estate—or to help the survivor decide whether probate is necessary. The attorney must be prepared to work with the survivor, taking into consideration his or her mourning and grief. In moments like these, the term “attorney and *counselor-at-law*” takes on a deeper meaning.

10-3 Location of Death

A survivor and his or her family will react differently—and will need to react differently—depending on where the death of the loved one occurs. Absent an accident or murder, three basic options exist for the location of the death: at home, at a nursing home, or at a hospital.

10-3:1 Home Death

Today's widespread availability of hospice care enables many families to experience the death of a loved one at home. Hospice attempts to provide pain management and comfort care, without either delaying or promoting death.⁹

10-3:1.1 Necessary Legal Documents

Families considering having their loved one die at home should arm themselves (on their loved one's behalf) with at least the following documents:

1. an Out-of-Hospital Do-Not-Resuscitate (DNR) order, to be used in the home to prevent emergency medical services (EMS) personnel from trying to resuscitate the deceased;¹⁰
2. a Directive to Physicians and Family or Surrogates (also known as a Living Will), which will inform the attending physician and medical staff about the person's wishes regarding life-sustaining treatment if he or she is in a terminal condition and unable to communicate his or her wishes regarding treatment;¹¹
3. a Medical Power of Attorney, which would, if necessary, allow the dying person's agent to make health care decisions on his or her behalf if the person is incompetent;¹² and

⁸ Harvard Health Publishing, *Dealing With Grief and Bereavement—The Family Health Guide*, December 2003, *available at* <http://www.health.harvard.edu/staying-healthy/dealing-with-grief-and-bereavementthe-familyhealth-guide>, citing studies in *J. Consult. Clin. Psych.* (Feb. 2002) (last visited May 7, 2020).

⁹ See generally Hospice Foundation of America, *What is Hospice?*, *available at* <https://hospicefoundation.org/End-of-Life-Support-and-Resources/Coping-with-Terminal-Illness/Hospice-Services> (last visited May 7, 2020).

¹⁰ See Tex. Health & Safety Code § 166.082.

¹¹ See Tex. Health & Safety Code § 166.031.

¹² See Tex. Health & Safety Code § 166.152.

4. an Appointment of Agent to Control Disposition of Remains, which spells out the dying person's preference regarding burial and cremation, the type of funeral the person wants, and even the contents of the obituary.¹³

As we explained earlier in this text, the dying person would have executed these instruments while he or she still possessed mental capacity. He or she would have informed at least one family member about the location of these instruments.

10-3:1.2 Informing the Authorities

When a loved one dies at home, the survivor has several options on who to contact. Generally, these include the following:

1. *The hospice:* If the decedent had been ill for some time, it is quite possible that his or her survivors would have arranged for hospice care. If the hospice nurse is present at the home at the time the decedent dies, the death is deemed "attended," just as it would be if the decedent had been under the care of a physician.¹⁴ The presence of hospice and the designation of the death as "attended" should be sufficient to spare the survivor the rigors of calling the police or EMS or having the Justice of the Peace for the precinct conduct an inquest into the death.¹⁵

If, however, the hospice nurse is not present at the time the patient dies, the survivor should call the hospice to report the death, and then follow their advice on what to do next. It may well be that the death would be labeled "unattended," needing investigation by the police, the medical examiner, and maybe the conducting of an inquest.¹⁶

2. *The police:* If the death was natural and expected, the police will complete a report form and contact the funeral home. However, if the death occurred under unusual circumstances, the police will investigate the death. A death investigator may investigate the scene of death and interview witnesses and medical caregivers.¹⁷ At this point, a Justice of the Peace for the precinct may conduct an inquest into the person's death. If, however, the county is served by a medical examiner, the death investigator may call in the local medical examiner who may transfer the decedent's remains to the medical examiner's office.¹⁸ The next step might be for the medical examiner to conduct an autopsy. Thereafter, the medical examiner will conduct an inquest into the decedent's death.¹⁹
3. *EMS:* Regardless of how well a caregiver has prepared for the pending death of someone, the actual death often elicits a call for EMS personnel. It is at this point that the survivor should be armed with the Out-of-Hospital DNR order and the Directive to Physicians, ready to assert the rights of the now-deceased

¹³ See Tex. Health & Safety Code § 711.002.

¹⁴ Tex. Health & Safety Code § 671.001(d).

¹⁵ See Tex. Crim. Pro. Art. § 49.04(a)(6).

¹⁶ See Tex. Crim. Pro. Art. § 49.04(a)(6).

¹⁷ Tex. Crim. Pro. Art. § 49.23.

¹⁸ Tex. Crim. Pro. Art. § 49.25.

¹⁹ Tex. Crim. Pro. Art. § 49.25.

person who executed these instruments. EMS often transports the person's remains to the hospital, where a physician examines the body and certifies the cause of death.

4. *The funeral home:* If death is expected and the decedent and family had made pre-arrangements (such as the purchase of a funeral/burial plan) with a funeral home, the survivor may simply call the funeral home. The funeral director will arrange for the body's transportation, a final examination, and certification of the death. If the decedent and his or her family had not made any pre-arrangements with a funeral home, the survivor may, at this point, do some comparison shopping to select a funeral home that fits his or her budget. The survivor should not rush into such an important decision.

10-3:2 Nursing Home Death

If a nursing home resident's death is sudden, it may occur at the nursing home. Otherwise, as the resident's condition slowly deteriorates, the nursing home may transfer the resident to a hospital prior to death.

Generally, nursing homes do not have a place to store a resident's remains. Neither does the home want to keep the dead body in the room for an extended period, especially if it is a semi-private room. Accordingly, if the decedent and his or her family had made pre-arrangements with a funeral home, the nursing home will call the funeral home to inform the funeral director about the death, whereupon the funeral home will transfer the remains.

If, however, no pre-arrangements are in place with a funeral home, the nursing home may pressure the survivor to contact a funeral home quickly to come transfer the remains. Yet, the survivor should not be rushed into a decision! What he or she may do in this situation is determine whether the body could be moved to the coroner's office for temporary storage while the survivor selects a funeral home.

10-3:3 Hospital Death

Death in the hospital is often referred to as an "attended death." In such deaths, the circumstances are known, the causes well documented. In most cases, the attending physician will certify the death and release the body to the funeral home directly from the hospital's morgue.

If, however, a person dies in a hospital and the attending physician is unable to certify the cause of death, the hospital's manager is required to report the death to the local Justice of the Peace.²⁰ Thereafter, the Justice of the Peace (or medical examiner in larger counties) will conduct an inquest into the decedent's death.²¹

10-4 The Autopsy

An autopsy is not required in every death. Generally, autopsies are performed under two sets of circumstances: (1) the decedent's surviving family members may ask for

²⁰ Tex. Crim. Pro. Art. § 49.04.

²¹ Tex. Crim. Pro. Art. §§ 49.04, 49.25.

an autopsy (referred to in this text as an “elective autopsy”)²² or (2) the law requires that a Justice of the Peace or medical examiner (in large counties or combinations of counties served by a medical examiner) order an autopsy to determine the cause and manner of death in cases of accident, homicide, suicide, and undetermined death.²³ If the decedent was an inmate within the state prison system, under certain circumstances, the Texas Department of Criminal Justice can also order that an autopsy be performed.²⁴ For purposes of this text, we shall refer to the autopsies provided for by Texas law as “legally required” autopsies.

10-4:1 Elective Autopsy

For a variety of reasons, the decedent’s family members may request that a pathologist conduct an autopsy on the dead body of their loved one.²⁵ Alternatively, a physician may seek the decedent’s family’s permission to have an autopsy performed.²⁶ In either circumstance, a family member must execute a standard written consent form giving the physician permission to conduct the autopsy.²⁷ Texas law establishes a priority list for the people who may authorize the autopsy and thus execute the consent form:

1. the decedent’s surviving spouse;
2. the person acting as the decedent’s guardian of the person at the time of death, or the executor or administrator of the guardian’s estate;
3. the decedent’s adult children;
4. either of the decedent’s parents; and
5. the decedent’s adult siblings.²⁸

If any of the aforementioned classes contains more than one member—excluding the surviving spouse, who always has priority—and the decision falls to that class, any member of the class can give permission for the autopsy unless another member of the class files an objection thereto.²⁹ If a member of the class does file an objection, a majority of the members of the class can vote to either support the objection or proceed with the autopsy.³⁰

An elective autopsy costs between \$3,000 and \$5,000, plus the cost of transporting the body.³¹ The family member who authorizes the autopsy must agree to pay for it. However, under certain circumstances, health insurance may pay for the autopsy. In

²² Tex. Crim. Pro. Art. § 49.31-34.

²³ Tex. Crim. Pro. Art. § 49.25.

²⁴ Tex. Govt. Code § 501.055.

²⁵ FamilyDoctor.org, Autopsy, *available at* <https://familydoctor.org/autopsy/> (last visited May 7, 2020).

²⁶ *See, e.g.*, Tex. Govt. Code § 501.055(c).

²⁷ Tex. Crim. Pro. Art. § 49.34.

²⁸ Tex. Crim. Pro. Art. § 49.33(a).

²⁹ Tex. Crim. Pro. Art. § 49.33(b).

³⁰ Tex. Crim. Pro. Art. § 49.33(b).

³¹ PBS Frontline, Post Mortem: Death Investigation in America, *available at* <https://www.npr.org/series/133208980/post-mortem-death-investigation-in-america> (last visited May 7, 2020).

fact, Texas law requires that all accident and health insurance policies in the state contain a clause authorizing an autopsy in the insurance company's discretion.³²

10-4:2 Legally Required Autopsy

When the death occurs under circumstances that indicate unnatural causes or when the coroner suspects the cause of death may be a disease that poses a threat to public health, the law provides for the performance of a legally required autopsy.³³ In those circumstances, either the Texas Department of Criminal Justice (if the decedent was a prison inmate)³⁴ or the Justice of the Peace³⁵ can order an autopsy, even without the decedent's family's consent.³⁶

If a person dies an unnatural death from a cause other than a legal execution), if a body is found and the cause of death is unknown, if the circumstances of the death indicate that the death may be the result of foul play, if suicide is obvious or suspected, or if the death was not attended by a physician, the local Justice of the Peace is legally required to conduct an inquest into the person's death.³⁷

If a doctor who attends the death is unable to certify the cause of death, the doctor must report to the Justice of the Peace to request an inquest.³⁸ The Justice of the Peace must conduct the inquest quickly,³⁹ at the place the body is found, the place of death, or any other place the Justice deems reasonable.⁴⁰ The purpose of the inquest is to determine the cause and circumstances of the decedent's death.⁴¹ During the course of conducting the inquest, the Justice of the Peace can exercise his or her discretion to order the performance of an autopsy.⁴²

10-5 Organ Donation Issues

Once the decedent's remains have been transferred to the funeral home, medical examiner's office, or anywhere other than the scene of death, the survivor may wish to turn his or her attention to the issue of anatomical gifts.

10-5:1 Making the Anatomical Gift

Texas law provides various means for individuals to make anatomical gifts. An individual may make such a gift by:

³² Tex. Ins. Code § 1201.216.

³³ Tex. Crim. Pro. Art. § 49.10.

³⁴ Tex. Govt. Code § 501.055.

³⁵ Tex. Crim. Pro. Art. § 49.10.

³⁶ Tex. Govt. Code § 501.055; Tex. Crim. Pro. Art. § 49.10.

³⁷ Tex. Crim. Pro. Art. § 49.04(a)(2)-(6).

³⁸ Tex. Crim. Pro. Art. § 49.04(a)(7), (8)(b).

³⁹ Tex. Crim. Pro. Art. § 49.05(a).

⁴⁰ Tex. Crim. Pro. Art. § 49.05(b).

⁴¹ Tex. Crim. Pro. Art. § 49.01(2).

⁴² Tex. Crim. Pro. Art. § 49.10(c).

1. authorizing a statement or symbol indicating that the person has made an anatomical gift to be imprinted on his or her driver's license or identification card;⁴³
2. including the gift in his or her will;⁴⁴
3. during a terminal illness or injury, communicating the desire to make the anatomical gift to at least two adults, one of whom must be a disinterested witness;⁴⁵ or
4. making the gift through a donor registry either by signing the donor card or having someone sign it for him or her.⁴⁶

Revocation, suspension, expiration, or cancellation of a driver's license or identification card on which an anatomical gift is indicated does not invalidate the gift.⁴⁷

An anatomical gift made by will takes effect on the donor's death regardless whether the will is probated.⁴⁸ Invalidation of the will after the donor's death does not invalidate the gift.⁴⁹

10-5:2 In the Absence of a Declaration

But what if the decedent did not arrange for organ donation? Typically, a medical professional trained in these matters will approach the survivor or family to request the donation. It would then be left to the family to make the decision.

Texas law establishes an order of priority to authorize the organ donation of a decedent:

1. an agent of the decedent at the time of death who could had the authority pursuant to Texas law to make an anatomical gift of the decedent's organs while the decedent was alive;
2. the decedent's spouse;
3. the decedent's adult children;
4. the decedent's parents;
5. the decedent's adult siblings;
6. the decedent's adult grandchildren;
7. the decedent's grandparents;
8. an adult who exhibited special care and concern for the decedent;
9. the person who was serving as the decedent's guardian of the person at the time of his or her death;

⁴³ Tex. Health & Safety Code § 692A.005(a)(1).

⁴⁴ Tex. Health & Safety Code § 692A.005(a)(2).

⁴⁵ Tex. Health & Safety Code § 692A.005(a)(3).

⁴⁶ Tex. Health & Safety Code § 692A.005(b).

⁴⁷ Tex. Health & Safety Code § 692A.005(c).

⁴⁸ Tex. Health & Safety Code § 692A.005(d).

⁴⁹ Tex. Health & Safety Code § 692A.005(d).

10. the hospital administrator; and
11. any other person having the authority to dispose of the decedent's body.⁵⁰

Of course, because this text is focused on Elder Law, some of the people granted authority to make these weighty decisions under the Texas statute may not be alive should any decisions need to be made. Regardless, we note that the individuals with authority to make anatomical gifts of the decedent's organs while he or she is alive take priority in the making of such gifts after he or she is deceased over those individuals included in the authorized list delineated above.⁵¹

10-6 Funeral Issues

Funeral issues are some of the most worrisome issues a survivor has to deal with following the death of a loved one.

10-6:1 Funeral Costs

As an initial matter, the issue of cost looms large for the survivor. According to the National Funeral Directors Association, the average cost of a traditional funeral in 2019 was \$7,640.⁵² If the burial required the purchase of a vault, the average cost jumped to \$9,135.⁵³ For people who opt for cremation, the median cost in 2019 was \$5,150.⁵⁴ These prices do not include cemetery, monument or marker costs, or miscellaneous cash-advance charges, such as for flowers or an obituary.⁵⁵

In deciding how much to spend on the funeral, the survivor should follow the following basic rule: Honor the decedent's wishes. These wishes may be expressed in the decedent's Last Will and Testament. Alas, most wills do not go beyond instructing the executor to provide a "decent burial," and in any event, the will is often left unread til after the funeral. The survivor would do well to determine whether the decedent had a Preneed Funeral Arrangement, or whether he or she had executed an Appointment of Agent to Control Disposition of Remains.

Too often, though, the decedent would have expressed no preferences about the funeral. In those cases, the survivor would most likely lean on the family's religious traditions as a guide to the appropriate funeral practices. From a secular viewpoint, the survivor can turn to the Federal Trade Commission's (FTC) Funeral Rule for guidance on various aspects of the funeral. In its preamble to the Rule, the FTC states:

The Funeral Rule, enforced by the Federal Trade Commission (FTC), makes it possible for you to choose only those goods and services you want or need and

⁵⁰ Tex. Health & Safety Code § 692A.009(a).

⁵¹ Tex. Health & Safety Code § 692A.009(a).

⁵² National Funeral Directors Association, Statistics: Median Cost of an Adult Funeral, *available at* <http://www.nfda.org/news/statistics> (last visited May 7, 2020).

⁵³ National Funeral Directors Association, Statistics: Median Cost of an Adult Funeral, *available at* <http://www.nfda.org/news/statistics> (last visited May 7, 2020).

⁵⁴ National Funeral Directors Association, Statistics: Median Cost of an Adult Funeral, *available at* <http://www.nfda.org/news/statistics> (last visited May 7, 2020).

⁵⁵ National Funeral Directors Association, Statistics: Median Cost of an Adult Funeral, *available at* <http://www.nfda.org/news/statistics> (last visited May 7, 2020).

to pay only for those you select, whether you are making arrangements when a death occurs or in advance. The Rule allows you to compare prices among funeral homes, and makes it possible for you to select the funeral arrangements you want at the home you use. (The Rule does not apply to third-party sellers, such as casket and monument dealers, or to cemeteries that lack an on-site funeral home.)⁵⁶

The Rule gives each consumer the right to:

1. buy only the funeral arrangements he or she wants;
2. get price information on the telephone;
3. get a written, itemized price list when he or she visits a funeral home;
4. see a written casket price list before seeing the actual caskets;
5. see a written outer burial container price list;
6. receive a written statement after deciding what he or she wants, and before he or she pays;
7. get an explanation in the written statement from the funeral home that describes any legal cemetery or crematory requirement;
8. use an "alternative container" instead of a casket for cremation;
9. provide the funeral home with a casket or urn the consumer buys elsewhere; and
10. make funeral arrangements without embalming.⁵⁷

Like the federal government, Texas regulates the funeral industry. The Texas rules are available at the Texas Funeral Services Commission website, available at <http://www.tfsc.state.tx.us>.

10-6:2 Government Assistance

The federal government provides some assistance toward funeral and burial costs. These come in the form of either Social Security or Veterans Administration (VA) benefits.

10-6:2.1 Social Security Benefits

The Social Security Administration pays a one-time benefit of \$255 to the decedent's surviving spouse if he or she was living with the decedent at the time of death.⁵⁸

If the spouses were living apart but the surviving spouse was receiving Social Security benefits on the decedent's earnings record, the surviving spouse may still be able to get this one-time payment.⁵⁹ If the decedent had no surviving spouse, a child who

⁵⁶ 16 C.F.R. § 453.

⁵⁷ 16 C.F.R. § 453.

⁵⁸ 20 C.F.R. § 404.390.

⁵⁹ 20 C.F.R. §§ 404.391; 404.347.

is eligible for Social Security benefits based on the decedent's record in the month of the decedent's death can get this payment.⁶⁰

10-6:2.2 Veterans Administration Benefits

The Veterans Administration (VA) provides five types of burial benefits:

1. burial allowance based on service-connected death;
2. burial allowance based on non-service-connected death;
3. burial allowance for a veteran who died while hospitalized by the VA;
4. burial plot or interment allowance; and
5. reimbursement for transportation of remains.⁶¹

The term "burial" encompasses all legal methods of disposing of the remains of a decedent, including cremation, burial at sea, burial at a cemetery, and donation to a medical school.⁶²

In addition to these services, the VA provides other benefits and services toward the memorialization and interment of veterans and certain survivors. These include:

1. burial in a national cemetery;
2. Presidential Memorial Certificates;
3. burial flags; and
4. headstones or markers.⁶³

What this all means is that an honorably discharged veteran is eligible for interment in a national cemetery. The VA provides the gravesite free of charge, as well as the grave opening and closing, perpetual care, a government headstone or marker, a burial flag, and a Presidential Memorial Certificate. Cremated remains are buried or inurned in national cemeteries in the same manner and with the same honors as casketed remains. These benefits enable a surviving spouse to save significant sums of money on the decedent's funeral and burial costs.

In addition to military veterans, the following categories of decedents are also eligible for burial in a national cemetery:

1. reservists and National Guard members eligible for retired pay or would have been eligible but for their being under 60 years of age;
2. reservists and National Guard members who die while undergoing treatment at the government's expense for service-related injury or illness;
3. members of the Reserve Officer Training Corps (ROTC) who die as a result of service-related injury or disease;
4. commissioned officers of the National Oceanic and Atmospheric Administration;

⁶⁰ 20 C.F.R. § 404.392.

⁶¹ 38 C.F.R. § 3.1700(a).

⁶² 38 C.F.R. § 3.1700(b).

⁶³ 38 C.F.R. § 3.1700(c).

5. commissioned officers of the Regular or Reserve Corps of the Public Health Service;
6. United States Merchant Mariners who served during WWII;
7. certain veterans of the Philippine Armed Forces who served before January 1, 1946;
8. an individual who served in the military services of a U.S. ally during a period of war, was dishonorably discharged therefrom, and was a citizen of the United States both at the time he or she enlisted in the armed forces of the U.S. ally and at the time his or her service ended;
9. the unmarried surviving spouse of an eligible decedent, even if that decedent is not buried in the national cemetery; and
10. a minor child of an eligible decedent, subject to certain conditions.⁶⁴

Eligible veterans who are buried in a non-governmental cemetery may still qualify for a free grave marker. Additionally, the veteran's surviving spouse or survivor of a legal union is eligible for a burial benefit.⁶⁵ If the decedent died as a result of a service-connected disability, the VA may grant additional burial benefits to the surviving spouse or survivor of a legal union to include the plot or interment allowance, reimbursement for transportation, and the service-connected burial allowance.⁶⁶

10-6:3 Cremation Issues

In some circles, a debate rages about the virtues of cremation compared with traditional burial. For a variety of reasons, many people today are turning to cremation. Earlier in this chapter, we discovered that cremation costs less than burial. It is no wonder, then, that several cremation societies have sprung up all over the country. Indeed, some have sprung up in Texas where the average cost of a cremation is under \$1,000, much less than the average \$10,000 it costs for a traditional burial.⁶⁷

In Texas, no law requires a casket for cremation. On the contrary, federal law requires a funeral home or crematory to inform the decedent's family that they may use an alternative container, and to make such containers available to them.⁶⁸ An alternative container may be made of unfinished wood, pressed wood, fiberboard, or cardboard.⁶⁹

After cremation, the decedent's family may store the ashes in a crypt, niche, grave, or container at home.⁷⁰ Alternatively, the family members could scatter the ashes over "uninhabited public land, over a public waterway or sea, or on the private property of

⁶⁴ 38 C.F.R. § 38.620.

⁶⁵ 38 C.F.R. § 38.1702(a).

⁶⁶ 38 C.F.R. § 38.1702(a).

⁶⁷ US Funerals Online, Arranging a Funeral or Cremation in Texas, *available at* <http://www.us-funerals.com/funeral-articles/funerals-and-cremations-in-texas.html#.V2cXA-T6tjo> (last visited May 7, 2020).

⁶⁸ 16 C.F.R. § 453.2(b)(2)(i).

⁶⁹ 16 C.F.R. § 453.1(a).

⁷⁰ Tex. Health & Safety Code § 716.302(e)(1).

a consenting owner.”⁷¹ Unless the container is biodegradable, the decedent’s family must remove the ashes from the container before scattering.⁷²

10-6:4 Death Certificates

The death certificate is a legal document that provides proof that a death has occurred.⁷³ The certificate includes the date of death, the decedent’s Social Security number, and the name of the place and the specific number of the plot, crypt, lawn crypt, or niche in which the decedent’s remains will be interred or, if the remains will not be interred, the place and manner of other disposition.⁷⁴ The certificate also includes the cause of death, as certified by the attending physician⁷⁵ or, if the death was not attended, by the person conducting the inquest into the decedent’s death.⁷⁶ The medical certification part of the certificate can be amended following the conclusion of an autopsy and receipt of the autopsy results.⁷⁷

10-6:4.1 Obtaining Copies of the Death Certificate

The process of obtaining the death certificate is not too difficult for the surviving spouse. The surviving spouse answers some questions at the funeral home regarding the decedent’s date of birth, parentage, and work history. The funeral director forwards that information to the hospital or physician who will be certifying the death. Once the doctor enters the cause of death and signs the certificates, Texas Department of State Health Services, Vital Statistics Unit, issues death certificates. The survivor pays for the certificates as part of the funeral costs paid to the funeral home. Indeed, in most cases, it is the duty of the funeral home director—as the person responsible for interment of the body or disposition of it if it is not being interred—to file the death certificate.⁷⁸

Beyond the original copies issued to the survivor, the Vital Statistics Unit issues certified copies of death certificates to qualified parties for a fee.⁷⁹ Qualified parties are limited to immediate family members (i.e., the decedent’s surviving spouse, children, siblings, parents, or grandparents) or people with a special relationship with the decedent (such as the executor of the decedent’s estate) who must provide legal documentation proving the special relationship.⁸⁰

⁷¹ Tex. Health & Safety Code § 716.302(e)(2), (3).

⁷² Tex. Health & Safety Code § 716.304.

⁷³ Tex. Health & Safety Code § 193.001.

⁷⁴ Tex. Health & Safety Code § 193.001(a)–(c).

⁷⁵ Tex. Health & Safety Code § 193.005(a).

⁷⁶ Tex. Health & Safety Code § 193.005(c).

⁷⁷ Tex. Health & Safety Code § 193.005(i).

⁷⁸ Tex. Health & Safety Code § 193.002.

⁷⁹ Tex. Health & Safety Code § 191.0045(a)(1).

⁸⁰ Texas Health and Human Services, Texas Dept. of State Health Services, Vital Statistics, Birth and Death Verifications, *available at* <https://dshs.texas.gov/vs/reqproc/verification.shtm> (last visited May 7, 2020).

10-6:4.2 Uses of the Death Certificate

The death certificate is an important legal document that enables the decedent's family members to close up the decedent's business matters here on Earth. As an initial matter, receipt of the death certificate is necessary for the burial or other disposition of the decedent's remains.⁸¹ Next, when the named executor of the decedent's estate applies for probate of the decedent's Last Will and Testament and of his or her estate, the named executor must provide proof to the court that the decedent has died.⁸² The decedent's death certificate constitutes the best form of proof that the decedent has indeed died. Finally, the decedent's survivors will also need copies of his or her death certificate to deliver to the bank, insurance company, stock broker, and other people with who they must now do business on the decedent's behalf.

10-7 Administrative Issues

At the same time that he or she is addressing funeral issues, the survivor must also address important administrative issues. The proper approach to these issues will go a long way to ensuring the smooth transfer of the decedent's estate to his or her beneficiaries or heirs.

10-7:1 Gather the Documents

The survivor must, as soon as possible after the decedent's death, gather the decedent's original legal documents, along with any other vital information. Among other things, the documents may include (to the extent they exist):

- Last Will and Testament;
- codicil to any Last Will and Testament;
- Body Bequeathal Contract;
- pre-need funeral contract and burial instructions;
- Cremation Society membership;
- names, addresses, and telephone numbers of family members;
- Social Security number;
- pension documents for any survivorship payments;
- memoranda regarding the distribution of personal effects;
- Living Trust Agreement;
- amendments to living trusts;
- prenuptial agreement;
- postnuptial partition agreement;
- conversions to community property under Texas Family Code § 4.102;

⁸¹ Tex. Health & Safety Code § 193.002.

⁸² Tex. Est. Code § 256.151(1).

- Community Property Survivorship Agreement;
- Family Limited Partnership Agreement;
- pension survivorship rights;
- life insurance policies;
- automobile title(s);
- deeds to real property;
- residential leases;
- mortgages/liens against real property;
- notes receivable and payable;
- judgments of record;
- active litigation files;
- buy-sell agreements;
- partnership agreements;
- password lists for computer access;
- previous year's federal income tax returns (IRS Form 1040, Form 1040A, and necessary schedules) and identity of the decedent's tax preparer;
- stocks and bonds;
- list of bank deposits; and
- decedent's driver's license.

10-7:2 Secure the Computer

The decedent would most likely have left a computer at home. However, the surviving spouse may not be familiar with either the operation of the computer or the information stored on it. Yet, the computer might contain financial data, family records, the identity of heirs, or a computer address book with phone numbers and e-mail information. If the surviving spouse is not computer literate, he or she should retain the services (or help) of someone who can assist in the retrieval of this information. If this information reveals that the decedent had online subscription agreements, the surviving spouse should close them out. The surviving spouse would also have to decide whether he or she wants to continue the decedent's Internet access agreement.

At the very least, the surviving spouse should have the computer hard drive "wiped" clean by a computer technician before the spouse disposes of it.

10-7:3 Notifications

Following the death of a loved one, the survivor faces the often unpleasant task of notifying various people and entities. Some of those notifications have legal implications.

10-7:3.1 Family Members

It is very important that the survivor notifies the decedent's family members of his or her death. Some—if not all—of these family members may be beneficiaries in the decedent's Last Will and Testament. Others just need to know, if for anything else, to preserve family harmony.

10-7:3.2 Obituary

The funeral home normally asks whether the survivor desires an obituary. Obituaries are voluntary, yet can be quite expensive. Whether or not the survivor opts to have an obituary, and how long he or she decides it should be, is a matter of personal preference. We simply note that the obituary has no legal significance and is not an official notice of the decedent's death.

10-7:3.3 Power of Attorney

If someone other than the surviving spouse holds a durable power of attorney for the decedent, the surviving spouse should inform that person about the death immediately. After all, the agent's authority under a durable power of attorney terminates upon the principal's death.⁸³ However, acts performed by the agent after the principal's death are valid if the agent was acting in good faith and was not aware of the principal's death.⁸⁴ It is important, therefore, that the agent be informed about the principal's death as soon as possible lest he or she does something that contradicts the surviving spouse's wishes.

10-7:3.4 Clergy

After notifying the family, to the extent the decedent was religious, the survivor should call the local religious leader of the decedent's faith or house of worship. The survivor should seek to honor religious traditions important to the decedent. The survivor will typically find that the clergy may be deeply involved with the funeral, offering suggestions to honor traditional religious practices and meeting with family members to prepare a eulogy.

10-7:3.5 Social Security

The Social Security Administration recommends that, as soon as possible after the death of someone who was receiving Social Security benefits, a family member should:

1. Notify Social Security of the beneficiary's death. In most cases, the funeral director will report the person's death to the Social Security Administration. To facilitate that, a survivor should give the funeral director the deceased's Social Security number so he or she can report the death.⁸⁵ However, the survivor should still call the Social Security Administration's toll-free number (1-800-772-1213) soon thereafter to ensure the survivor's benefits are properly processed.

⁸³ Tex. Est. Code §§ 751.131(1), 752.051.

⁸⁴ Tex. Est. Code § 751.054(a).

⁸⁵ Social Security Administration, *How Social Security Can Help You When a Family Member Dies*, available at <https://www.ssa.gov/pubs/EN-05-10008.pdf> (last visited May 7, 2020).

2. If the decedent had been receiving monthly Social Security benefits by direct deposits, the survivor should notify the bank or other financial institution of the beneficiary's death. The survivor should also request that any funds received for the decedent for the month of death and later be returned to the Social Security Administration.⁸⁶
3. If the decedent received benefits by check, the survivor should not cash any checks received for the month the decedent died or thereafter. Instead, he or she should return the checks to the Social Security Administration as soon as possible.⁸⁷

If the surviving spouse is receiving Social Security benefits on the decedent's earnings record, upon receiving notification of the decedent's death, the Social Security Administration will change the payments to survivor's benefits.⁸⁸

If the survivor is already receiving Social Security benefits based on his or her own earnings record, he or she should apply for survivor's benefits.⁸⁹ This can be done during the survivor's initial contact with the Social Security Administration. The survivor will receive only one check, but it will be based on the bigger of the two earnings records.⁹⁰

A surviving spouse receives full benefits at age 65 or older, or reduced benefits as early as age 60.⁹¹ A disabled widow or widower can receive benefits at ages 50–60.⁹² The survivor's benefit may be reduced if he or she also receives a pension from a job where Social Security taxes were not withheld.⁹³

10-7:3.6 Office of Personnel Management

The Office of Personnel Management (OPM) handles the retirement and death benefits for all federal employees and retirees. If the decedent was a federal employee or retiree, the survivor should report the death by calling the OPM at 1(888)-767-6738.⁹⁴ The survivor could also inform the OPM by completing an online form available on the OPM website, OPM.gov.⁹⁵

After reporting the death to the OPM, the survivor can apply for benefits through the OPM. If the decedent had been receiving a monthly pension from the federal government, the surviving spouse will be entitled to a monthly survivor's pension. He or she will also receive a lump sum payment, covering the benefits earned from the first

⁸⁶ Social Security Administration, How Social Security Can Help You When a Family Member Dies, *available at* <https://www.ssa.gov/pubs/EN-05-10008.pdf> (last visited May 7, 2020).

⁸⁷ Social Security Administration, How Social Security Can Help You When a Family Member Dies, *available at* <https://www.ssa.gov/pubs/EN-05-10008.pdf> (last visited May 7, 2020).

⁸⁸ 20 C.F.R. § 404.335.

⁸⁹ 20 C.F.R. § 404.335.

⁹⁰ 20 C.F.R. § 404.335.

⁹¹ 20 C.F.R. § 404.335.

⁹² 20 C.F.R. § 404.335(c).

⁹³ 20 C.F.R. § 404.335(c)(3).

⁹⁴ Office of Personnel Management Website, OPM.gov, My Annuity and Benefits, *available at* <https://www.opm.gov/retirement-services/my-annuity-and-benefits/life-events/death/report-of-death/> (last visited May 7, 2020).

⁹⁵ Office of Personnel Management Website, OPM.gov, My Annuity and Benefits, *available at* <https://www.opm.gov/retirement-services/my-annuity-and-benefits/life-events/death/report-of-death/> (last visited May 7, 2020).

of the month to the decedent's date of death.⁹⁶ To receive said benefits, the surviving spouse must complete the appropriate Application for Death Benefits form and attach any other forms and/or evidence as the application or circumstances require.⁹⁷

The surviving spouse should attach to the application a copy of the decedent's death certificate and a copy of the couple's certificate of marriage. He or she should then send the completed application to:

Office of Personnel Management
Retirement Operations Center
ATTENTION: Survivor Processing Section
Post Office Box 45
Boyers, PA 16017-0045⁹⁸

A widow or widower who is claiming benefits for himself or herself and on behalf of children should file one application.⁹⁹

The OPM also supervises the Federal Employee Group Life Insurance (FEGLI) program. Most federal employees are eligible for the program. If the decedent was a participant in the program, the survivor should either contact the decedent's human resources office for a claim form (Form FE-6) or download one from the FEGLI website at www.opm.gov/insure/life. The claimant should submit the form, along with a certified death certificate, an Agency Certification of Insurance Status (Form SE 2821), and other supporting documents such as court orders, assignments, powers of attorney, birth certificates, guardianship papers, and election forms verifying FEGLI coverage to the human resources office or, if so instructed, directly to FEGLI at:

P.O. Box 6080
Scranton, PA 18505-6080

The address for overnight deliveries is:

OFGELI
10 Ed Preate Drive
Moosic, PA 18507¹⁰⁰

⁹⁶ 5 C.F.R. § 843.201.

⁹⁷ Office of Personnel Management Website, OPM.gov, My Annuity and Benefits, *available at* <https://www.opm.gov/retirement-services/my-annuity-and-benefits/life-events/death/report-of-death/> (last visited May 7, 2020).

⁹⁸ Office of Personnel Management Website, OPM.gov, My Annuity and Benefits, *available at* <https://www.opm.gov/retirement-services/my-annuity-and-benefits/life-events/death/report-of-death/> (last visited May 7, 2020).

⁹⁹ Office of Personnel Management Website, OPM.gov, My Annuity and Benefits, *available at* <https://www.opm.gov/retirement-services/my-annuity-and-benefits/life-events/death/report-of-death/> (last visited May 7, 2020).

¹⁰⁰ United States Office of Personnel Management, Federal Employees' Group Life Insurance (FEGLI) Program Handbook, 192 (2019).

10-7:3.7 Other Pension Administrators

The surviving spouse should have information on other pensions the decedent received. If that is not readily available, the attorney should ask to see the decedent's copy of the previous year's federal income tax return. Attached thereto should be one or more IRS Form 1099 that would identify the payor and give other account information.

10-7:3.8 Life Insurance Companies

If the decedent owned life insurance policies, the survivor must locate each policy. The survivor should then contact the issuer to begin the paperwork to file a claim. The insurance company will mail the claim forms to the survivor. The survivor will complete the claim form and return it to the issuer, along with a copy of the decedent's death certificate.

Texas law imposes certain deadlines on the insurance company as regards the receipt, investigation, and paying of the claim. The insurance company must acknowledge the claim and start investigating it within 15 days of receiving written notice of the claim.¹⁰¹ As part of its investigation, the company may request additional items and statements it reasonably believes it would need to make a determination reference the claim.¹⁰² Once the company has received all necessary information, it has another 15 days to notify the claimant in writing whether it will accept or reject the claim.¹⁰³ If the company cannot meet these deadlines, it must inform the claimant of this inability, whereupon the company will have an additional 45 days to accept or reject the claim.¹⁰⁴ If the company then rejects the claim, it must give the claimant written notice as to the reason why.¹⁰⁵ If the company accepts the claim and agrees to pay, it must send payment within 5 business days of its informing the claimant that it would pay the claim.¹⁰⁶ All things considered and barring any further delays, the insurance company must pay the claim no later than 60 days after receiving the claim, proof of the beneficiary's death, and documents confirming the rights of the claimants to the proceeds.¹⁰⁷

10-7:3.9 Tax Appraisal District

If the survivor is the decedent's spouse, he or she should contact the local tax appraisal district as soon as possible after the decedent's death.

If a homeowner is receiving the 65-plus exemption¹⁰⁸ and dies leaving a surviving spouse under age 65, the surviving spouse can continue the homestead exemption so long as he or she is 55 or older at the time of the decedent's death, and (1) lives in and (2) owns the home and (3) applies to continue the tax exemption.¹⁰⁹ Appendix 18 contains an Application for Residence Homestead Exemption form.

¹⁰¹ Tex. Ins. Code § 542.055(a)(1).

¹⁰² Tex. Ins. Code § 542.055(a)(3).

¹⁰³ Tex. Ins. Code § 542.056(a).

¹⁰⁴ Tex. Ins. Code § 542.056(d).

¹⁰⁵ Tex. Ins. Code § 542.056(c).

¹⁰⁶ Tex. Ins. Code § 542.057(a).

¹⁰⁷ Tex. Ins. Code § 542.058(a).

¹⁰⁸ Tex. Tax Code § 11.13(d).

¹⁰⁹ Tex. Tax Code § 11.13(q).

10-8 Assets and Accounts that Pass Outside Probate

Many assets pass to survivors without going through the probate process. These assets range from items as simple as bank accounts to complex creations like the revocable living trust. In this section, we discuss some of those assets and look at how survivors could ensure that they receive the assets after the decedent's death.

10-8:1 Bank Accounts

In Chapter 5, we discussed bank accounts and their function as resource management tools for the elderly. We return to them now to focus on bank accounts the proceeds of which can be transferred to a decedent's survivor without going through the probate process. The survivor should determine whether he or she is a party on any of these types of accounts and should take appropriate action to have accounts transferred to his or her name where applicable. If the survivor is not sure about his or her ownership status reference an account, he or she should ask the financial institution for a copy of the signature card. The card is actually a contract that will show whether the survivor is entitled to become owner of the account now that the decedent has died. If the survivor is thus entitled, he or she should give a death certificate to the financial institution, whereupon it would release the funds to the survivor.

10-8:1.1 Single Party Account With Payable on Death (POD) Beneficiary

As we discovered in Chapter 5, an elderly person who owns this type of account is, while still alive, the only person with authority to access it. Upon the elder's death, however, the person or persons named on the account card as the POD beneficiary or beneficiaries become the owner(s) of the account.¹¹⁰ The POD arrangement supersedes anything the elder may say about the account in his or her Last Will and Testament. The account proceeds pass outside of probate, and are not included in the decedent's estate.¹¹¹

10-8:1.2 Multiple Party Account Without Right of Survivorship

This type of account is commonly referred to as a "joint account." During the lifetime of all parties to the account, the account belongs to them all to their respective net contributions to it—unless clear and convincing evidence exists that they intended otherwise.¹¹² In short, each person is entitled to what he or she deposited, minus what he or she withdrew, plus a proportionate share of the interest earned by the account.¹¹³ Notwithstanding this ownership arrangement, any of the account owners may withdraw any amount from the account at any time, and the financial institution will honor the withdrawal request.¹¹⁴ When one of the parties dies, his or her net contributions to

¹¹⁰ Tex. Est. Code § 113.052.

¹¹¹ Tex. Est. Code § 113.052.

¹¹² Tex. Est. Code § 113.102.

¹¹³ Tex. Est. Code § 113.003.

¹¹⁴ Tex. Est. Code § 113.203.

the account pass according to the terms of his or her will or (in the absence of a will) by the laws of intestacy.¹¹⁵

10-8:1.3 Multiple Party Account With Right of Survivorship

This type of account has all the features of the multiple party account without right of survivorship except that when an account holder dies, his or her share of the account passes to the surviving owners.¹¹⁶ However, this is so only because the parties to the account have a written agreement—signed by all parties including the decedent—establishing the right of survivorship in the joint account.¹¹⁷ The agreement normally contains language substantially similar to the following:

On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate.¹¹⁸

No probate is necessary for the survivors to access the funds in the account. Neither a will nor the inheritance laws control the account. However, the IRS may seize the account to settle the tax debt of any of the owners.

10-8:1.4 Multiple Party Account With Right of Survivorship and Payable on Death Provision

The parties to this account own the account in proportion to their net contributions to it. The financial institution may pay any sum in the account to any of the parties at any time. On the death of the last surviving party, ownership of the account passes to the POD beneficiary or beneficiaries.¹¹⁹

10-8:1.5 Trust Account

A trust account is an account with one or more persons named as trustee for the funds, and one or more persons named as beneficiary of those funds. During the life of the creator of the trust (referred to as the grantor or settlor), the funds belong to the trustee.¹²⁰ The beneficiary or beneficiaries have no rights to the account. The trustee may withdraw funds from the account.¹²¹ A beneficiary may not withdraw funds from the account before all trustees are deceased.¹²² Upon the death of the last surviving trustee, ownership of the account passes to the beneficiary or beneficiaries.¹²³ Accordingly, the trust account is not a part of the trustee's estate and does not pass under the

¹¹⁵ Tex. Est. Code § 113.151.

¹¹⁶ Tex. Est. Code § 113.151.

¹¹⁷ Tex. Est. Code § 113.051.

¹¹⁸ Tex. Est. Code § 113.051(b).

¹¹⁹ Tex. Est. Code § 113.052.

¹²⁰ Tex. Est. Code § 113.104.

¹²¹ Tex. Est. Code § 113.052.

¹²² Tex. Est. Code § 113.052.

¹²³ Tex. Est. Code § 113.153.

trustee's will or by intestacy unless the trustee survives all of the beneficiaries and all of the other trustees.¹²⁴

10-8:2 Brokerage Accounts and Dividend Reinvestment Plans

When the decedent owned an investment account wherein he or she owned stock (such as with a brokerage account or a Dividend Reinvestment Plan) with an out-of-state institution (as is the case with most Dividend Reinvestment Plans), the wording of the institution's paperwork will determine what happens to the shares held by the decedent upon his or her death. For the account proceeds to pass outside probate, the paperwork must clearly indicate a right of survivorship or a POD designation; if it does not, the financial institution will in all likelihood demand Letters Testamentary and the asset will be subject to the probate process.

10-8:3 Automobiles

Texas now makes it relatively easy to transfer ownership of an automobile upon the death of the owner. Each Texas automobile title now contains a separate optional right of survivorship agreement that (1) provides that if the agreement is between two or more eligible persons, upon the death of one or more of the owners, the motor vehicle will be owned by the surviving owners; and (2) provides for the acknowledgment by signature, either electronically or by hand, of the persons.¹²⁵ If the vehicle is registered in the name of one or more of the people who acknowledged the agreement, the title may contain a: (1) rights of survivorship agreement acknowledged by all the persons or (2) remark if a rights of survivorship agreement is on file with the Department of Transportation.¹²⁶ Upon the death of one of the owners (in our context, the elderly owner of the vehicle), the survivor can get title transferred to him or her by simply presenting the title and death certificate to the local tax assessor-collector's office.¹²⁷

If the title lists both names but there is no right of survivorship, before transferring title, the tax assessor-collector will ask for Letters Testamentary, an Order Admitting Will to Probate as Muniment of Title, or an Affidavit of Heirship to a Motor Vehicle.¹²⁸

10-8:4 Community Property Survivorship Agreement

In 1987, Texas amended its Constitution so as to authorize community property survivorship agreements.¹²⁹ Stated simply, a community property survivorship agreement is an agreement between spouses creating a right of survivorship in community property.¹³⁰ When a married person who has executed such an agreement dies, his or her share of the community property described in the agreement passes to the surviving

¹²⁴ Tex. Est. Code § 113.052.

¹²⁵ Tex. Transp. Code § 501.031(a).

¹²⁶ Tex. Transp. Code § 501.031(b).

¹²⁷ Tex. Transp. Code § 501.031(c)(2).

¹²⁸ Tex. Transp. Code § 501.074(a).

¹²⁹ Tex. Const. art. XVI, § 15.

¹³⁰ Tex. Est. Code § 112.001.

spouse.¹³¹ Texas law holds that the agreement is effective to pass title to the community property without any further action.¹³²

Notwithstanding the effectiveness of the agreement to pass title to the surviving spouse, Texas law provides that after the decedent's death, the surviving spouse may apply to the court for an order establishing that the agreement is valid and satisfies the requirements of the law.¹³³ This requires the surviving spouse to produce the original community property survivorship agreement in court.¹³⁴ Following the court's adjudication that the community property survivorship agreement is valid, the surviving spouse must file the agreement with the County Clerk.¹³⁵

Thereafter, the surviving spouse may sell any community property that he or she obtains through the community property survivorship agreement, but must wait 6 months after the date of the decedent's death to make the sale.¹³⁶ So long as the surviving spouse has filed the agreement with the County Clerk, the purchaser is assured of good title.¹³⁷

10-8:5 If the Survivor Spouse Receives Dividend Checks or Other Payments Made Out to the Decedent

Following the decedent's death, it is possible for the surviving spouse to receive dividend checks or other payments made out to the decedent. These typically arrive in the mail. Should this happen, the surviving spouse has two options in dealing with these payments.

1. First, the surviving spouse can return the payment, and request that a new check be issued to the "estate of the decedent."¹³⁸
2. Second, if a court of competent jurisdiction has already appointed an executor or administrator of the decedent's estate and the check is either in payment for the redemption of currencies or for principal and/or interest on U.S. securities, payment for tax refunds, or payment for goods and services, the survivor can have the executor or administrator deposit the check in the decedent's account.¹³⁹ In endorsing the check, the executor or administrator must include, as part of the endorsement, an indication of the capacity in which the executor or administrator is endorsing. An example would be: "John Jones by Mary Jones, executor of the estate of John Jones."¹⁴⁰

¹³¹ Tex. Est. Code § 112.052.

¹³² Tex. Est. Code § 112.053.

¹³³ Tex. Est. Code § 112.101(a).

¹³⁴ Tex. Est. Code § 112.101(d).

¹³⁵ Tex. Est. Code § 112.105.

¹³⁶ Tex. Est. Code §§ 112.204, .206.

¹³⁷ Tex. Est. Code §§ 112.204, .206.

¹³⁸ See 31 C.F.R. § 240.15(b).

¹³⁹ 31 C.F.R. § 240.15(a)(1)(i).

¹⁴⁰ 31 C.F.R. § 240.15(a)(1)(i).

10-8:6 IRA Funds

If the decedent had an individual retirement account (IRA), if the financial institution distributes any proceeds to the beneficiary, the beneficiary will be obligated to include the amount received in his or her gross income for the year of receipt, and to pay all taxes due thereon.¹⁴¹ If the surviving spouse is the IRA beneficiary, he or she can roll over the IRA distribution into his or her own IRA, thus deferring the federal income tax.¹⁴² If the decedent had a large estate subject to the federal estate tax, the surviving spouse can defer the estate tax by utilizing the unlimited marital deduction.¹⁴³

To receive the IRA proceeds or initiate the IRA rollover, the surviving spouse must contact the IRS trustee. He or she will need to supply the trustee with a copy of the decedent's death certificate. Upon receipt, the IRA trustee will process the payment or IRA rollover.

10-8:7 Trust Assets

If the decedent had executed a revocable living trust, it is likely that he or she named the surviving spouse as the successor trustee. This would minimize the procedures required to maintain the trust upon the decedent's death. In reality, the ownership of this joint revocable living trust will not change; the trust will simply continue for the surviving grantor's benefit. All assets in the trust will now be available to the surviving spouse—as they were while the decedent was still alive.

If, however, the survivor is not named as the successor trustee, authority for management of the various trust assets will vest in the person who is named as successor trustee. In order to access the various trust assets, the successor trustee will need the original trust agreement and a copy of the decedent's death certificate.

If the living trust contains credit shelter trust provisions, the successor trustee will have to re-title appropriate assets to fund the credit shelter trust. The Elder Law attorney will be able to guide the survivor in this process. If the successor trustee retains the same attorney who drafted the trust instrument, he or she will be familiar with the decedent's intent in creating the trust, and will be able to advise the successor trustee in fulfilling it.

We note, however, that recent changes to tax law have made the credit shelter trust almost obsolete. One of the main purposes of a credit shelter trust is to limit estate taxes when the surviving spouse dies. Recent tax law changes have made the federal estate tax inapplicable to nearly all Americans. A certain amount of each person's estate is exempted from taxation by the federal government. Under the most recent changes to this section of the Internal Revenue Code (IRC), the basic exclusion amount for the estate of a person dying between December 31, 2017, and January 1, 2026, is \$10,000,000.¹⁴⁴ When adjusted for inflation pursuant to the provisions of the statute,¹⁴⁵ the amount was \$11.4 million in 2019. This meant that a decedent who died in 2019 with an estate valued at less than \$11.4 million paid no federal estate tax.

¹⁴¹ 26 U.S.C. §§ 72(a)(1), 403(a)(1).

¹⁴² 26 U.S.C. § 403(a)(4).

¹⁴³ 26 U.S.C. § 2056(a).

¹⁴⁴ 26 U.S.C. § 2010(c)(3)(C).

¹⁴⁵ 26 U.S.C. § 2010(c)(3)(B).

Moreover, if the decedent had been married and had died without ever using any of his or her allowance, the surviving spouse could add the deceased spouse's exclusion amount to his or her own.¹⁴⁶ This means that for the decedent dying in 2019, \$22.8 million dollars (the total value of both exclusions) is protected from federal estate taxation without complex estate planning. Because most Americans do not have estates of that magnitude, the credit shelter trust—which used to be utilized to transfer assets to spouses to shield them from estate taxes—is slowly becoming obsolete.

10-9 Homestead Occupancy

We addressed homesteads in Chapter 3. Under Texas law, a homestead is “the dwelling house constituting the family residence, together with the land on which it is situated and the appurtenances connected therewith.”¹⁴⁷ Technically, and pursuant to the modern homestead exemption laws, the homestead is an artificial estate in land, created to protect the possession and enjoyment of the owner against the claims of creditors by preventing the sale of the property for payment of the owner's debts so long as the land is occupied as a home.

Laws exempting the homestead from liability for debts of the owner are strictly of U.S. origin. They did not exist under the English Common Law. Accordingly, today's homestead rights exist only through the constitutional and statutory provisions that create them. Nearly every state has created such provisions; the earliest such provisions in what is today the United States were enacted in 1839 in what was then the Republic of Texas.¹⁴⁸

10-9:1 The Texas Homestead

Texas homestead laws are unique. Truly, no other state affords homeowners similar protection and benefits—although, as in any other state, a person can claim only one homestead.

¹⁴⁶ 26 U.S.C. § 2010(c) (4), (5).

¹⁴⁷ *Farrington v. First Nat'l Bank of Bellville*, 753 S.W.2d 248 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

¹⁴⁸ According to the Texas State Historical Association, many Americans who settled in Texas in the early nineteenth century were pursued by their creditors, and for their protection, Stephen F. Austin recommended a moratorium on the collection of the colonists' foreign debts. In response to that recommendation, the legislature of Coahuila and Texas enacted Decree No. 70 of 1829 to exempt from creditors' claims lands received from the sovereign as well as certain movable property. Although that act was repealed in 1831, the principle remained alive in Texans' minds and was a model for the Texas Act of 1839, which protected the home of a family from seizure by a creditor. This was the first statute of this sort, and the principle of homestead exemption is therefore deemed Texas's particular contribution to jurisprudence. The homestead principle was embodied in the Constitution of 1845 and all constitutions thereafter. James W. McKnight, Texas State Historical Association, *The Homestead*, available at <https://tshaonline.org/handbook/online/articles/mlh02> (last visited June 10, 2020).

10-9:2 Texas Homestead Benefits

Texans derive many benefits from the state's homestead laws. Among these are the homestead tax reductions, capital gain exemption, and exemption from judgment. The homestead rules also affect the way Texans negotiate and take home equity loans, and the involvement of Texans in the reverse mortgage market.

In the context of decedents and their survivors, homestead occupancy is the most important homestead issue that arises after the decedent's death.

10-9:3 Homestead Occupancy

Upon the death of one spouse, the homestead descends and vests in the same manner as the decedent's other real property, and is governed by the same laws of descent and distribution.¹⁴⁹ However, the surviving spouse is entitled to retain a survivor's homestead right in the property for life or for so long as the survivor elects to use the homestead.¹⁵⁰ The survivor's homestead right may not be defeated by either spouse through the devise of the homestead in either party's will.¹⁵¹ Rather, the laws of testamentary disposition are subject to the survivor's homestead right.¹⁵² Accordingly, even if the decedent's Last Will and Testament gives his or her community property half of the house to someone else (such as his or her child), that new half owner cannot exercise any dominion over the house until the surviving spouse either dies or abandons the homestead.

10-10 Tax Issues

Upon the death of a loved one, the survivor needs to address certain federal income tax issues and, depending on just how the decedent was earning his or her living, on some state tax issues as well. Unless the survivor or the decedent's personal representative is a certified tax accountant, tax preparer, or tax attorney, it would behoove him or her to retain the services of a professional tax preparer to address these tax issues.

10-10:1 Determining Tax Issues Facing Decedent's Estate

The first task the attorney retained to represent the personal representative has to fulfill as regards taxes is to determine the tax issues facing the decedent's estate—and, by extension, the personal representative. These issues depend on several factors:

- Where was the decedent domiciled at the time of death?
- What was his or her marital status?
- What is the value of the decedent's gross estate?
- Did the decedent die testate, or did he or she die intestate?
- If the decedent died testate, to whom did the decedent leave his or her estate? Were there any charitable beneficiaries?

¹⁴⁹ Tex. Est. Code § 102.003.

¹⁵⁰ Tex. Const. art. XVI, § 52.

¹⁵¹ Tex. Const. art. XVI, § 52.

¹⁵² *While v. Sparks*, 118 S.W.2d 649 (Tex. Civ. App.—Dallas 1938, writ *dism'd*).

- Did the decedent die owing a tax liability to any taxing authority?
- At what point of the tax filing season did the decedent die?
 - Did the decedent die after filing his or her income tax return?
 - Did the decedent die before filing his or her tax return?
 - Did the decedent die after the close of the tax filing season without having requested an extension to file the return?

The importance of these factors arises out of one great and irreversible fact: At the time of a person's death, such person ceases to exist as a *taxable entity*. Indeed, as a result of the death, a newly created *taxable entity*—called *an estate*—comes into being! Whether and when the decedent's personal representative must file an income tax return for the decedent and/or the newly created taxable entity and the form or forms he or she needs to file depends on the point of the decedent's tax filing season at which the decedent died.

10-10:2 Filing Requirements and Forms Needed

In representing the personal representative professionally, the attorney must acquire a few forms from the IRS's website (or from whatever tax preparation software product he or she uses). The attorney has no need to try and dazzle the client with reams and reams of useless forms; just stick to the basics—the forms one really and truly needs to get the job done. The information in the following paragraphs presents a synopsis of Internal Revenue Service Publication 559, *Survivors, Executors and Administrators*, revised and published on February 4, 2020. For more current information, please see the IRS website at <https://www.irs.gov/forms-pubs/about-publication-559.pdf>¹⁵³

10-10:2a Establishing the Estate—Form SS-4

The attorney's—and the personal representative's—first encounter with the Internal Revenue Service on behalf of the decedent occurs when they apply for the estate's Employer Identification Number (EIN). Whether the decedent died testate or intestate, it is important that the personal representative obtains an EIN for the new taxable entity created by the decedent's death. The application can be done by mail, by fax, or online at www.irs.gov. It is typically easier to apply online. The personal representative—or the attorney acting on behalf of the personal representative—must be careful to enter the decedent's information EXACTLY as he or she had it on his or her last federal income tax return. For example, imagine a decedent who goes by the name "Vann Eze DerMann." He signs his name that way, and as far as everyone is concerned, his name is "Vann Eze DerMann." In reality, his name is "Vann E. Zermann," and when he files his tax returns each year, that is the name he uses. If his personal representative is not aware of this bit of information, and thus does not relay the correct information to the attorney, they will most likely not be able to obtain the EIN for the estate. Hopefully, the death certificate would have the correct information and the error would be corrected.

¹⁵³ Internal Revenue Service, Publication 559, *Survivors, Executors and Administrators*, Feb. 4, 2020, available at <https://www.irs.gov/forms-pubs/about-publication-559.pdf> (last visited May 7, 2020).

Assuming the personal representative is aware of the intricacies of the decedent's name and all other "secret information," he or she—and the attorney—will be successful, and the IRS will issue Form SS-4.

10-10:2b Form 56—Notice Concerning Fiduciary Relationship

Having obtained the EIN for the estate, the personal representative must now file Form 56, Notice Concerning Fiduciary Relationship, to inform the IRS of the creation of the fiduciary relationship under IRC § 6903¹⁵⁴ and provide the qualification for the fiduciary relationship under IRC § 6036.¹⁵⁵ Note that Form 56 is not the same as, and does not serve the same purpose as, Form 2848. Form 2848 is for use by a taxpayer's authorized representative in a controversy with the IRS.¹⁵⁶ Although the fiduciary and the authorized representative may be the same person, a difference exists in the two roles:

- The fiduciary (who files Form 56) is treated by the IRS as if he or she is actually the taxpayer. Upon appointment, the fiduciary automatically has both the right and the responsibility to undertake all actions the taxpayer is required to perform. For example, the fiduciary must file returns and pay any taxes due on behalf of the taxpayer.¹⁵⁷ In the estate administration context, titles used for a fiduciary would be "executor," "administrator," or "trustee."
- An authorized representative (who files Form 2848) is treated by the IRS as the agent of the taxpayer.¹⁵⁸ He or she can perform only the duties authorized by the taxpayer, as indicated on Form 2848. An authorized representative is neither required nor permitted to do anything other than the actions explicitly authorized by the taxpayer. In the estate administration context, an authorized representative would be the attorney who represents the fiduciary or the accountant, or registered tax preparer retained by the fiduciary to prepare and file the tax returns. It is important to note that if the decedent had retained someone as an authorized representative prior to his or her death, that relationship ends upon the decedent's death. That person can no longer speak for the decedent, and cannot speak for the estate unless the fiduciary appoints him or her as the authorized representative.

10-10:2c Decedent's Final Form 1040 (or Intermediate Form 1040, if Necessary)

If it is necessary that the personal representative files an income tax return for the decedent, the return will typically be due by April 15 *following* the year of the decedent's death. However, that return may or may not be the only return to be filed by the personal representative. The number of returns to be filed is dependent on just when the decedent died, and on what stage he or she was at vis-à-vis the tax filing season at the time of death.

¹⁵⁴ 26 U.S.C. § 6903.

¹⁵⁵ 26 U.S.C. § 6036.

¹⁵⁶ IRM 4.11.55.

¹⁵⁷ 26 U.S.C. § 6012(b).

¹⁵⁸ IRM 4.11.55.1.2.

This is so because if during any year following his or her death the decedent earns sufficient income and is required to file a federal income tax return, he or she must file a “final income tax return”—a “final Form 1040.” Now, if, for example, the decedent died after the close of the tax year, but before he or she had filed a tax return for that year, that return would not qualify as his or her final tax return. Instead, the return would be treated as a regular return that the personal representative would have to file by the normal due date plus any available extensions. If the deadline for extensions is past, the personal representative would have to grapple with late filing penalties and interest.¹⁵⁹

We illustrate with a simple example:

Tête Mwen Phan died on March 24, 2019, before filing her Year 2018 federal income tax return. Her personal representative should file her Year 2018 return by April 15, 2019. Her final return is due by April 15, 2020, with an automatic extension to October 15, 2020. On the return due on April 15, 2020, the personal representative will report all income that Tête Mwen Phan earned between January 1, 2019, and midnight of March 24, 2019.

The following example contains more sophisticated facts:

Ayejus Dyed filed for an automatic extension to file his 2019 federal income tax return (due April 15, 2020) to October 15, 2020. Mr. Dyed dies on September 11, 2020. His personal representative correctly files his 2019 federal income tax return before October 15, 2020. He must now file Mr. Dyed’s 2020 federal income tax return by April 15, 2021, or request an automatic extension to file by October 15, 2021.

Both examples involved the personal representative having to file two Form 1040s, one a regular Form 1040 and one a final Form 1040. What determines whether the decedent must file a final Form 1040? Consider the following pointers:

- As an initial matter, the time period covered by the decedent’s final Form 1040 is January 1 of the year of death through midnight of the date of death. Any income earned in the preceding year does not belong on the final Form 1040.
- The full standard deduction and additional standard deductions for age and blindness are also available.
- If the decedent was eligible for the earned income credit, the credit could be claimed on the decedent’s final return even though the return covered less than 12 months. If the allowable credit is more than the tax liability for the year, the excess is refunded.¹⁶⁰
- The type of income, age, and filing status of a decedent determine the filing requirements of his or her final Form 1040. As regards filing status, if the decedent died at a time when he or she was married and had been filing his or her tax returns as married, filing jointly, there would be no need for the decedent to file a final return; the surviving spouse would file the return and receive any refund due—or pay any taxes due. On the other hand, if the decedent were single,

¹⁵⁹ 26 USC § 6651.

¹⁶⁰ 26 USC § 32(a).

it would be necessary for him or her to file a final return to obtain a refund if income tax had been withheld from any source during his or her final months of life or if the decedent had paid estimated taxes for that year.

- The timing of income and expenses is also important to the filing of that final Form 1040. Assuming that the decedent was a cash basis taxpayer, all income actually or constructively received before his or her death is included on the final Form 1040.¹⁶¹ Likewise, all expenses actually or constructively paid before the decedent's death are deducted on the final Form 1040.¹⁶²
- All gross income that the decedent had a right to receive at death but did not actually or constructively receive by then is not included in the final Form 1040 because these items of income are "income in respect of a decedent" (IRD).¹⁶³ If the decedent's will does not designate a beneficiary for this income, the personal representative must report them on the estate's Form 1041 as income.¹⁶⁴ If the decedent's will names a beneficiary or the property is transferred to a beneficiary by operation of law, then the income is IRD and is reported by the beneficiary on his or her Form 1040.¹⁶⁵

Following are some examples of how these receipts of income work:

Example 1: Bryan owned and operated a cotton farm. He used the cash method of accounting. He sold and delivered 150 bales of cotton to the cotton gin for \$14,182, but did not receive payment before his death.

Up to the moment that the estate was settled, the estate had not received payment. The estate transferred the right to payment to Bryan's sister, Nancy. When Nancy receives the \$14,182, she must report that amount as income on her federal income tax return. It is reported neither on Bryan's final Form 1040 nor on the Form 1041 of his estate.

Example 2: Assume the same facts as in Example 1 except that Bryan used the accrual method of accounting.

This time, the amount accrued from the sale of the cotton would be included on Bryan's final income tax return. Neither the estate nor Nancy will realize income in respect of the decedent when the money is paid later.

Example 3: Jorge was entitled to a large salary payment at the date of his death. The payor had agreed to pay him over five installments. The estate collected two installments, and then distributed the right to the remaining installments to the beneficiary named in Jorge's will.

None of the payments would be included in Jorge's final income tax return. The estate must include the two installments it received in gross income on the Form 1041s that it files; the beneficiary of Jorge's will must include each of the three installments in gross income in each of the tax years received.

¹⁶¹ Internal Revenue Service, Publication 538, Accounting Periods and Methods, Cash Method, 8 (2019).

¹⁶² Internal Revenue Service, Publication 538, Accounting Periods and Methods, Cash Method, 9 (2019).

¹⁶³ 26 U.S.C. § 691(a)(1).

¹⁶⁴ 26 U.S.C. § 691(a)(1)(A).

¹⁶⁵ 26 U.S.C. § 691(a)(1)(B), (C).

10-10:2c-1 Name, Address, and Signature

Various rules govern how the personal representative (or tax preparer) must input the decedent's name, address, and signature. These rules are spelt out in Internal Revenue Service Publication 17, *Your Federal Income Tax*. Following is a summary of the guidance provided in this publication. Note that the filing rules and methods adopted by the preparer should always take into consideration the decedent's marital status at the time of death and whether a court has appointed a personal representative by the time someone files the tax return. That having been said, following are some rules offered by the publication:¹⁶⁶

- Across the top of the tax return, the tax preparer should write the word "DECEASED," the decedent's name, and the date of the decedent's death.
- If the decedent is filing a joint return with his or her surviving spouse, then in the name and address space on page 1 of the return, the preparer should write the names of the decedent and the surviving spouse and enter their address (we are assuming that the decedent and the spouse had the same address; if they did not, then enter their different addresses).
- If the decedent is not filing a joint return, the personal representative should write the decedent's name in the taxpayer's name space and the personal representative's name and address in the remaining space.
- If the probate court has appointed a personal representative for the decedent, the personal representative must sign the return.
- If it is a joint return, the surviving spouse must sign it. If the probate court has not yet appointed a personal representative, the surviving spouse should sign the return and write in the signature area, "*Filing as surviving spouse.*"
- If the probate court has not appointed a personal representative, and if the decedent is not survived by a spouse, then the person in charge of the decedent's property must file and sign the return as "*personal representative.*"

10-10:2c-2 Mandatory Filing Requirements

Filing a final Form 1040 for the decedent is mandatory if:¹⁶⁷

- The decedent's gross income for that final year is greater than the minimum filing requirements based on his or her filing status.
- The decedent's self-employment income is \$400 or more.
- The decedent may owe Social Security and Medicare (i.e., FICA) taxes on tips not reported by an employer.
- It is necessary to correct information returns.

¹⁶⁶ Internal Revenue Service, Publication 559, *Survivors, Executors and Administrators*, 4 (2020).

¹⁶⁷ Internal Revenue Service, Publication 559, *Survivors, Executors and Administrators*, 4-5 (2020).

10-10:2d Form 1310: Claiming a Refund for a Decedent

If the personal representative is claiming a federal income tax refund for the decedent, he or she must file Form 1310, Statement of Person Claiming Refund Due a Deceased Taxpayer with the return.¹⁶⁸ The return preparer must attach a copy of the court certificate to the return showing that the personal representative was appointed to that office (testator or administrator). Strictly speaking, the Letters Testamentary or Letters of Administration should be sufficient to file with the tax return, but in the abundance of caution, it is wise that the personal representative file Form 1310 also.¹⁶⁹

If, however, the decedent had been married and the person claiming the refund is the decedent's surviving spouse filing a joint return with the decedent, the surviving spouse would not need to file Form 1310.¹⁷⁰

10-10:2e Form 1041: U.S. Income Tax Return for Estates and Trusts

The EIN issued to the personal representative will state the date by which the representative must file the estate's Form 1041. Form 1041 is used to file the following information:¹⁷¹

- the income, deductions, gains, and losses of the estate;
- the income that is either accumulated or held for future distribution or distributed currently to the beneficiaries;
- any income tax liability of the estate; and
- employment taxes on wages paid to household employees employed by the estate.

10-10:2f Form 8822: Change of Address

The attorney uses Form 8822 to notify the IRS of a change in the decedent's mailing address. The attorney would, on behalf of the personal representative, file this form to have all correspondence from and with the IRS be sent to an address different to the decedent's former address. This is necessary because, after all, the decedent is dead and no longer lives at the last known address the IRS has on file for him or her.

10-11 Income Tax Issues for the Estate, Fiduciaries, Survivors, and Heirs

The following section focuses on the effect of an elderly person's death on the income tax benefits, liabilities, and filing responsibilities of his or her survivors (including

¹⁶⁸ Internal Revenue Service, Publication 559, Survivors, Executors and Administrators, 8-9 (2020).

¹⁶⁹ Internal Revenue Service, Publication 559, Survivors, Executors and Administrators, 8-9 (2020).

¹⁷⁰ Internal Revenue Service, Publication 559, Survivors, Executors and Administrators, 9 (2020).

¹⁷¹ Internal Revenue Service, Publication 559, Survivors, Executors and Administrators, 16 (2020).

his or her widow or widower), heirs, beneficiaries, estate, and fiduciaries. The truth is that these effects are not limited to relatives and associates of the elderly, but can happen to anyone who has lost a loved one. Still, the focus of this book is the elderly.

10-11:1 Income Tax Issues of Survivors and Heirs

The attorney should ensure that the decedent's survivors and heirs are aware of the following income tax rules and principles that will affect them following their loved one's demise:

1. If the decedent qualified as some other person's qualifying relative for the part of the year during which he or she was alive, the surviving taxpayer can claim the full tax benefits for the year regardless of when death occurred during the year.¹⁷²
2. If the decedent was married, his or her surviving spouse can file a joint return for the year of death and may qualify for special tax rates for the following 2 years if he or she has a dependent child by filing as "qualifying widow(er)."¹⁷³ For the year that the decedent dies, the surviving spouse files a joint return with the decedent. For the next 2 years, if the surviving spouse has a dependent child—but not a foster child—he or she can file as a "qualifying widow(er)," using the tax rates for a married couple filing joint.¹⁷⁴

Generally, a survivor can file as a surviving spouse for this special benefit if he or she meets all of the following requirements:¹⁷⁵

- (i) The survivor was entitled to file a joint return with the decedent spouse for the year of death, whether or not they actually filed jointly.
- (ii) The survivor did not remarry before the end of the current tax year.
- (iii) The survivor has a child or stepchild who qualifies as a dependent for the tax year.
- (iv) The surviving taxpayer provides more than half the cost of maintaining a home, which is the principal residence of that child for the entire year except for temporary absences.

In short, a surviving spouse who does not have a dependent child living with him or her is not a qualifying widow or widower and must file as a surviving spouse. We note that the last year in which a surviving spouse can file jointly with, or claim an exemption for, a deceased spouse is the year of the decedent's death.

10-11:2 Income Tax Issues of the Estate and its Fiduciaries

Before one can discuss the income tax issues facing the estate and its fiduciaries, one should first become familiar with some basic rules governing estates and their fiduciaries.

¹⁷² 26 U.S.C. § 152(d).

¹⁷³ 26 U.S.C. § 2(a).

¹⁷⁴ 26 U.S.C. § 2(a).

¹⁷⁵ 26 U.S.C. § 2(a).

10-11:2.1 Estate Basics

At the moment that a person dies, a new entity—the estate—comes into existence as a new taxpayer.

For income tax purposes, the estate begins with the probate estate. This “probate estate” includes all property that comes under the control of the personal representative by operation of either the will (where the decedent died testate) or state law (where the decedent died intestate).¹⁷⁶

The estate begins on the date of the decedent’s death and continues until the final distribution of the assets is made to the beneficiaries.

10-11:2.2 The Role of the Personal Representative

The personal representative oversees the estate. Typically, if the decedent died testate—that is, with a will—the personal representative is called an “Executor”; if, on the other hand, the decedent died without a will, the personal representative is called an “Administrator.” The personal representative is responsible for:

- collecting and conserving all probate assets;
- paying all legitimate liabilities (including all taxes);
- preparing all tax returns (or having them prepared); and
- distributing the remaining assets to the proper heirs or beneficiaries.

10-11:2.3 The Governing Instrument

To perform his or her duties properly, any fiduciary appointed by the will or by a court of competent jurisdiction must carefully read and evaluate the estate’s governing instrument. For the personal representative, that instrument is the decedent’s will.

The governing instrument of a trust is a trust document. If the trust is a testamentary trust, it would be included in the decedent’s will. The trustee must be given a copy of the will that he or she may read and evaluate the terms of the trust.

If the decedent died intestate, the personal representative and the tax preparer should familiarize themselves with the intestacy laws of the state where the decedent was domiciled because these laws would constitute the governing instrument for the estate.

In the final analysis, then, the governing instrument, along with the appropriate state laws, will give guidance to the personal representative and the tax preparer on the following matters:

- identification of beneficiaries;
- distributions to be made to the beneficiaries;
- special allocations of income or expenses; and
- fiduciary accounting income.

¹⁷⁶ Tex. Est. Code § 22.012.

10-11:2.4 Income of an Estate

To properly file Form 1041, the personal representative and the tax preparer must know and understand the income of the estate.

An estate's taxable income includes all income from assets coming under the control of the personal representative during the period of probate administration, subject to the rules of community property.¹⁷⁷

The estate must also report income from items passing to the estate as a named beneficiary (or under state law—such as where a named beneficiary predeceased the decedent and no contingent beneficiary was named and therefore the property passed to the decedent's estate).

Other circumstances that give rise to income include the following:

1. If the decedent died owning personal property owned solely in his or her name, any income earned by such property is considered income of the estate. This is so because title to the property passed to the estate upon the decedent's death. Ownership of the assets will not pass to the beneficiaries until the personal representative has distributed them to such beneficiaries.
2. If the decedent's will transfers solely owned personal property to a testamentary trust, the estate will report the income from such personal property from the date of death until the time the property is transferred to the trust. This transfer normally takes place at the end of the probate process.
3. But note that if the decedent operated a business or farm up to the date of his or her death, the estate is not considered by law to operate the business or farm unless the will contains specific language directing the estate to continue the operation of this activity.

10-11:2.5 Income Reported—or Not Reported—by the Beneficiaries

In our Trusts and Estates class at law school, we learned that the will beneficiaries are the "natural objects of the testator's bounty." What are the income tax consequences for them of receiving this bounty—this property?

As an initial matter, the estate's gross income does not include income from items passing directly to the decedent's beneficiaries,¹⁷⁸ or (under community property laws) the surviving spouse.

Following are some commonly encountered situations in which income from assets will not be subject to estate income taxation because it is paid directly to the estate beneficiaries:

1. property owned jointly with right of survivorship;
2. property registered as POD;

¹⁷⁷ Rev. Rul. 57-133; Rev. Rul. 59-375; Rev. Rul. 62-116.

¹⁷⁸ Rev. Rul. 75-61.

3. employee death benefits and deferred compensation payable directly to designated beneficiaries;
4. IRA, Keogh, SEP-IRA, and other qualified retirement plans payable directly to a named beneficiary; and
5. property titled in the name of a living trust where the trust provides for the distribution to heirs.

10-12 Income, Deductions, and Exemptions

As the personal representative and the attorney/tax preparer sort through the decedent's paperwork to file his or her final Form 1040 and the estate's Form 1041, they will be trying to determine which items constitute income, which ones constitute expenses—and, thus, deductions—and which ones are exemptions and thus neither reportable as income nor deductible therefrom. They will also have to determine which items must be reported on the final Form 1040, and which ones on the estate's Form 1041. If the taxpayer owned a business concern, the personal representative and the tax preparer will have to determine whether he or she ran it on a cash or accrual basis. The following paragraphs offer some guidance on these issues.

10-12:1 Actual or Constructive Receipt and Disbursement

All income actually or constructively received before the death of the decedent is included on the final Form 1040.

All items paid before the death of the decedent are deducted on the final Form 1040.

10-12:2 Income in Respect of a Decedent

All gross income that a decedent had a right to receive at death but was not actually or constructively received is not included on his or her final Form 1040 because these items are "IRD."

If the decedent's will does not designate a beneficiary of these IRD items, they are reported on the estate's Form 1041 as income.¹⁷⁹

If the decedent's will names a beneficiary or the property is transferred by operation of law, then this IRD income is reported by the beneficiary on his or her Form 1040.¹⁸⁰

10-12:3 Character of Income

In receiving and reporting income, it is important to note, and to maintain, the character of such income. The general rule is that the character of income received in respect of a decedent is the same as it would have been to the decedent if he or she were alive.¹⁸¹ For example, if the income would have been a capital gain to the

¹⁷⁹ 26 U.S.C. § 691(a)(1)(A).

¹⁸⁰ 26 U.S.C. § 691(a)(1)(B).

¹⁸¹ 26 U.S.C. § 691(a)(3).

decedent, it will be a capital gain to the estate—and to the beneficiary who eventually receives it.

10-12:4 Deductions in Respect of a Decedent

Taxpayers are allowed various deductions on their tax returns. Some deductions are personal, available to every taxpayer; others are available to taxpayers engaged in business enterprises. After the taxpayer dies and his or estate is going through the probate process, the personal representative and the attorney/tax preparer must make some decisions regarding these deductions. They have two principles to guide them:

1. If the decedent had obligations before death that were not paid at the time of death, these items are termed “deductions in respect of a decedent.”¹⁸²
2. Items such as business expenses, interest, taxes, and income producing expenses for which the decedent was liable at death, but were not paid before death, are deducted by either the estate on Form 1041 or the beneficiary on Form 1040, as the case may be.¹⁸³

10-12:5 Income and Expenses After Death

If the decedent used the cash basis method of accounting (as most people do), there would be both IRD and Deductions with Respect to a Decedent (DRD) for the income earned and expenses incurred before death but brought to light after the death of the decedent.

10-12:6 Wages

On occasion, the personal representative receives wages for the decedent after he or she dies. There is a proper method of reporting such wages for income tax purposes.

First, we note that wages actually or constructively received prior to the decedent's death are included on the final Form 1040.¹⁸⁴ Any wages received after the decedent's death are IRD and are reported either by the estate on Form 1041¹⁸⁵ or by the beneficiary who receives said wages on his or her own Form 1040.¹⁸⁶

Next, note that the decedent's Form W-2 Box 1, Income Subject to Federal Tax, to be used in preparing his or her final Form 1040 includes only the actual gross wages received. The Social Security and Medicare Wages, Boxes 3 and 5, include 100% of the actual amount and accrued amounts.

Third, the IRD is to be reported by the employer on Form 1099 MISC as non-employee compensation in Box 3, and is not subject to self-employment tax.

Fourth, it is important to note that the term “wages” does not include any payment by an employer to a survivor or the estate of a former employee made after 1972 and

¹⁸² 26 USC § 691(b).

¹⁸³ 26 USC § 691(b)(1).

¹⁸⁴ 26 USC § 61(a)(1).

¹⁸⁵ 26 USC § 691(a)(1)(A).

¹⁸⁶ 26 USC § 691(a)(1)(B).

after the calendar year in which such employee died.¹⁸⁷ Hence, such payments are not subject to income taxation as wages.

10-12:7 Interest and Dividends

As regards interest and dividends, the rules are many:

1. Amounts received prior to death are included on the final Form 1040.
2. Any amount earned from the date of the last interest compounding date prior to death up to the date of death is IRD.
3. Interest and dividends earned after death are reported by the estate on Form 1041 or by the beneficiary on his or her Form 1040.
4. All dividends received prior to death are included on the final Form 1040.
5. Any dividend declared before the decedent's death but not received by then is IRD and is included on the estate's Form 1041 or the beneficiary's Form 1040.
6. Before reporting interest and dividends that should rightly be included on the decedent's final Form 1040, the personal representative should ensure that he or she receives a Form 1099 evidencing the payment.
7. Likewise, the personal representative should receive a separate Form 1099 showing the interest and dividends includible on the returns of the estate or other recipient after the date of death and payable to the estate or other recipient (i.e., the beneficiary).
8. If the Form 1099 does not reflect the correct recipient or amounts, the personal representative should request a corrected Form 1099 from the payor.

10-12:8 Treatment of Self-Employment Income

If the decedent had been operating a sole proprietorship or was involved in a partnership or some other form of business enterprise, the personal representative might be faced with self-employment income and self-employment tax issues. The attorney/tax preparer must be ready to give adequate representation:

1. The attorney/tax preparer should report self-employment income actually or constructively received or accrued, depending on the decedent's accounting method.
2. For self-employment tax purposes only, the decedent's self-employment income will include the decedent's distributive share of a partnership's income or loss through the end of the month in which death occurred.
3. For this purpose only, the partnership's income or loss is considered to be earned ratably over the partnership's tax year.

¹⁸⁷ Treas. Reg. § 31.3121(a)(14)-1.

10-12:9 Treatment of Rental Income, Expenses, and Depreciation

If the decedent owned rental property, the income, expenses, and depreciation deduction thereof are treated as follows:

- Income received and expenses paid prior to the decedent's death are deducted on the decedent's final Form 1040.
- Income accrued and expenses incurred prior to death are reported as IRD and DRD by the estate on the estate's Form 1041 or passed on to the underlying beneficiaries also as IRD and DRD.
- Income received and expenses incurred after death are reported on the estate's Form 1041 or passed on to the beneficiaries.
- Depreciation is prorated for the period ending on the date of the decedent's death.
- Depreciation is based on a stepped-up fair market value on the date of death under the new statutory method and life.
- The estate is not permitted to elect IRC § 179 expensing on new personal property acquired after the decedent's death.
- The "short year" rules for depreciation apply for any tax year the estate has that is less than 12 full months.

10-12:10 Partnership Income or Loss: Partnership Closes Books on Decedent's Date of Death

If the decedent had been involved in a partnership, the following rules would control the distribution of partnership income or loss:

1. The tax year of the partnership closes for the partner on the date of the decedent's death.¹⁸⁸
2. The decedent's income and losses up to the date of death would be reported on his or her final Form 1040.¹⁸⁹
3. All income and loss after the date of death is reported on the estate's Form 1041¹⁹⁰ or the Form 1040 of the underlying beneficiary.¹⁹¹

10-12:11 IRA and Pension Distributions: Decedent's Distributions Prior to Death

Decedents sometimes die possessed with interests in pension plans and IRAs. Specific rules exist on the tax issues arising from the existence of these interests. Some of these rules include the following:

¹⁸⁸ 26 U.S.C. § 706(c)(2).

¹⁸⁹ 26 U.S.C. § 61(a)(12).

¹⁹⁰ 26 U.S.C. § 691(a)(1)(A).

¹⁹¹ 26 U.S.C. § 691(a)(1)(C).

1. Distributions received prior to death are included on the decedent's final Form 1040.¹⁹²
2. An amount distributable before death and received after death is IRD to the estate¹⁹³ or designated beneficiary or beneficiaries,¹⁹⁴ and is reported accordingly.
3. Distributions received after the decedent's death are also IRD¹⁹⁵ and are not subject to the 10% early withdrawal penalty even if the decedent was younger than 59.5 years at the time of his or her death or the recipient is younger than 59.5.¹⁹⁶
4. A surviving spouse who is named as the beneficiary of a decedent spouse's IRA may roll the decedent's IRA into his or her own traditional IRA, or, to the extent it is taxable, roll it over into a:
 - a. qualified employer plan;
 - b. qualified employee annuity plan (section 403(a) plan);
 - c. tax-sheltered annuity plan (section 403(b) plan); and
 - d. deferred compensation plan of a state or local government (section 457(b) plan), or treat himself or herself as the beneficiary rather than treating the IRA as his or her own.¹⁹⁷

10-12:12 Post Death Required Minimum Distribution (RMD) Rules

After the decedent's death, the IRA—whether the old one or the newly rolled over one—will eventually make distributions to the beneficiary. It is useful to know just how these distributions will be taxed.

First, if the IRA or qualified pension plan has a designated beneficiary, the remaining account balance will be distributed over the remaining life expectancy of the beneficiary whether or not the decedent died before or after the required beginning date.¹⁹⁸

Second, if the plan does not have a designated beneficiary and the decedent dies after the required beginning date (generally April 1 following the year in which the decedent owner dies), the remaining balance is paid out over the remaining life expectancy of the decedent owner of the IRA or qualified plan.

¹⁹² 26 USC § 61(a)(10).

¹⁹³ 26 U.S.C. § 691(a)(1)(A).

¹⁹⁴ 26 U.S.C. § 691(a)(1)(C).

¹⁹⁵ 26 U.S.C. § 691(a)(3).

¹⁹⁶ 26 U.S.C. § 403(b)(10).

¹⁹⁷ IRS, Retirement Topics—Beneficiary, *available at* <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-beneficiary> (last visited May 7, 2020).

¹⁹⁸ IRS, Required Minimum Distributions for IRA Beneficiaries, *available at* <https://www.irs.gov/retirement-plans/required-minimum-distributions-for-ira-beneficiaries> (last visited July 20, 2020).

Third, if the IRA or qualified plan does not have a designated beneficiary and the decedent owner dies before the required beginning date, the account balance must be distributed within 5 years after the year of the decedent owner's death.¹⁹⁹

10-12:13 Estate and Administration Expenses on Form 1041

The estate is entitled to a series of deductions on Form 1041. First are the estate administration expenses that would be deducted on the estate's Form 1041. These are the expenses incurred as a result of the decedent's death.

The IRC provides that estate administrative expenses should be deducted as expenses of the estate,²⁰⁰ and thus should be deducted on the estate's Form 706, the Estate Tax Return. However, IRC Section 642(g) contains an election provision whereby an executor may "elect" to deduct administrative expenses on a timely filed Form 1041 (including extensions).²⁰¹ The executor must also attach a waiver statement that the estate will not deduct these expenses on the Estate Tax Return, Form 706. Section 642(g) also provides that these administrative expenses can be partially elected and waived, showing which expenses are being deducted on the estate's Form 1041 while retaining the other administrative expenses on Form 706.²⁰²

If these expenses are deducted on Form 1041, any allocable expenses must be allocated between exempt and non-exempt income. The amounts allocated to tax-exempt income are not deductible.²⁰³

Only the "reasonable" amounts for "administrative" expenses are deductible on either Form 1041 or Form 706.²⁰⁴

10-12:14 Funeral Expenses

Notwithstanding IRC § 642(g), funeral expenses are never deducted on either Form 1041 or Form 1040. They are deducted only on Form 706.²⁰⁵

10-12:15 Interest Expenses

The IRC allows the deductibility of interest expenses from the following sources:

- qualified mortgage interest;
- investment interest;
- passive interest; and
- business interest.²⁰⁶

¹⁹⁹ Prop. Reg. § 1.401(a)(9)-3, Q&A 1.

²⁰⁰ 26 U.S.C. § 2053(a)(2).

²⁰¹ 26 U.S.C. § 642(g).

²⁰² 26 U.S.C. § 642(g).

²⁰³ See 26 U.S.C. § 642.

²⁰⁴ Treas. Reg. § 20.2053-3(a).

²⁰⁵ Treas. Reg. § 20.2053-2.

²⁰⁶ 26 U.S.C. § 163.

To the extent that a decedent incurred such interest expense during the year of his or her death, he or she is allowed these deductions on the final Form 1040 filed on his or her behalf.²⁰⁷

10-12:16 Charitable Contributions

Generally, taxpayers can make deductible charitable contributions of up to 50% of their adjusted gross income.²⁰⁸ A decedent is no exception. However, any amounts not deducted on the final Form 1040 are lost. Charitable contributions are not transferable to the estate's Form 1041 or to a beneficiary's Form 1040. In short, charitable contributions made by the estate after the decedent's death are deductible only if the decedent's will provides that the contributions be paid out of the taxable income of the estate. This is true even if the beneficiaries agree that a contribution can be made from the estate funds.²⁰⁹

10-13 Texas Tax Issues

Although Texas does not have an income tax, it is possible for someone to die and for his or her survivors to face tax issues with state, county, or municipal authorities in Texas. It therefore behooves the personal representative—and the attorney representing him or her—to quickly try to settle these tax issues.

10-13:1 Property Tax Issues

The most common local tax issue decedents leave behind is the property tax. Decedents typically owe real property taxes. If the decedent's home is encumbered by a mortgage, the mortgage holder will settle the tax bill. But if the home is not encumbered by a mortgage, it is the responsibility of the personal representative to contact the county tax assessor or county appraisal district and settle any outstanding property tax liability.

In the event the decedent was a sole proprietor or the sole shareholder in an LLC or otherwise was the owner of a business enterprise, it would be quite likely that he or she also owed personal property taxes at the time of his or her demise. Once again, a visit to the county tax assessor or county appraisal district should lead to a resolution of these outstanding tax issues.

10-13:2 Taxes Administered by Texas Comptroller of Public Accounts

The Texas Comptroller of Public Accounts administers 60 separate taxes, fees, and assessments in the state of Texas, including sales taxes collected on behalf of more than 1,400 cities, counties, and other local governments around the state. The Comptroller also administers the franchise tax, motor vehicle taxes, and sales and use tax. If the decedent operated any type of business, the personal representative and his or her attorney should make an inquiry of the Office of the Texas Comptroller of Public

²⁰⁷ 26 U.S.C. § 163.

²⁰⁸ 26 U.S.C. § 170(a), (b).

²⁰⁹ 26 U.S.C. § 642(c)(1).

Accounts to determine whether the decedent died owing any taxes. If the decedent dies owing any such taxes, the personal representative (using estate funds) must settle these liabilities.

10-14 Federal Wealth Transfer Taxes

There was a time when the federal wealth transfer taxes—the gift, estate, and generation-skipping transfer taxes—were of much concern to many Americans. In those days, the unified credit—that is, the amount of assets that each person is allowed to gift to other parties without having to pay gift, estate, or generation-skipping transfer taxes—was significantly lower than it is today. Currently, the credit is very high. In 2019, for example, the credit was \$11.4 million.²¹⁰ The figure will be higher in 2020. The net effect is that few, if any people, currently pay the federal wealth transfer taxes. This may be good news to Texas, because Texas does not impose an inheritance tax either. Accordingly, any property someone living in Texas receives from a Texas decedent is received free of any wealth transfer taxation.

10-15 Conclusion

Death is indeed a word that evokes strong emotions. But so, too, is its opposite—survival. When an elderly person dies, his or her survivor—who is most likely also an elderly person—has to figure out how to close that phase of life that included the decedent, and how to survive without him or her. While he or she is still trying to figure that out, though, the survivor has to undertake several tasks to ensure a smooth transition from one phase of life to the next. An attorney versed in the knowledge of what to do when death strikes will go a long way toward providing some comfort and a sense of stability to the survivor.

²¹⁰ 26 U.S.C. § 2010(c).