Mineral Title: Distribution Through Testate and Intestate Estates

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Relevant Vocabulary

Dead person is the "decedent."

Does the decedent die with or without a will?

Intestate: decedent who died without a will.

Testate: decedent who died with a will.

Heir: TECHNICALLY, someone who, under the intestacy statutes, is entitled to receive property of an intestate decedent

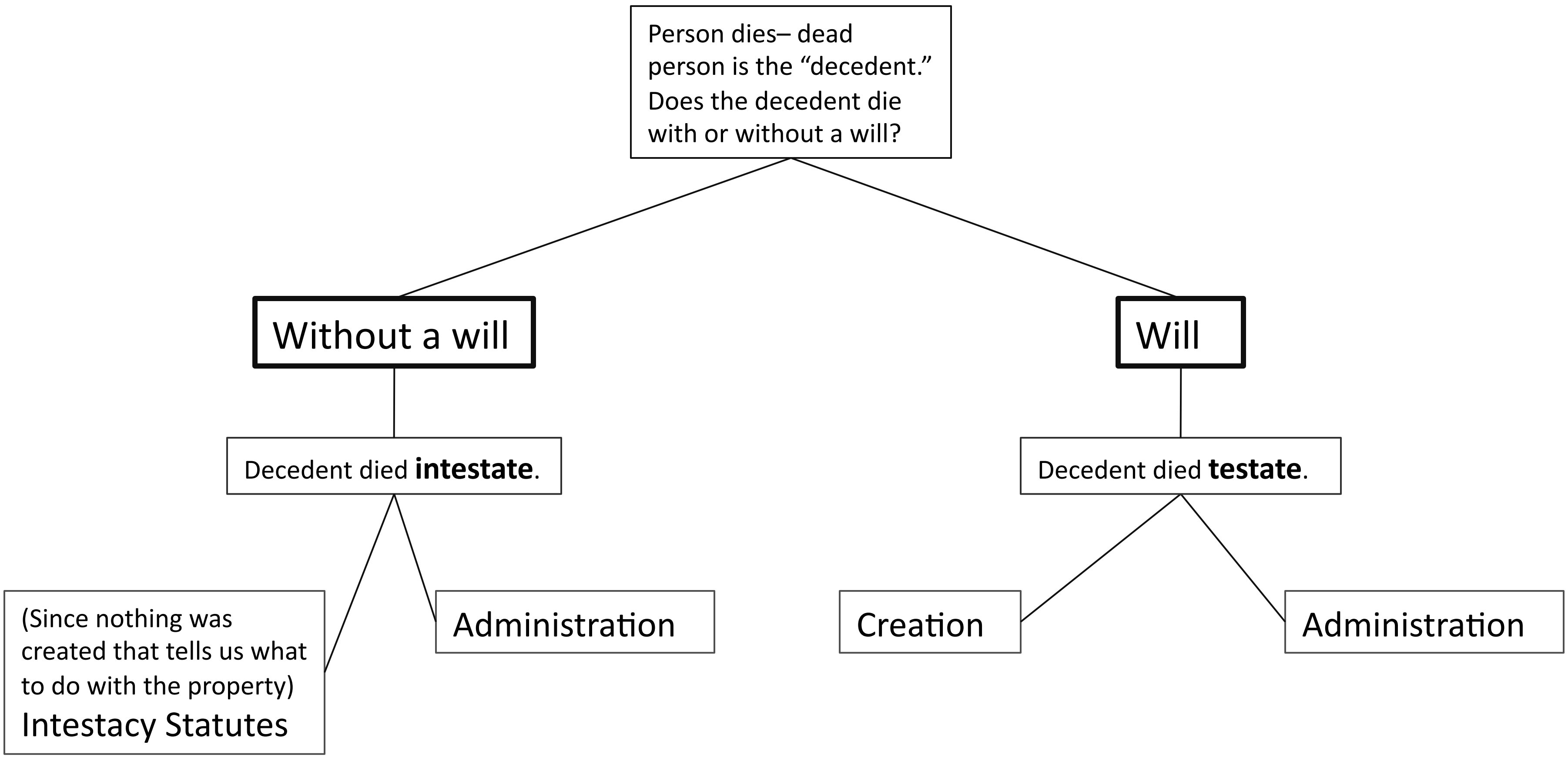
But, "heir" is also used LOOSELY sometimes , in some jurisdictions, just to describe a person who inherits property (real or personal) , regardless of whether it was under a will or through intestacy.
-Black's Law Dictionary (2004).

Legatee: TECHNICALLY, someone who is named in a will to take PERSONAL property. LOOSELY, is sometimes used to describe someone who receives REAL property under a will, too.

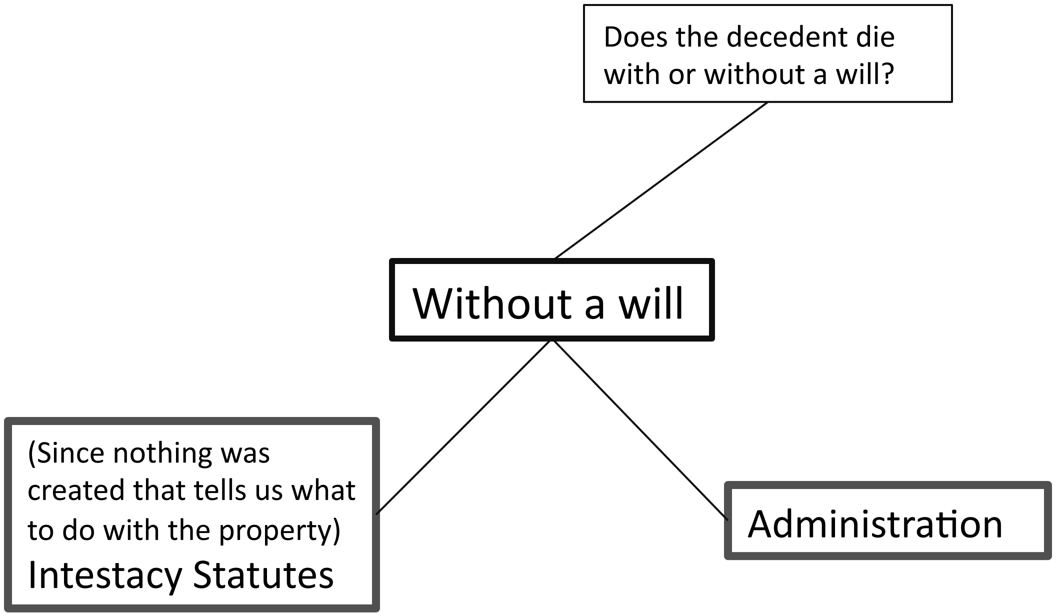
General Legatee: what he receives is paid out of the estate's probate assets
Specific Legatee: bequest comes out of personal property transferred by owner's death.
Residuary Legatee: is the person named in a will who takes the property that remains after the (other) legatees– the residue of a decedent's estate.

Devisee: someone who receives property by will. (Note that *if* "legatee" is used in the loose sense, a legatee and a devisee are the same thing!)

So, it follows that a **Residuary Devisee** is the person named in a will who takes the property that remains after the (other) devises.


Person dies– dead person is the "decedent." Does the decedent die with or without a will?
Without a will
Will
Decedent died **intestate**.
Decedent died **testate**.
(Since nothing was created that tells us what to do with the property) Intestacy Statutes
Administration
Creation
Administration

Where we are:



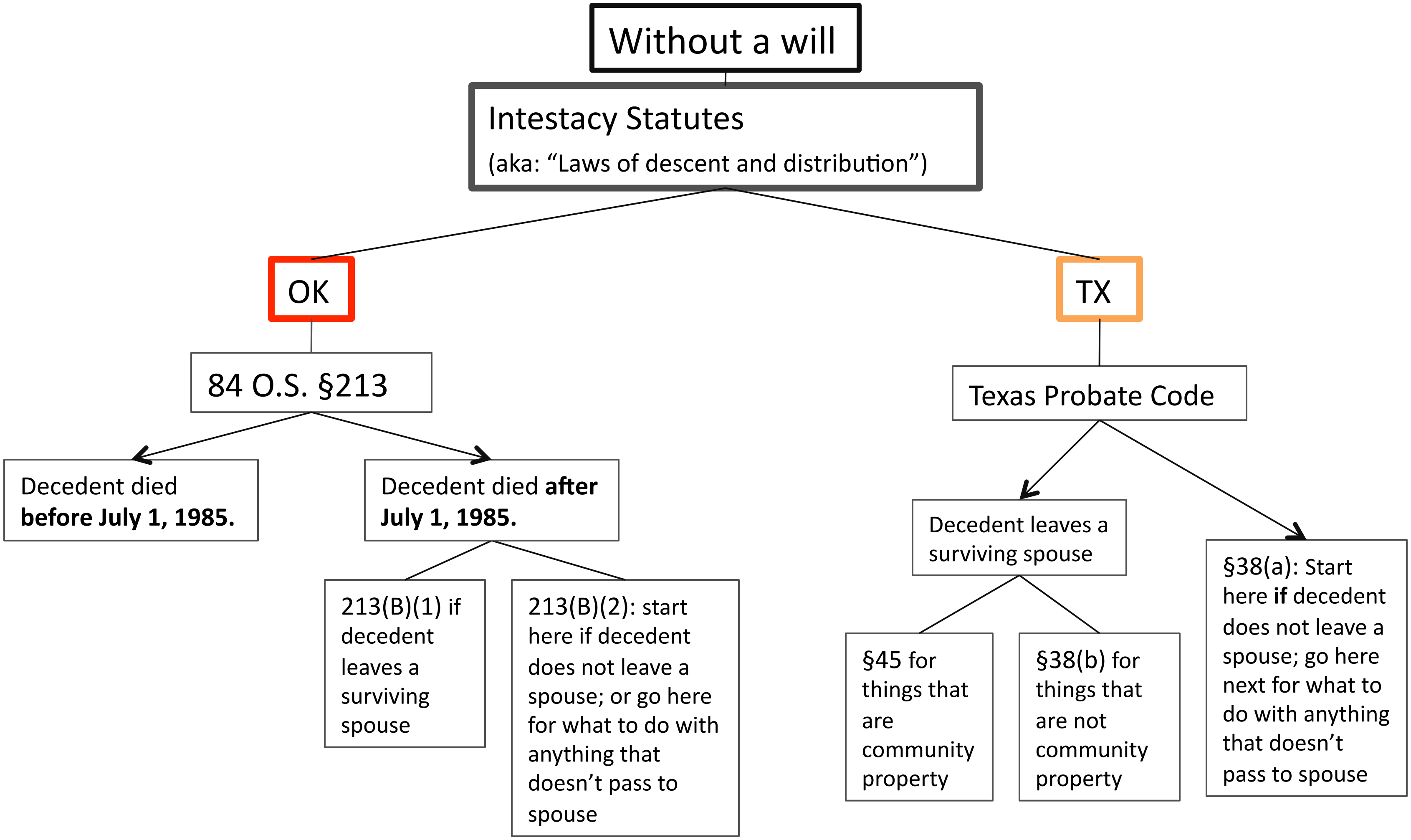
Section I. Intestate Estates

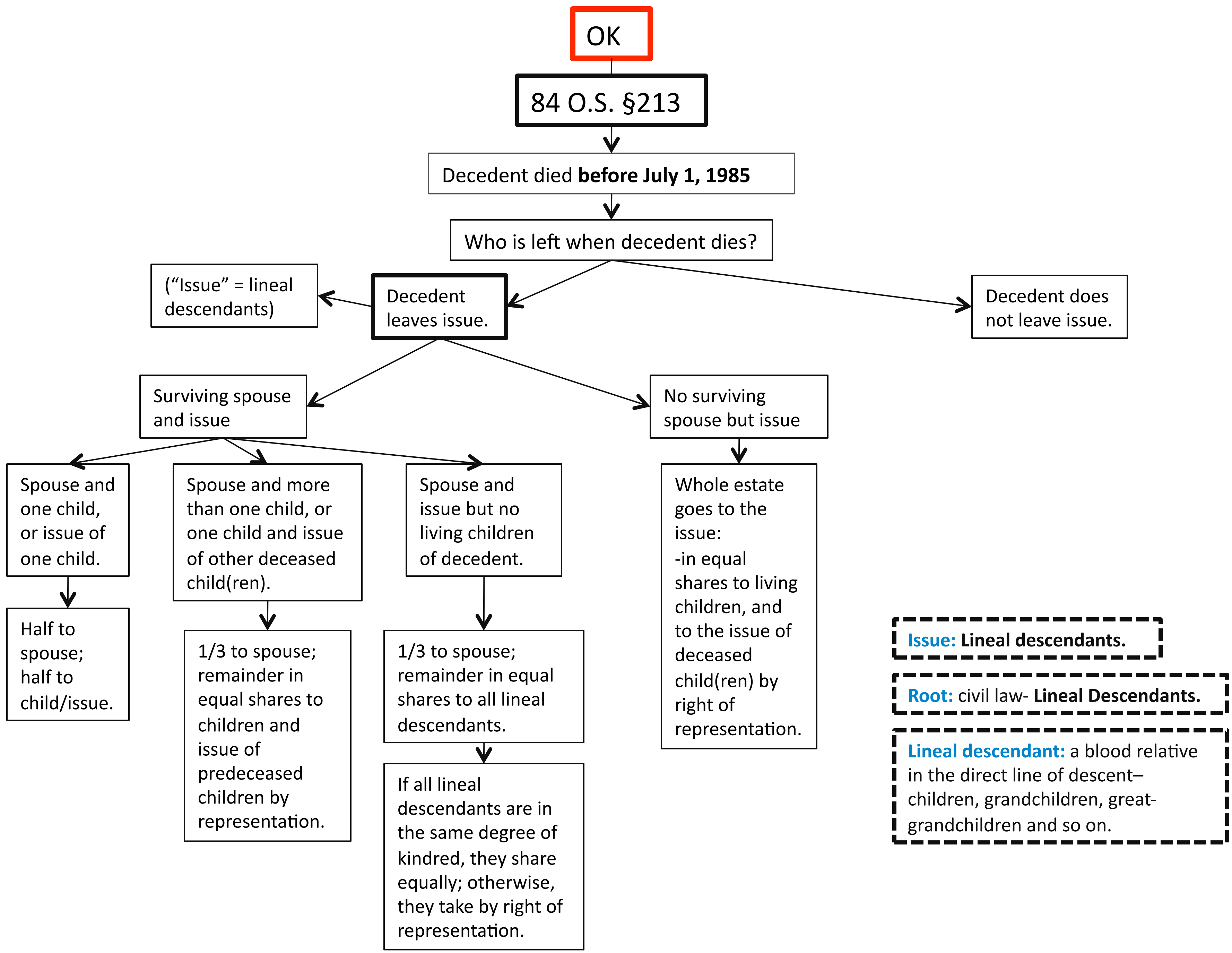
Intestate: 1. Of or relating to a person who died without a valid will; 2. of or relating to the property owned by a person who died without a valid will (intestate estate).

Intestate Succession: The method used to distribute property owned by a person who dies without a valid will.

I. Intestate Estates

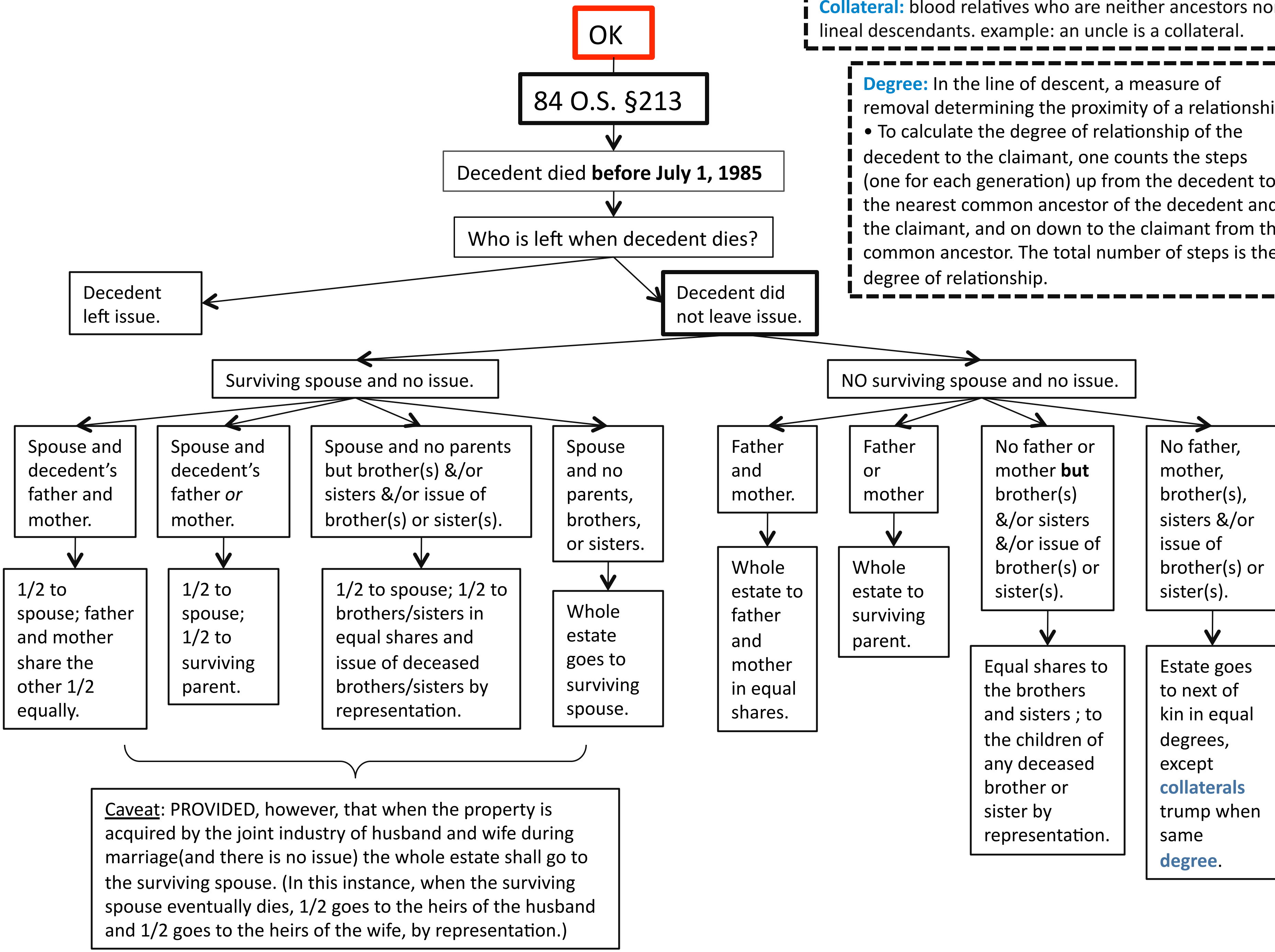
a. Laws Related to Intestate Distribution

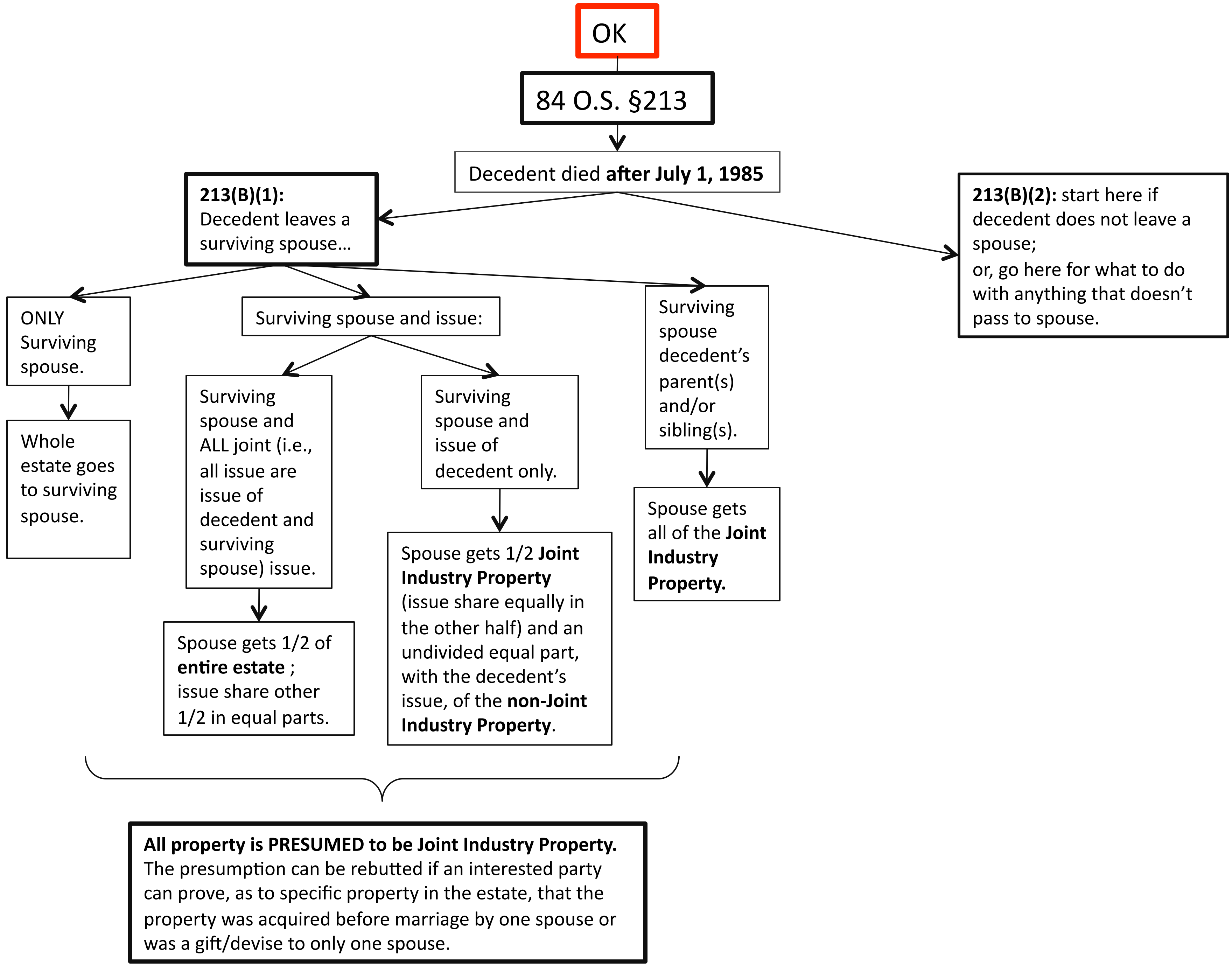


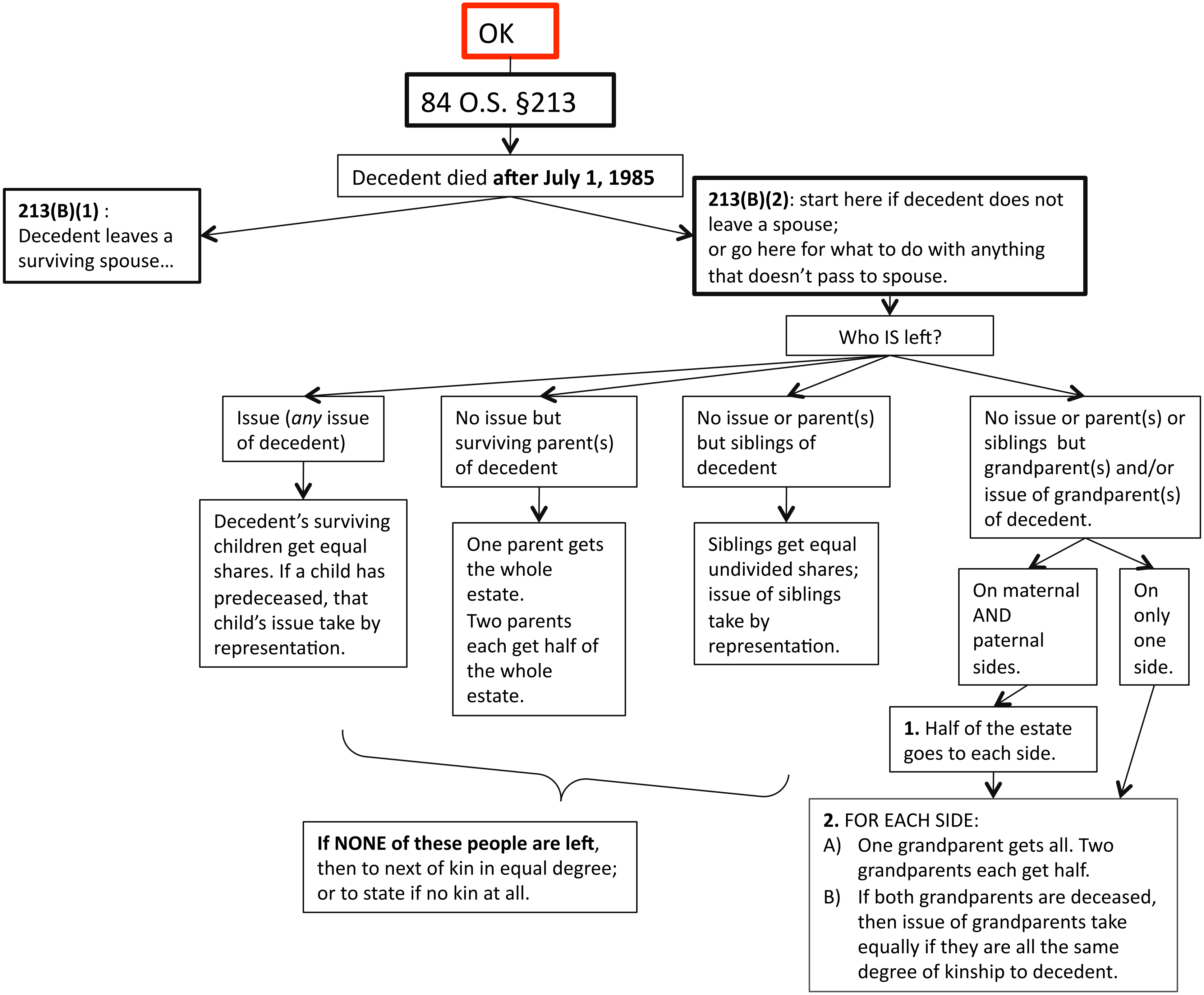

OK
84 O.S. §213
Decedent died before July 1, 1985
Who is left when decedent dies?
("Issue" = lineal descendants)
Decedent leaves issue.
Decedent does not leave issue.
Surviving spouse and issue
No surviving spouse but issue
Spouse and one child, or issue of one child.
Spouse and more than one child, or one child and issue of other deceased child(ren).
Spouse and issue but no living children of decedent.
Whole estate goes to the issue: -in equal shares to living children, and to the issue of deceased child(ren) by right of representation.
Half to spouse; half to child/issue.
1/3 to spouse; remainder in equal shares to children and issue of predeceased children by representation.
1/3 to spouse; remainder in equal shares to all lineal descendants.
If all lineal descendants are in the same degree of kindred, they share equally; otherwise, they take by right of representation.
Issue: Lineal descendants.
Root: civil law- Lineal Descendants.
Lineal descendant: a blood relative in the direct line of descent– children, grandchildren, great-grandchildren and so on.

Collateral: blood relatives who are neither ancestors nor lineal descendants. example: an uncle is a collateral.

Degree: In the line of descent, a measure of removal determining the proximity of a relationship
• To calculate the degree of relationship of the decedent to the claimant, one counts the steps (one for each generation) up from the decedent to the nearest common ancestor of the decedent and the claimant, and on down to the claimant from the common ancestor. The total number of steps is the degree of relationship.




OK
84 O.S. §213
Decedent died **after July 1, 1985**
213(B)(1): Decedent leaves a surviving spouse…
213(B)(2): start here if decedent does not leave a spouse; or, go here for what to do with anything that doesn't pass to spouse.
ONLY Surviving spouse.
Whole estate goes to surviving spouse.
Surviving spouse and issue:
Surviving spouse and ALL joint (i.e., all issue are issue of decedent and surviving spouse) issue.
Spouse gets 1/2 of **entire estate** ; issue share other 1/2 in equal parts.
Surviving spouse and issue of decedent only.
Spouse gets 1/2 **Joint Industry Property** (issue share equally in the other half) and an undivided equal part, with the decedent's issue, of the **non-Joint Industry Property**.
Surviving spouse decedent's parent(s) and/or sibling(s).
Spouse gets all of the **Joint Industry Property.**
All property is PRESUMED to be Joint Industry Property. The presumption can be rebutted if an interested party can prove, as to specific property in the estate, that the property was acquired before marriage by one spouse or was a gift/devise to only one spouse.


OK
84 O.S. §213
Decedent died **after July 1, 1985**
213(B)(1) : Decedent leaves a surviving spouse…
213(B)(2): start here if decedent does not leave a spouse; or go here for what to do with anything that doesn't pass to spouse.
Who IS left?
Issue (*any* issue of decedent)
Decedent's surviving children get equal shares. If a child has predeceased, that child's issue take by representation.
No issue but surviving parent(s) of decedent
One parent gets the whole estate. Two parents each get half of the whole estate.
No issue or parent(s) but siblings of decedent
Siblings get equal undivided shares; issue of siblings take by representation.
No issue or parent(s) or siblings but grandparent(s) and/or issue of grandparent(s) of decedent.
On maternal AND paternal sides.
On only one side.
1. Half of the estate goes to each side.
2. FOR EACH SIDE:
A) One grandparent gets all. Two grandparents each get half.
B) If both grandparents are deceased, then issue of grandparents take equally if they are all the same degree of kinship to decedent.
If NONE of these people are left, then to next of kin in equal degree; or to state if no kin at all.

Per Capita: (usually) **per stirpes**
Per Stirpes: (Latin: "by roots or stocks") Proportionate division between beneficiaries according to their deceased ancestor's share.

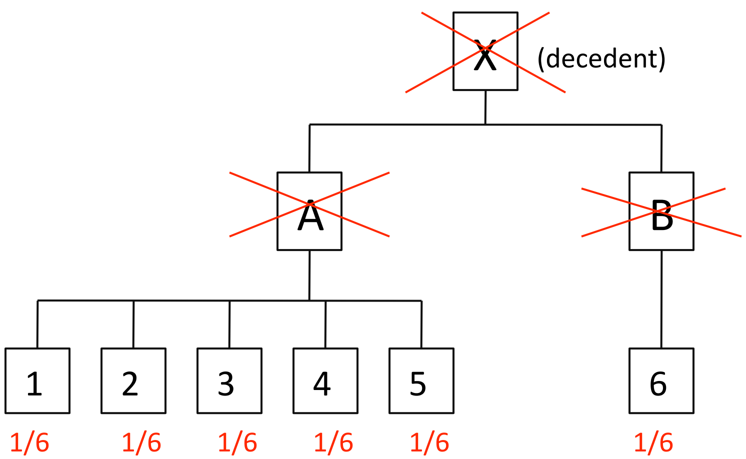
OK

"Representation" means...

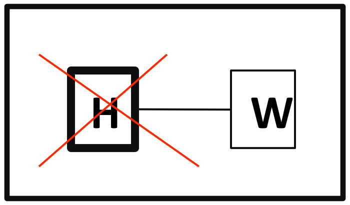
Oklahoma has basically adopted a modified per stirpes approach.

<u>3 steps:</u>
1. Go to the first generation (following the decedent) with at least one living member.
2. In that generation, count the number of living roots.
3. Allocate a share and divide down if necessary.

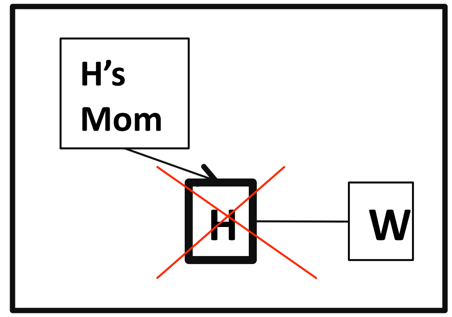
Example:



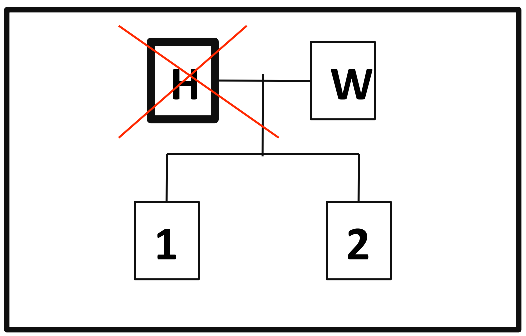
Intestate Estates- Examples
(ALL post-1985)



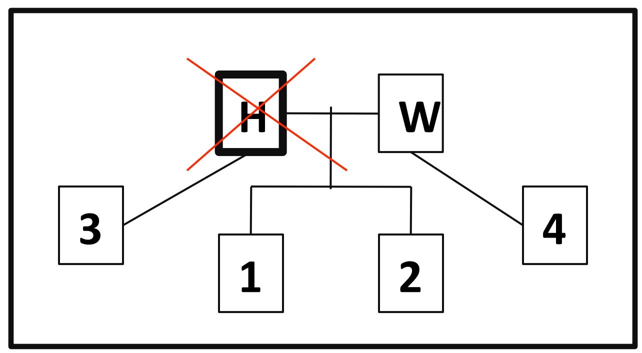
Wife takes ALL!
(No issue; no surviving decedent's parent.)



Wife takes all Joint Industry Property (JIP) and 1/3 non-JIP. Decedent's mom gets 2/3 non-JIP.



Wife takes 1/2 JIP and an 1/3 (undivided equal part with 1 and 2) of non-JIP.
1 and 2 each take 1/4 JIP and 1/3 non-JIP.

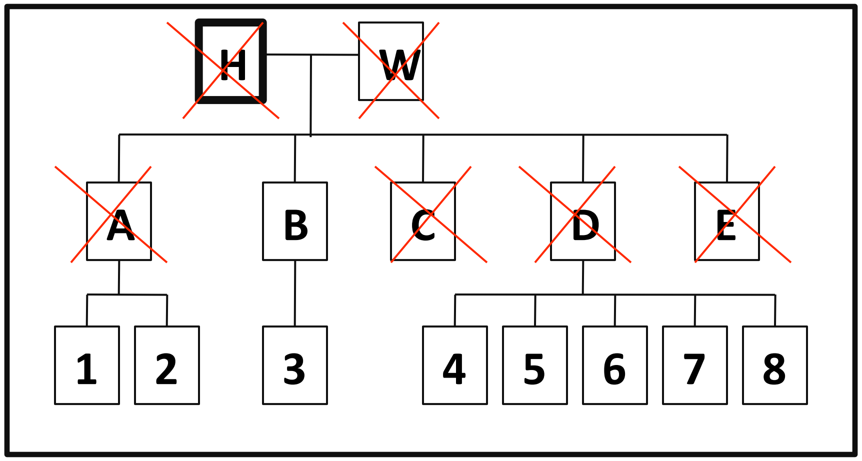


Wife takes 1/2 JIP and 1/4 (undivided equal part with 1, 2, and 3) non-JIP.
1, 2, and 3 each take 1/6 JIP and 1/4 non-JIP.
4 (not issue of decedent) takes nothing.

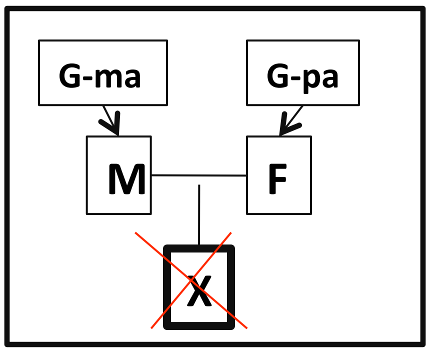
Intestate Estates- More Examples (ALL post-1985)

Root: civil law- **Lineal Descendants.**

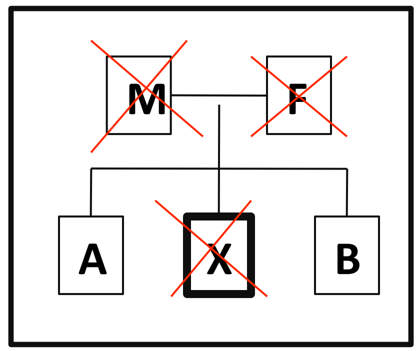
Lineal descendant: a blood relative in the direct line of descent– children, grandchildren, great-grandchildren and so on.



The child (of decedent) generation DOES have at lease one living member: B. Thus, we go to the child generation and count the live roots. There are three live roots in the child generation (A's root; B; D's root)– each of those roots gets 1/3. So…
1 and 2 each get 1/6 (1/2 of A's 1/3).
B (still alive) gets 1/3.
4, 5, 6, 7, and 8 each get 1/15 (1/5 of D's 1/3).

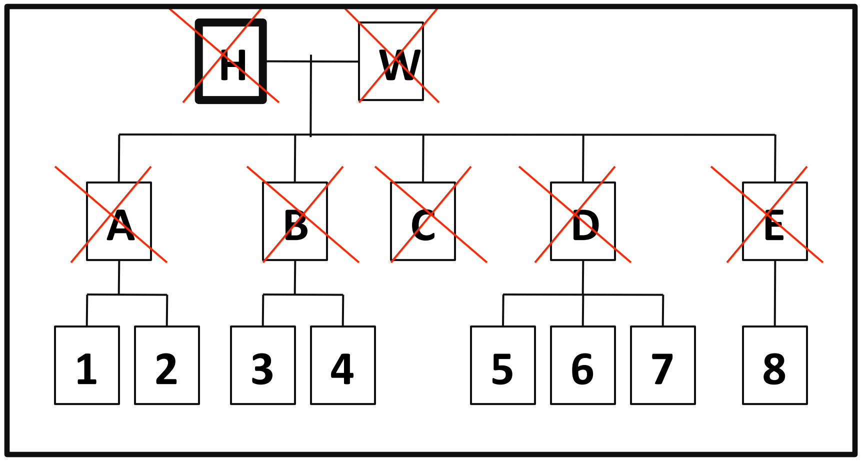


84 O.S. §213(b)(2): Two surviving parents each get half of the decedent's estate– no need to go to grandparents.
M and F each get 1/2.

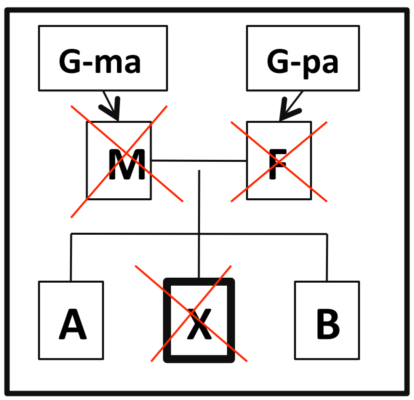


A and B each get 1/2.

Intestate Estates- Even *More* Examples (ALL post-1985)

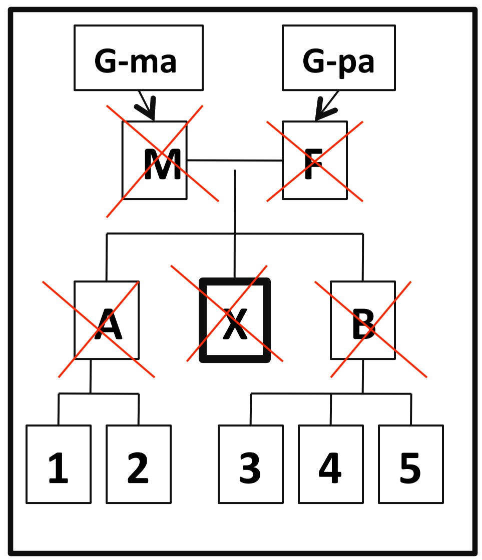


There are no living members in the child generation. So, we go to the grandchild generation because it is the first generation with at least one living member.
The grandchild generation has 8 live roots.
1, 2, 3, 4, 5, 6, 7, and 8 each get 1/8.

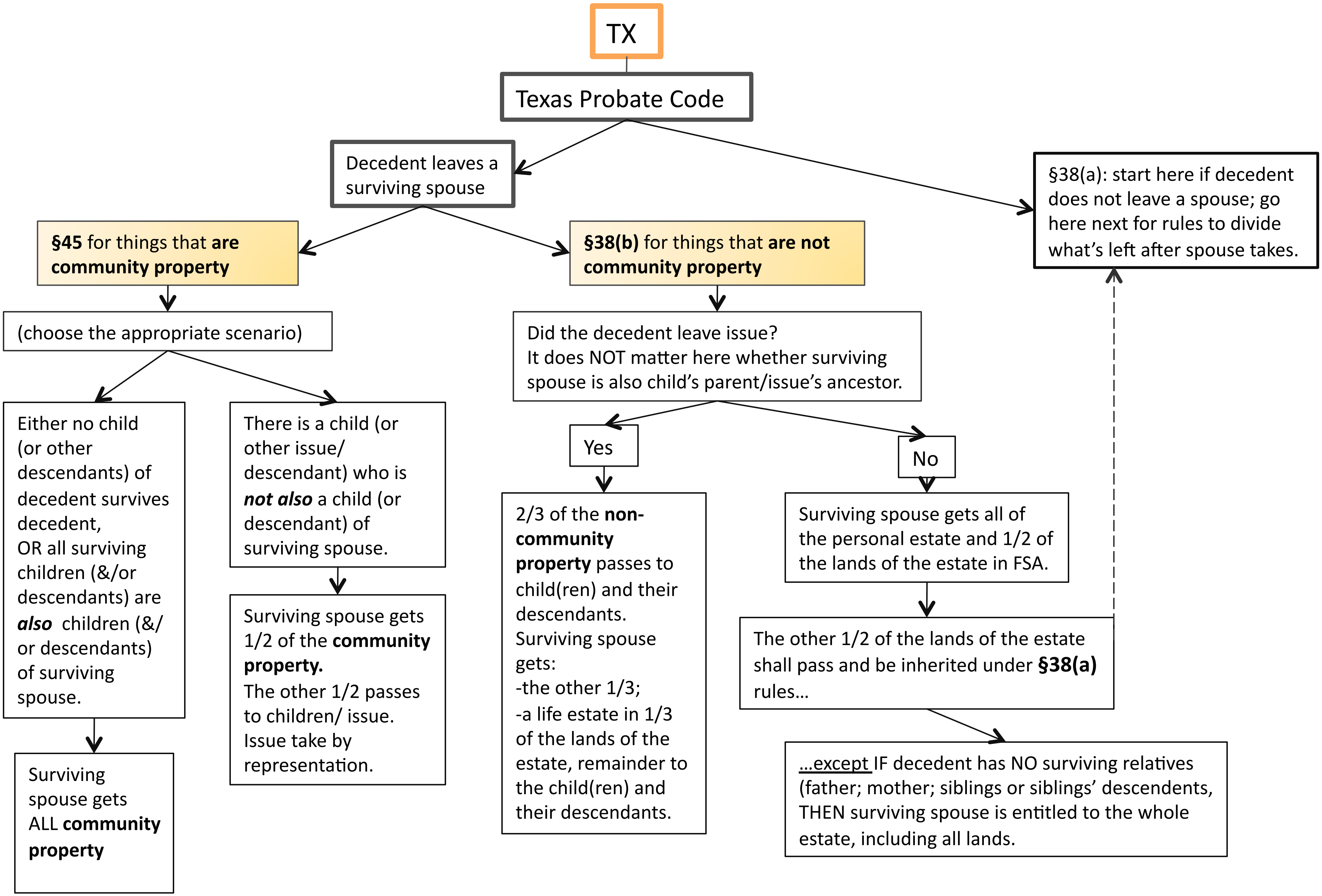


A and B are surviving issue of parents of decedent. Under §213(b)(2), they take over the grandparents (who get nothing).
So, A and B each get 1/2.

<u>WHAT IF</u> M and F had NOT predeceased the decedent? Under §213(b)(2), the parents take before their issue/ decedent's siblings. So, if that was the case,
M and F each get 1/2.



A and B are issue of parents of decedent. They have predeceased, but they left surviving issue. Under §213(b)(2), the issue of issue of parents of decedent take by representation (over the grandparents, who get nothing). So, since the statute says "by representation," we go to the first generation with at least one living member, and then we divide equally among live roots.
Result:
1, 2, 3, 4, and 5 each get 1/5.



ALL property is PRESUMED to be Community property. The presumption can be rebutted by proof that something is separate property.

ALL property is PRESUMED to be Community property. The presumption can be rebutted by proof that something is separate property.

Texas has specific rules about community property. These rules are found in Family Code §3!

Texas Family Code
Title 1: The Marriage Relationship
Subtitle B: Property Rights & Liabilities
Chapter 3: Marital Property Rights & Liabilities
Subchapter A: General Rules for Separate and Community Property

§3.001- Separate Property is:
1) Owned or claimed by a spouse before marriage.
2) Acquired during marriage, BY gift, devise, or descent.
3) Recovered from personal injuries during marriage.

§3.006-
When property is REAL property, **inception of title rule**!

The spouse claiming real property as his or her separate property must show **inception of title** through **1**, **2**, or **3** (above).
Deed from a 3d party to a husband **&** wife raises the presumption that the property deeded is community.
-Dutton v. Dutton, 18 S.W.2d 849 (Tex. App. Eastland 2000).
Property conveyed to **one** spouse during the marriage is also presumed to be community; spouse conveyed to has burden to rebut the presumtion.

§3.002- Community Property is:
Community property consists of the property, other than separate property, acquired by either spouse during marriage.

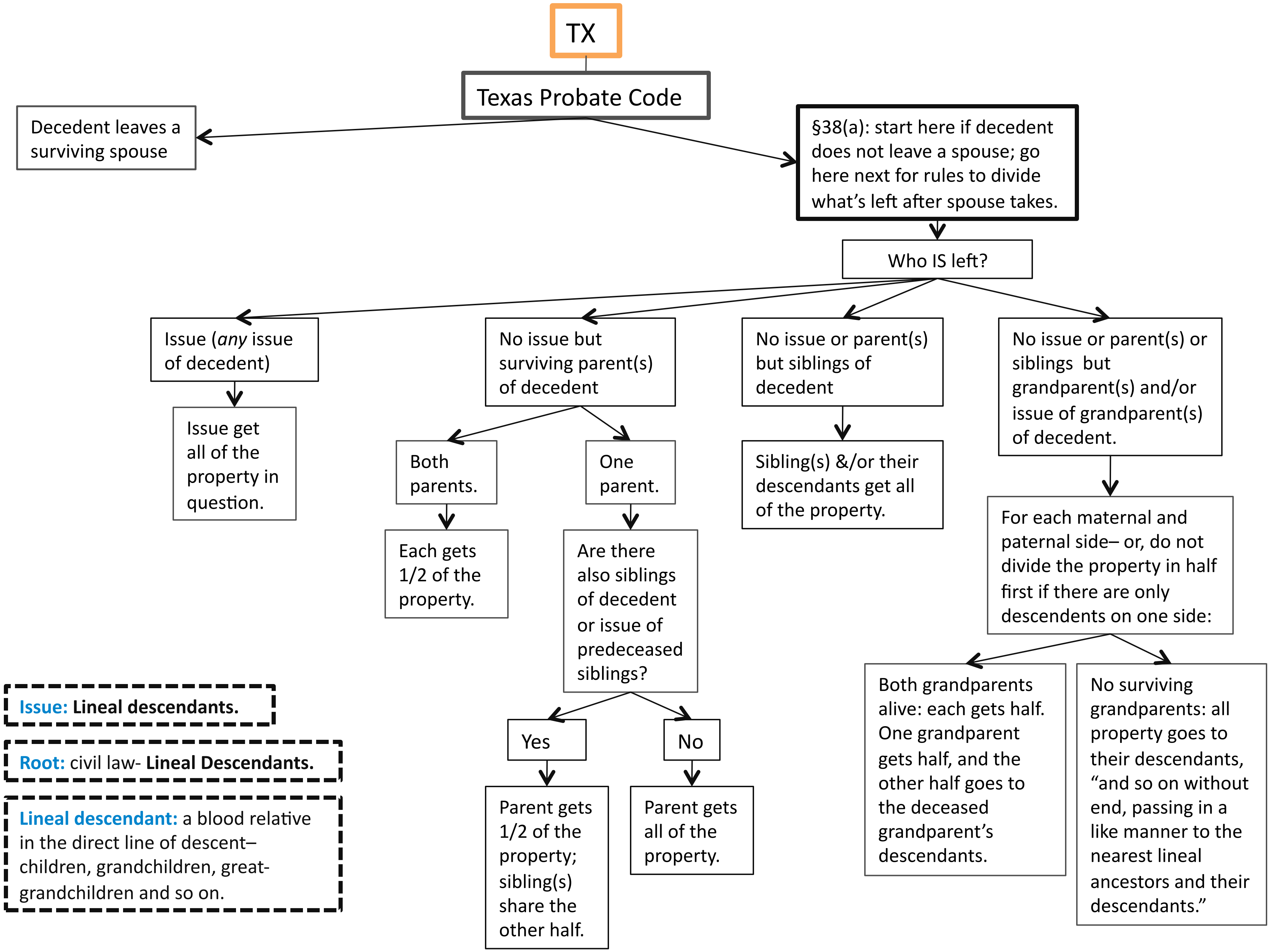
§3.003-
(a) property possessed by either spouse on dissolution of marriage is presumed to be community.
(b) clear and convincing evidence is required to establish property as separate.

§3.004-
(a) A subscribed and acknowledged schedule of spouse's separate property may be recorded in the deed records of the county in which at least one of the parties resides.
(b) to be constructive notice to a good faith purchaser, though, schedule must also be recorded in county where property is located.

§3.005- If one spouse makes a gift to the other…
The gift is presumed to include all the income and property that may *arise from* the property that is the gift.

Burden of proof is on the party claiming that a gift was made– they must prove this by clear and convincing evidence. –Hayes v. Rinehart, 65 S..3d 286 (Tex. Civ. App. Eastland 2001).

§§3.007 and 3.008-
What to do with Employee Benefits and Insurance Proceeds


TX
Texas Probate Code
Decedent leaves a surviving spouse
§38(a): start here if decedent does not leave a spouse; go here next for rules to divide what's left after spouse takes.
Who IS left?
Issue (*any* issue of decedent)
Issue get all of the property in question.
No issue but surviving parent(s) of decedent
Both parents.
Each gets 1/2 of the property.
One parent.
Are there also siblings of decedent or issue of predeceased siblings?
Yes
Parent gets 1/2 of the property; sibling(s) share the other half.
No
Parent gets all of the property.
No issue or parent(s) but siblings of decedent
Sibling(s) &/or their descendants get all of the property.
No issue or parent(s) or siblings but grandparent(s) and/or issue of grandparent(s) of decedent.
For each maternal and paternal side– or, do not divide the property in half first if there are only descendents on one side:
Both grandparents alive: each gets half. One grandparent gets half, and the other half goes to the deceased grandparent's descendants.
No surviving grandparents: all property goes to their descendants, "and so on without end, passing in a like manner to the nearest lineal ancestors and their descendants."
Issue: Lineal descendants.
Root: civil law- **Lineal Descendants.**
Lineal descendant: a blood relative in the direct line of descent– children, grandchildren, great-grandchildren and so on.

TX

Texas Probate Code

If decedent dies intestate and has absolutely no heirs, refer to Texas Property Code.

Texas Property Code says: if an individual dies without heirs, real and personal property is subject to escheat. **§71.001(b)**: "escheat" means vesting of title to property in the state in an escheat proceeding.

§71.004: An individual is presumed to have died without heirs if for the 7 year period preceding court's determination:
(1) a lawful claim to individual's property has not been asserted, AND
(2) a lawful act of ownership on individual's property has not been exercised.

The right of the state to bring an escheat proceeding depends on whether there has been exercise of reasonable diligence to discover claimants of the estate.
-87 S.W.2d 297

If diligence is not used, heir can later bring suit for escheated property.

§71.303: suit for escheated real property

TX

"Representation" means…

Decedent died before Sept. 1, 1991

"An estate of a person who dies before the effective date of the Act (of 1991) is covered by the law as it existed when the person died, and the former law is continued in effect for that purpose."

Texas Act of 1840: consensus seems to be strict per stirpes approach, no matter who is left.

At some point, though, change to per stirpes/ per capita hybrid.

Other historic statutes mentioned: Texas Revised Civil Statutes, Articles 1652 (1879); 1695 (1895); 2468 (1911); 2577 (1925).

Case referencing Article 2577: ***Peters v. Clancy*, 192 S.W.2d 937 (Tex Civ. App. 1946).** In the case, all of the intestate decedent's heirs were nieces and nephews, related to him in the second degree. The court read Revised Civil Statutes Article 2577 to mandate per capita distribution (just like the 1991 revision) when the only surviving heirs who will take are related to the decedent in the same degree.

Decedent died on or after Sept. 1, 1991

Texas Probate Code §43

Who survives the decedent?

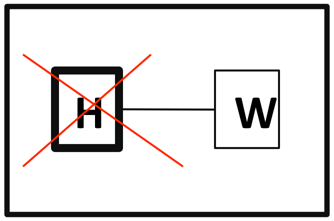
If all surviving heirs are related to the decedent in the same degree, they take per capita.

If there are surviving heirs in different degrees, use per stirpes: "the descendants of those who have predeceased shall inherit only such portion of such property as the parent through whom they inherit would be entitled to if alive."

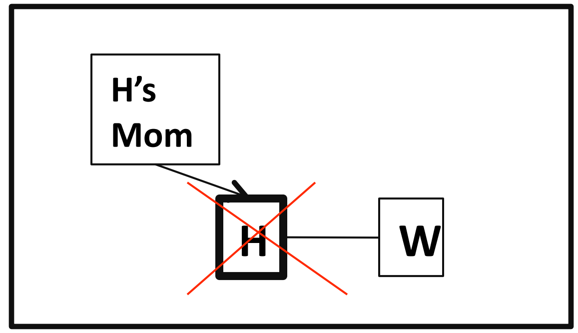
Example: If all of decedent's children are dead when decedent dies, and 8 grandchildren are the heirs, they all take the same amount as each other– ie, they do NOT split with sibling(s) the share their parent would have had– it does not matter which child of the decedent their parent was.

Degree: In the line of descent, a measure of removal determining the proximity of a relationship • To calculate the degree of relationship of the decedent to the claimant, one counts the steps (one for each generation) up from the decedent to the nearest common ancestor of the decedent and the claimant, and on down to the claimant from the common ancestor. The total number of steps is the degree of relationship.

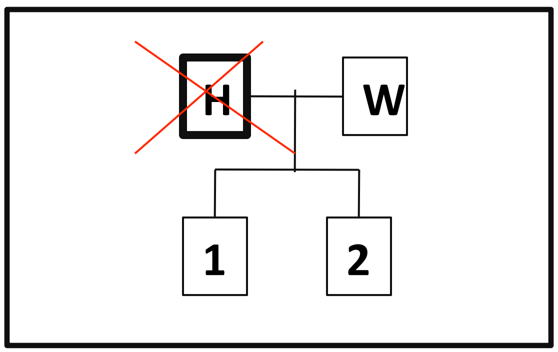
Intestate Estates- Examples



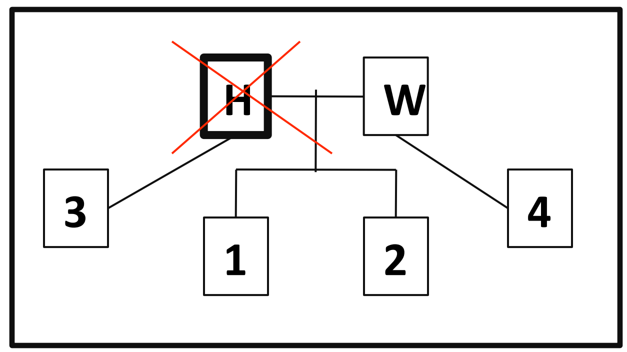
Community Property: wife takes all.
Non-Community Property: since surviving wife is the ONLY heir, wife also gets all of the non-Community Property. Ie, same result as Oklahoma– wife takes whole estate.



Community Property: wife takes all.
Non-Community Property: wife takes all of personal estate and 1/2 of lands. Decedent's mom gets the other 1/2 of the non-Community Property lands.

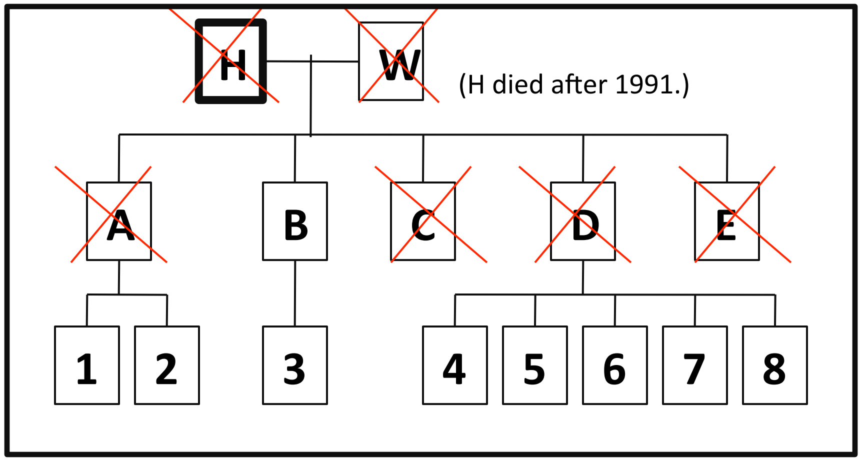


Community Property: all surviving children are also children of the surviving spouse, so wife takes all.
Non-Community Property:
1 and 2 get 2/3 of the non-community property. Wife gets the other 1/3, plus a life estate in 1/3 of the lands of the estate (remainder to 1 and 2).



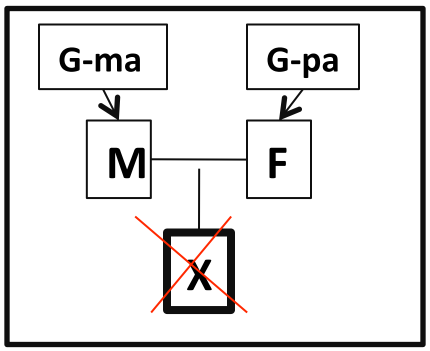
Community Property: Wife takes 1/2; 3 (child of decedent who is not child of surviving spouse) takes the other 1/2.
Non-Community Property: Wife takes 1/3, plus a life estate in 1/3 of the lands of the estate, (remainder to 1,2, and).
1, 2, and 3 each take 1/3 of the other 2/3– 2/9 each.

Intestate Estates- More Examples

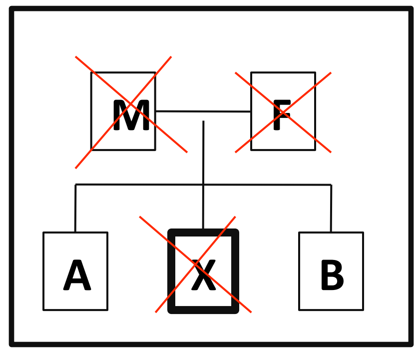


Community Property/Non-Community Property: the distinction is irrelevant because there is no surviving spouse.

There are surviving heirs in different degrees, so the heirs take through per stirpes representation:
B takes 1/3.
1 and 2 each take 1/6.
4, 5, 6, 7, and 8 each take 1/15.

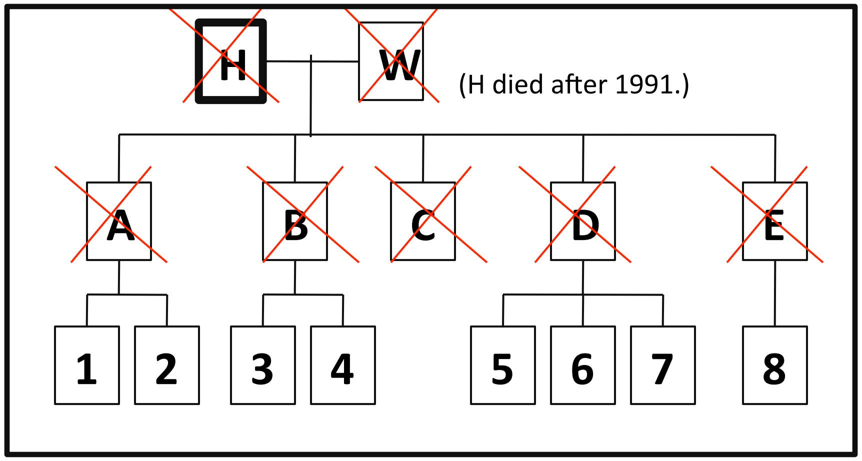


M and F each get 1/2.

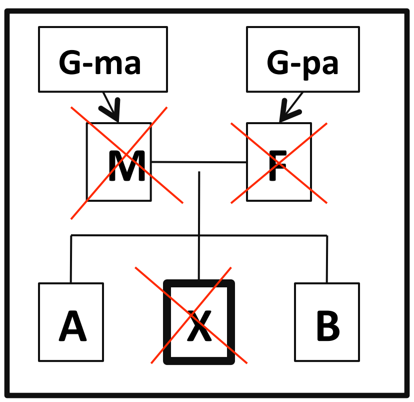


A and B each get 1/2.

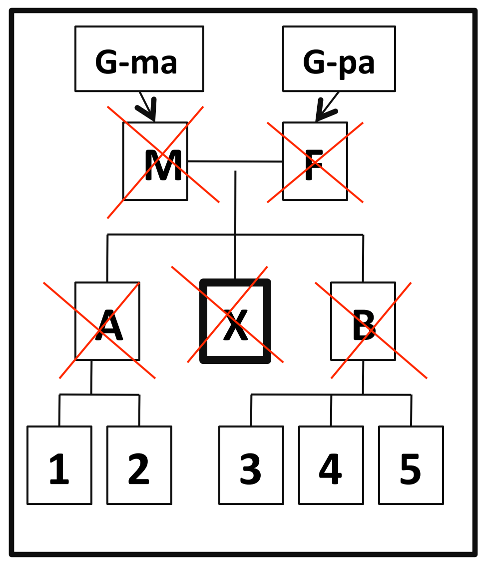
Intestate Estates- Even *More* Examples



All of the surviving heirs are related to the decedent in the same degree, so the heirs take through per capita representation.
1, 2, 3, 4, 5, 6, 7, and 8 each take 1/8.



Probate Code §38(a) gives issue of decedent's parents priority over decedent's grandparents. So, A and B each take 1/2.



(X died after 1991.)

Issue of decedent's parents have priority over decedent's grandparents. Here, all of the heirs are related to the decedent in the same degree, so they take per capita.
1, 2, 3, 4, and 5 each take 1/5.

Without a will

Administration

OK

58 O.S. § 122. Persons entitled to letters of administration
WHO will be the administrator?

58 O.S. § 133. Proof of death intestate
(Before someone can be the administrator, it must be proved that the decedent dies intestate!)

TX

Probate Code §178(b): court grants administration if it deems the granting of administration necessary.

§37: If it is necessary and an administrator is appointed, the administrator has the right to possession and holds the estate to be disposed of in accordance with the law.

§180:
IF the court finds that NO necessity for administration exists, the court will issue an order saying that.
Effects of the order: …"shall constitute sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, and to persons purchasing or otherwise dealing with the estate, for payment or transfer to the distributees of the decedent, and such distributees shall be entitled to enforce their right to such payment or transfer by suit."

OK

58 O.S. § 122. Persons entitled to letters of administration
Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers or sisters.
5. The grandchildren.
6. The next of kin entitled to share in the distribution of the estate.
7. The creditors.
8. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

58 O.S. § 133. Proof of death intestate
Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court may also examine any other person concerning the time, place and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

Probate: 1. The judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court;
2. Loosely, a personal representative's actions in handling a decedent's estate.

Testate: Having a will left at death.
Testate Succession: The passing of rights or property by will.

Where we are:

Person dies– dead person is the "decedent." Does the decedent die with or without a will?

Will

Creation

2 possible areas where concerns arise:

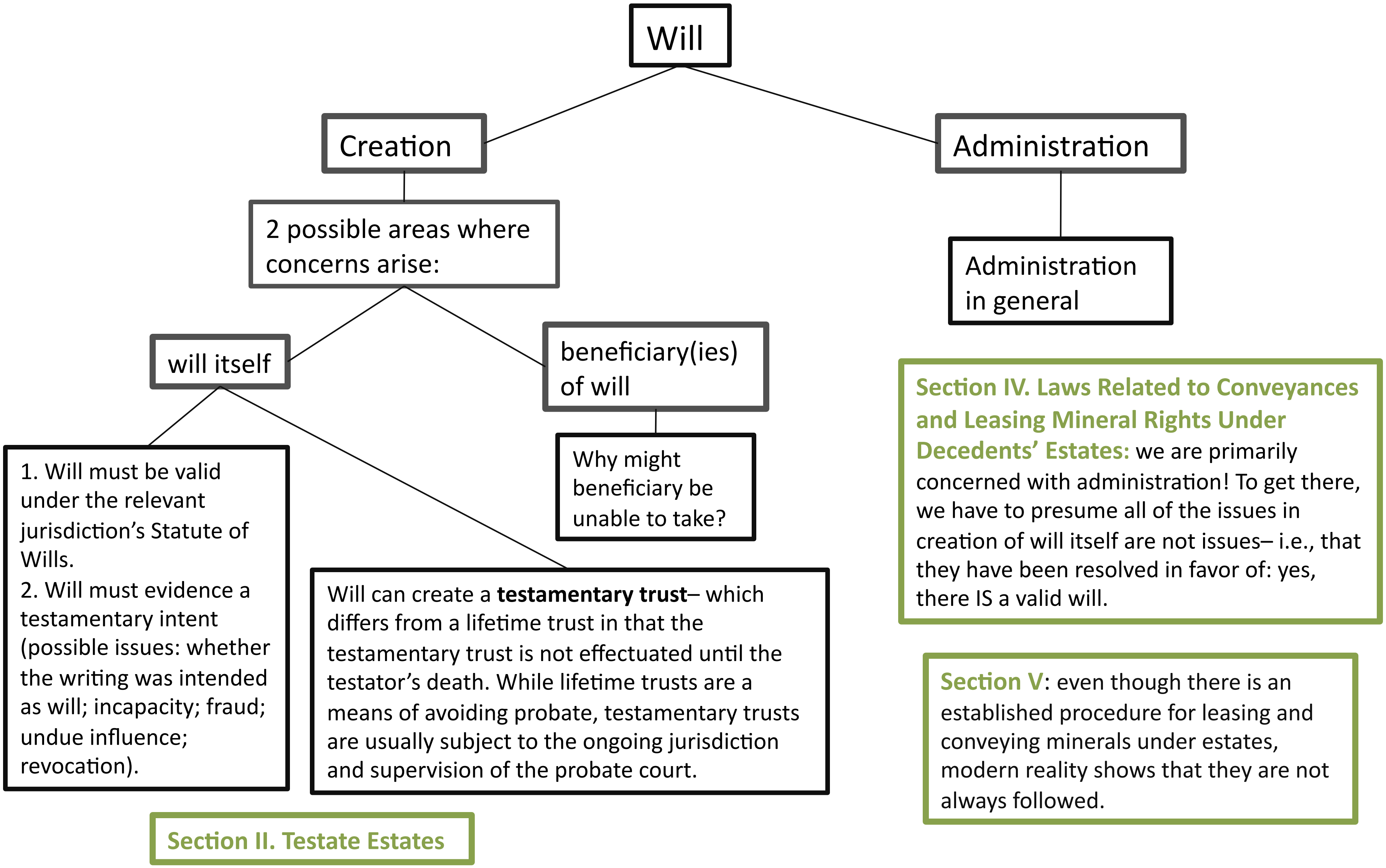
- **will itself**
  1. Will must be valid under the relevant jurisdiction's Statute of Wills.
  2. Will must evidence a testamentary intent (possible issues: whether the writing was intended as will; incapacity; fraud; undue influence; revocation).
- **beneficiary(ies) of will**
  Beneficiary might not be able to take, due to: action of beneficiary; minority; death of beneficiary; disclaimer of beneficiary; conditional bequest.

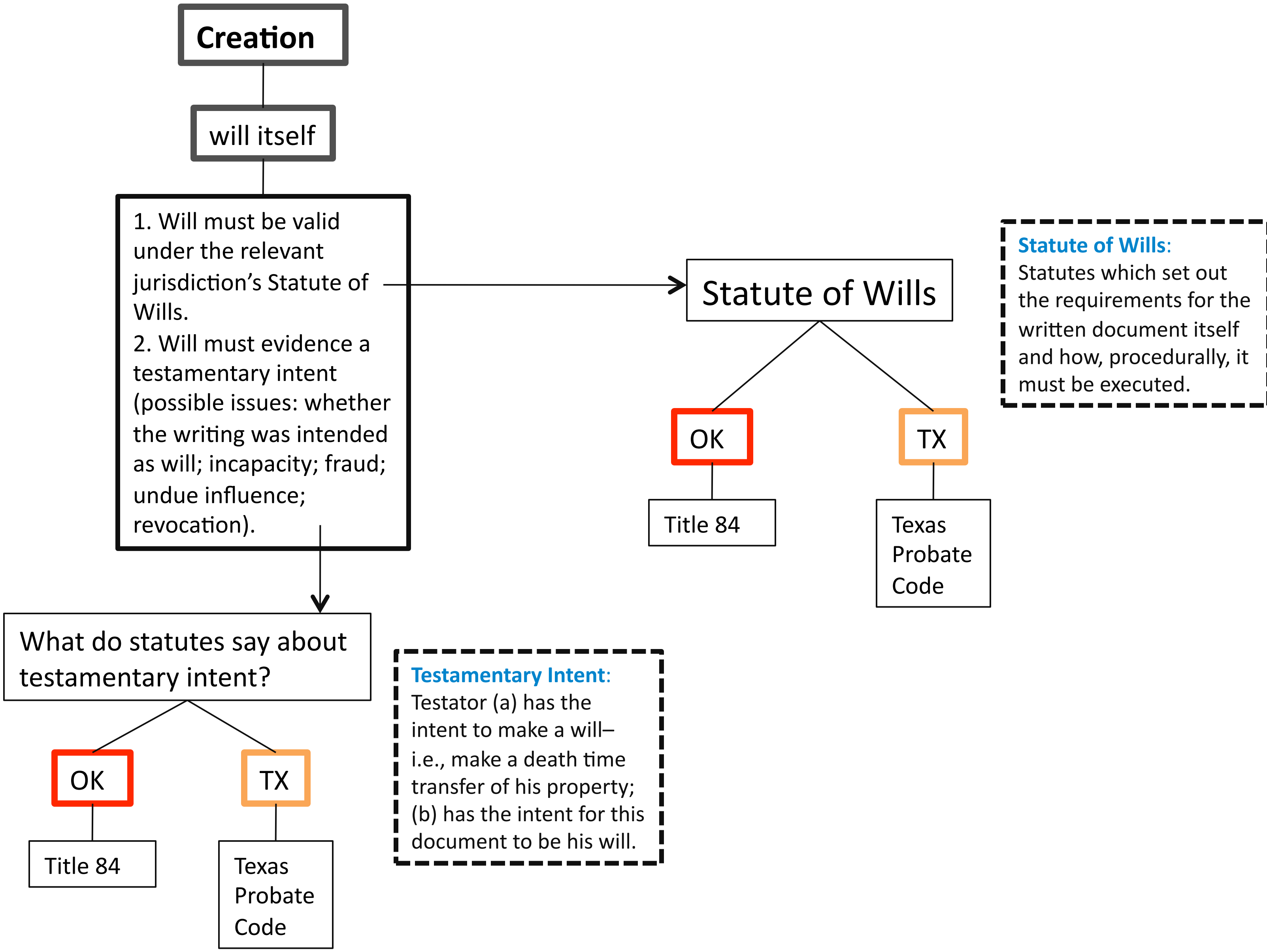
Administration

Procedure– how does it provide for taking out mineral leases?

II. Testate Estates

a. Laws Related to Testate Distribution




Creation
will itself
1. Will must be valid under the relevant jurisdiction's Statute of Wills.
2. Will must evidence a testamentary intent (possible issues: whether the writing was intended as will; incapacity; fraud; undue influence; revocation).
Statute of Wills
OK
Title 84
TX
Texas Probate Code
Statute of Wills: Statutes which set out the requirements for the written document itself and how, procedurally, it must be executed.
What do statutes say about testamentary intent?
OK
Title 84
TX
Texas Probate Code
Testamentary Intent: Testator (a) has the intent to make a will– i.e., make a death time transfer of his property; (b) has the intent for this document to be his will.

Statute of Wills

OK

Title 84

Three different types of wills are possible in Oklahoma: 1. noncupative (oral); 2. holographic; 3. formal ("self-proving").
Requirements for executing a will of each of these varieties:

1.

§46. Nuncupative wills--Requisites
1. The estate bequeathed must not exceed $1,000 in value.
2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator at the time to bear witness that such was his will.
3. The decedent must at the time, have been in actual military service in the field, or doing duty on shipboard at sea.

§51. Nuncupative will need not be in writing
A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities.

2.

§54. Holographic wills--Requisites
A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed.

3.

§55. Formal requisites in execution--Self-proved wills
Every will, other than a nuncupative will, must be in writing; and every will, other than a holographic will and a nuncupative will, must be executed and attested as follows:

§56. Method of witnessing a will
A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.

What do statutes say about testamentary intent?

OK

Title 84

§41. Persons who may make a will--Persons subject to guardianship or conservatorship
A. People over 18 “of sound mind” can make a will.
B. People with a guardian can still make a will, but there are some special rules.

§141. Devise of land gives all testator's estate
Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

§43. Duress, menace, fraud, or undue influence--Revocation
A will or part of a will procured to be made by duress, menace, fraud or undue influence, may be denied probate; and a revocation procured by the same means, may be declared void.

§101. Revocation of wills
Except in the cases in this article mentioned no written will, nor any part thereof, can be revoked or altered otherwise than:
1. By a written will or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,
2. By being burnt, torn, canceled, obliterated or destroyed, with intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

§ 114. Divorce or annulment as revoking will
In the event of either divorce or annulment, the testator's former spouse shall be treated for all purposes under the will as having predeceased the testator. Provided, however, this section shall not apply if the decree of divorce or of annulment is vacated or if the testator remarries his former spouse, or following said divorce or annulment, executes a new will or codicil which is not revoked or held invalid.

Statute of Wills

TX

Texas Probate Code

Two different types of wills are possible in Texas:
1. formal ("self-proving"); 2. holographic.
Requirements for executing a will of each of these varieties:

1.

§59. Requisites of a Will

(a) Will shall be in writing and signed by the testator. If not written wholly in the handwriting of the testator, the will shall be attested to by two or more credible witnesses. To be made self-proving (which means that the witnesses will not have to testify in person at the probate proceedings) by the affidavits of the testator and the attesting witnesses, made before an officer authorized to administer oaths in Texas.

(b) A will with a self-proving affidavit [form included in this statute] subscribed and acknowledged by the testator and subscribed and sworn to by the witnesses would suffice.

(c) A self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise it is not treated differently than a will not self-proved– i.e., a self-proved will may be contested or revoked or amended by a codicil in exactly the same fashion as a will not self-proved.

2.

§60. Exception Pertaining to Holographic Wills.

When the will is written wholly in the handwriting of the testator, the attestation of the subscribing witnesses may be dispensed with .
Such a will may be *made* self-proving at any time during the testator's life by the attachment of an affidavit by the testator to the effect that the instrument is his last will; that he was at least 18 years of age when he executed it; that he was of sound mind; that he has not revoked such instrument.

§ 84. Proof of Written Will Produced in Court

Technically, falls under administration, but explains what it takes to prove the will's execution by the testator in court.

What do statutes say about testamentary intent?

TX

Texas Probate Code

§57. Who may execute a will
Every person who is 18 years (or who is married or a member of the armed forces at the time the will is made) and who is of sound mind, has the power to make a last will and testament, under the rules and limitations prescribed by law.

§88.
(This really falls under administration, but) applicant must prove this to the court to probate a will.

§63. Revocation of Wills
No will in writing, and no clause thereof or devise therein, shall be revoked, except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by the testator destroying or canceling the same, or causing it to be done in his presence.

§88.
Applicant to probate a will must also prove that the will was not revoked by the testator.

Creation

will itself

Will can create a **testamentary trust**– which differs from a lifetime trust in that the testamentary trust is not effectuated until the testator's death. While lifetime trusts are a means of avoiding probate, testamentary trusts are usually subject to the ongoing jurisdiction and supervision of the probate court.

Testamentary trusts are revocable under WILLS LAW: in your jurisdiction, how may a will be revoked?

Statutory authority for creating a testamentary trust:

OK

60 O.S. 175.6(C)

TX

Prop. Code §112.001(3)

Trust-related Vocabulary:
<u>Trustor</u> (aka: settlor; donor; sometimes "testator" *when* it is a testamentary trust)- creates the trust.
<u>Trustee</u>- appointed by trustor as a custodian of trust property.
<u>Beneficiary</u>- will eventually receive trust property. There can be multiple beneficiaries and/or beneficiaries of many different types of interests in the property.

Main issue we are concerned with: **what are the trustee's powers under the testamentary trust**?

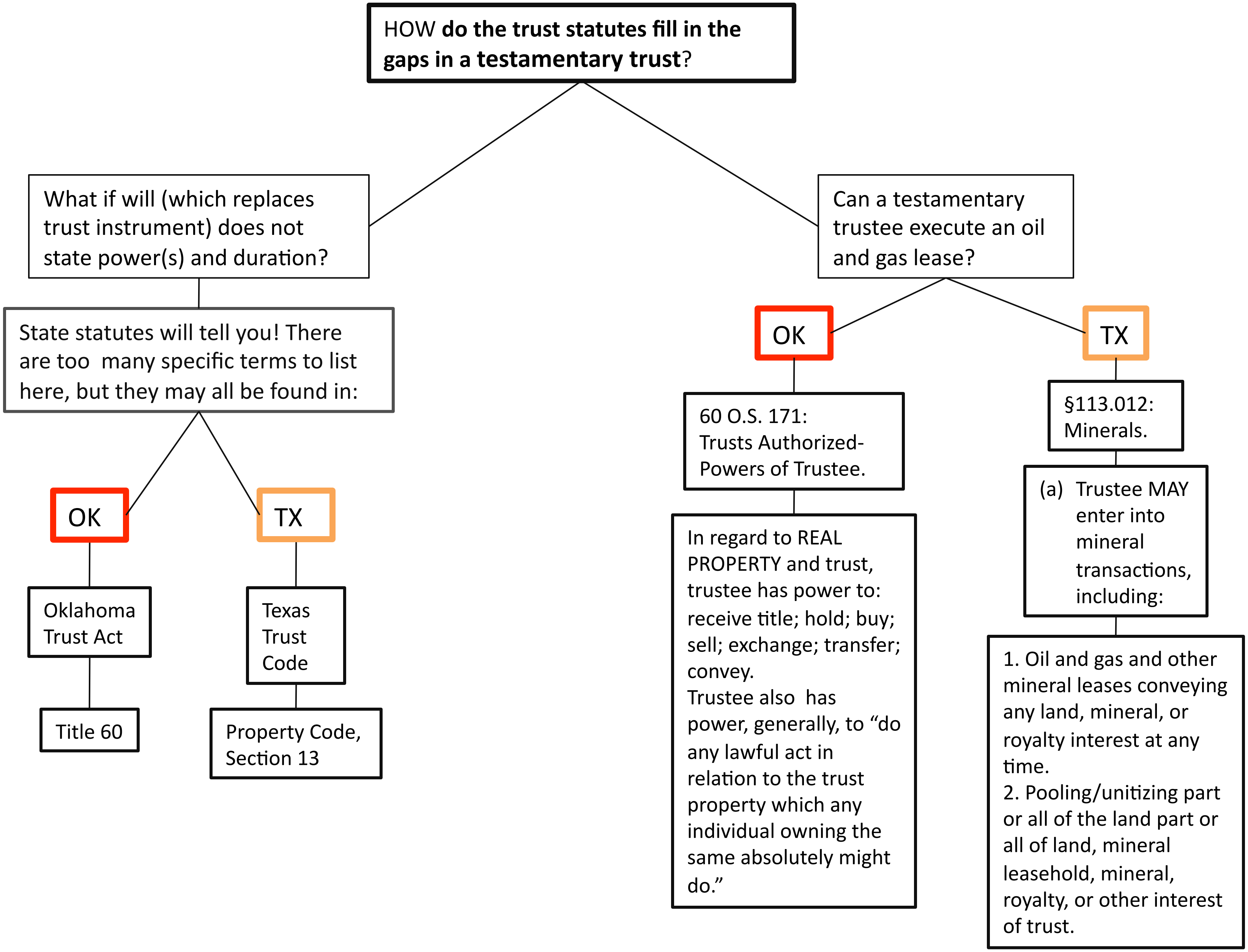
What if will (which replaces trust instrument) does not state power(s) and duration?

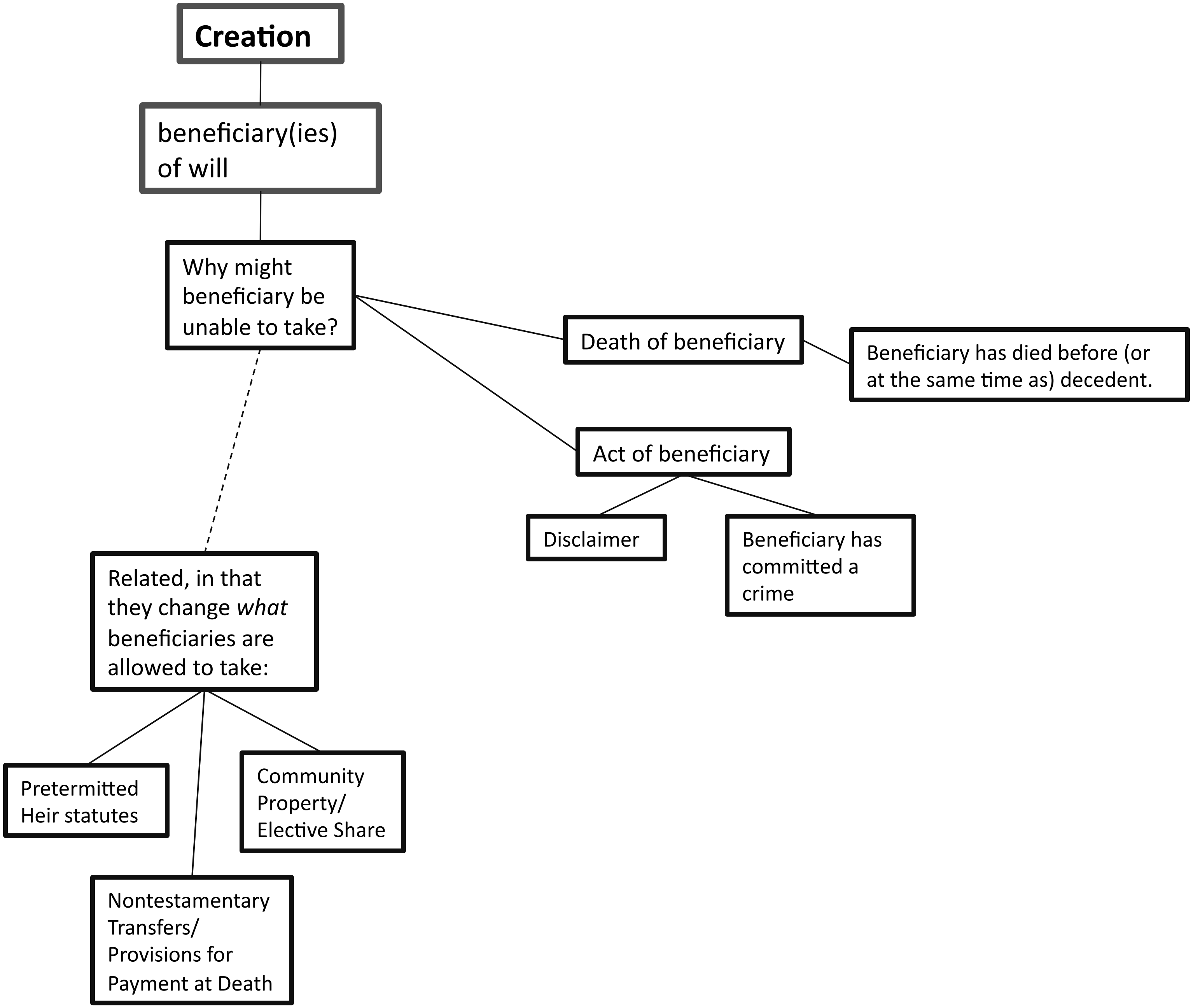
Can a testamentary trustee execute an oil and gas lease?

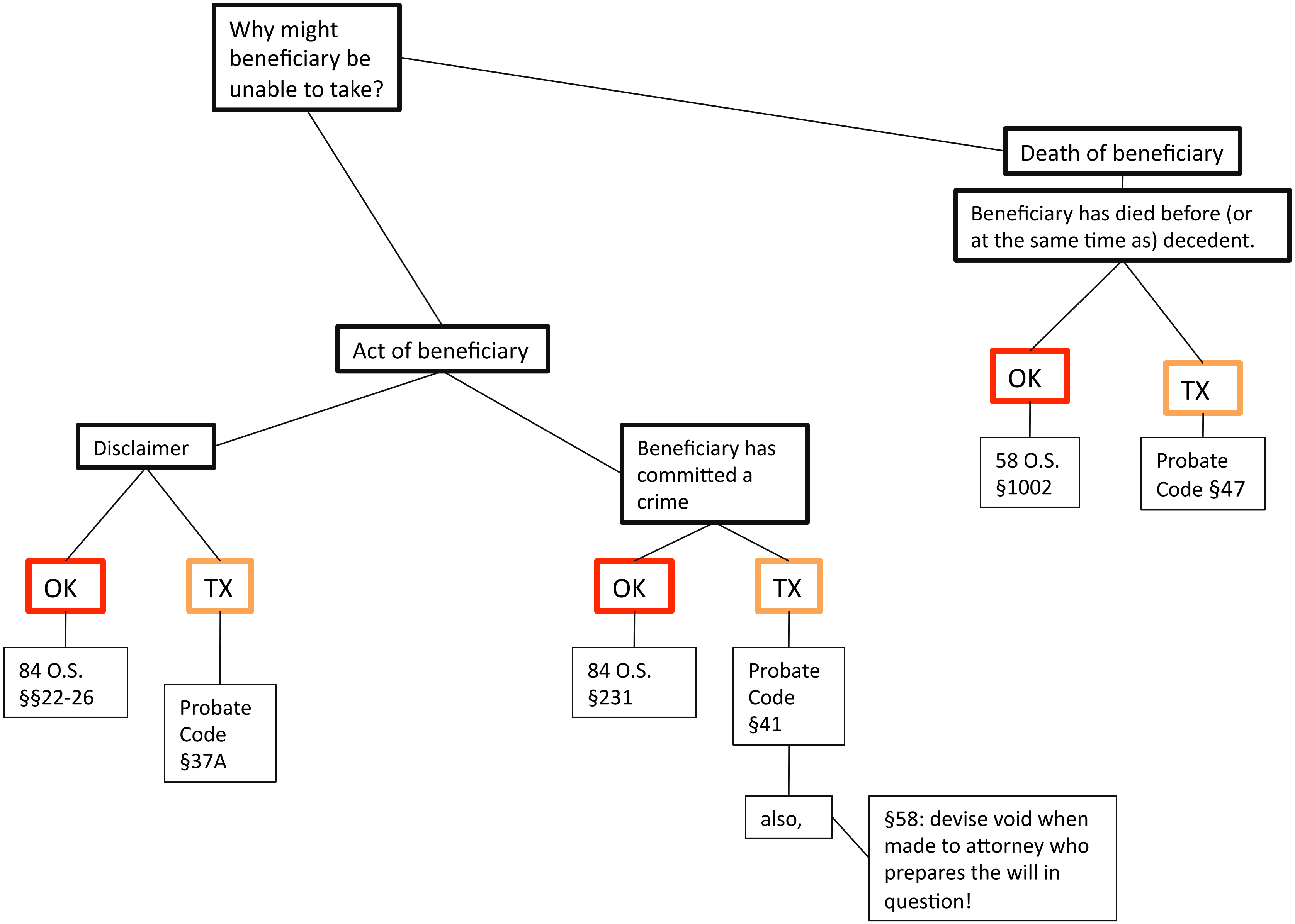
This is really easy, because the state's trust-related statutes will fill in the gaps. The state's Trust Act (or Trust Code) explains all of the powers the trustee has.

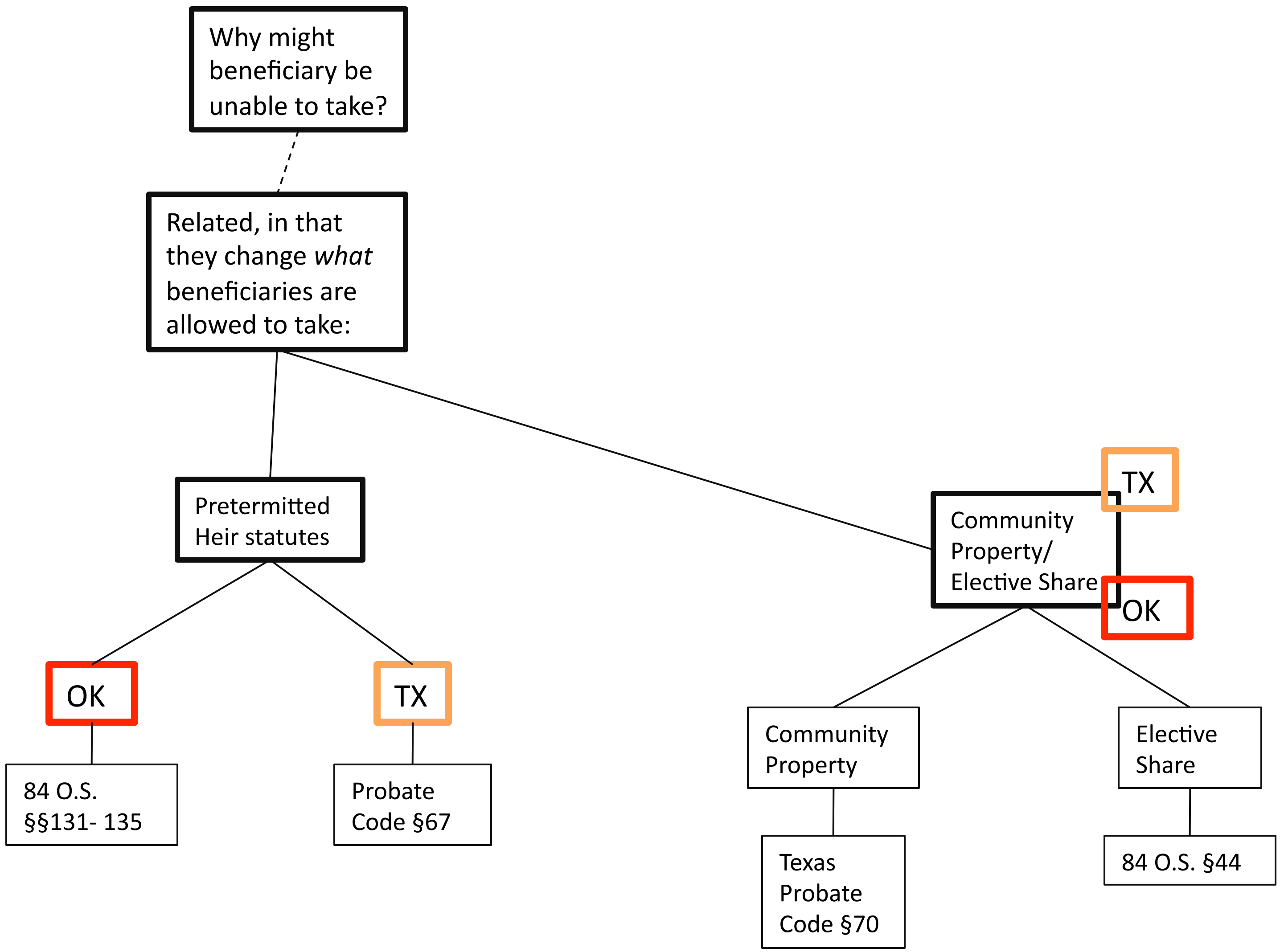
Exception:

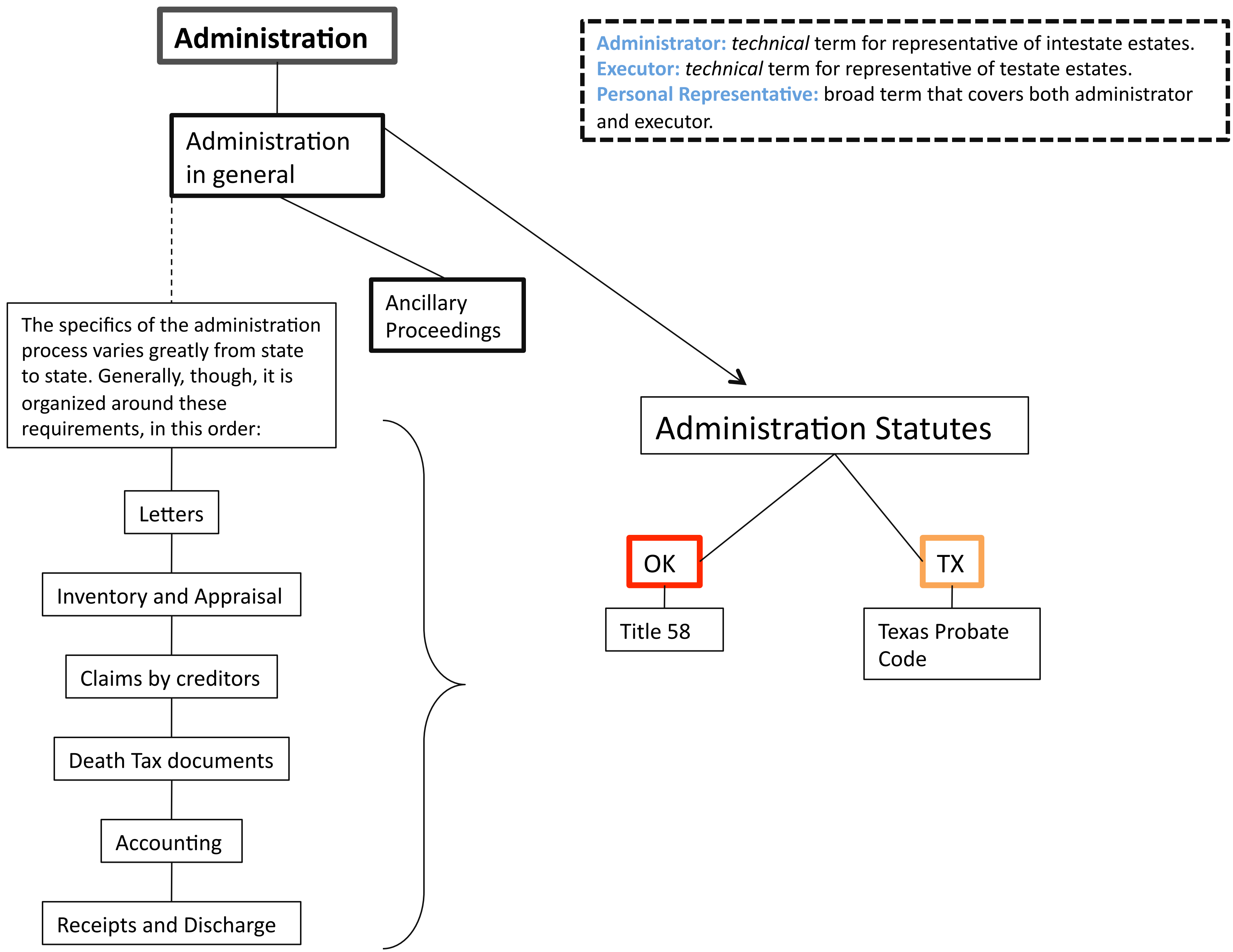
If the will specifically says a trustee does NOT have a certain power. In that case (in regard to the specifics states in the will) the will controls.


HOW **do the trust statutes fill in the gaps in a testamentary trust**?
What if will (which replaces trust instrument) does not state power(s) and duration?
State statutes will tell you! There are too many specific terms to list here, but they may all be found in:
OK
Oklahoma Trust Act
Title 60
TX
Texas Trust Code
Property Code, Section 13
Can a testamentary trustee execute an oil and gas lease?
OK
60 O.S. 171: Trusts Authorized-Powers of Trustee.
In regard to REAL PROPERTY and trust, trustee has power to: receive title; hold; buy; sell; exchange; transfer; convey. Trustee also has power, generally, to "do any lawful act in relation to the trust property which any individual owning the same absolutely might do."
TX
§113.012: Minerals.
(a) Trustee MAY enter into mineral transactions, including:
1. Oil and gas and other mineral leases conveying any land, mineral, or royalty interest at any time.
2. Pooling/unitizing part or all of the land part or all of land, mineral leasehold, mineral, royalty, or other interest of trust.

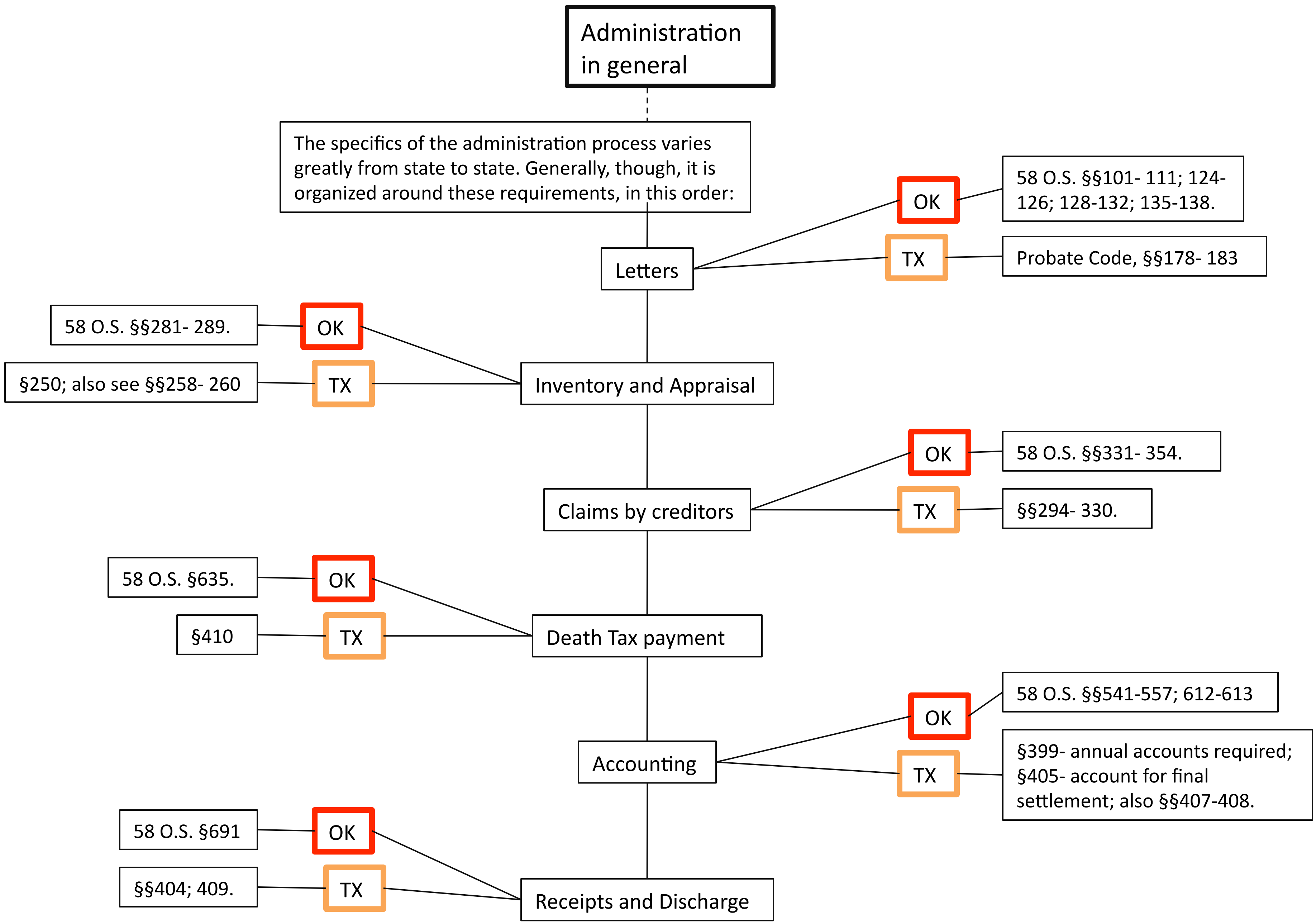

Creation
beneficiary(ies) of will
Why might beneficiary be unable to take?
Death of beneficiary
Beneficiary has died before (or at the same time as) decedent.
Act of beneficiary
Disclaimer
Beneficiary has committed a crime
Related, in that they change *what* beneficiaries are allowed to take:
Pretermitted Heir statutes
Community Property/ Elective Share
Nontestamentary Transfers/ Provisions for Payment at Death


Why might beneficiary be unable to take?
Act of beneficiary
Disclaimer
OK
84 O.S. §§22-26
TX
Probate Code §37A
Beneficiary has committed a crime
OK
84 O.S. §231
TX
Probate Code §41
also,
§58: devise void when made to attorney who prepares the will in question!
Death of beneficiary
Beneficiary has died before (or at the same time as) decedent.
OK
58 O.S. §1002
TX
Probate Code §47


Why might beneficiary be unable to take?
Related, in that they change *what* beneficiaries are allowed to take:
Pretermitted Heir statutes
OK
84 O.S. §§131- 135
TX
Probate Code §67
Community Property/ Elective Share
TX
OK
Community Property
Texas Probate Code §70
Elective Share
84 O.S. §44



Administration
Administrator: *technical* term for representative of intestate estates.
Executor: *technical* term for representative of testate estates.
Personal Representative: broad term that covers both administrator and executor.
Administration in general
Ancillary Proceedings
The specifics of the administration process varies greatly from state to state. Generally, though, it is organized around these requirements, in this order:
Letters
Inventory and Appraisal
Claims by creditors
Death Tax documents
Accounting
Receipts and Discharge
Administration Statutes
OK
TX
Title 58
Texas Probate Code


Administration in general
The specifics of the administration process varies greatly from state to state. Generally, though, it is organized around these requirements, in this order:
Letters
OK
58 O.S. §§101- 111; 124-126; 128-132; 135-138.
TX
Probate Code, §§178- 183
Inventory and Appraisal
OK
58 O.S. §§281- 289.
TX
§250; also see §§258- 260
Claims by creditors
OK
58 O.S. §§331- 354.
TX
§§294- 330.
Death Tax payment
OK
58 O.S. §635.
TX
§410
Accounting
OK
58 O.S. §§541-557; 612-613
TX
§399- annual accounts required; §405- account for final settlement; also §§407-408.
Receipts and Discharge
OK
58 O.S. §691
TX
§§404; 409.

Ancillary Proceedings

Context:
Nonresident decedent but, *owned property* in the state.

OK

58 O.S. § 677. Petition by nonresident--Contents--Hearing--Objections

A. Title to Oklahoma property owned by a nonresident may be passed by the filing of a petition having attached thereto a duly certified copy of the last will and testament, an order admitting the will to probate and an order distributing the estate from the domiciliary probate proceeding, or if the decedent died intestate, by attaching a duly certified copy of the order appointing the personal representative and an order distributing estate from the domiciliary estate.

(Statute goes on to explain the procedural requirements.)

TX

Probate Code §95

(a) Foreign Will May Be Probated. The written will of a testator who was not domiciled in Texas at the time of his death which would affect any real or personal property in this State, may be admitted to probate upon proof that it stands probated or established in any of the United States, its territories, the District of Columbia, or any foreign nation.

(b) Application and Citation.

1) Will probated in domiciliary jurisdiction. If a foreign will has been admitted to probate or established in the jurisdiction in which the testator was domiciled at the time of his death…

(2) Will probated in non-domiciliary jurisdiction. If a foreign will has been admitted to probate or established in any jurisdiction other than the domicile of the testator at the time of his death…

(Procedural requirements continue.)

III. Effects of the Final Decree in a Decedent's Estate

OK

58 O.S. § 632. Rights fixed by decree
In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal.

632.1. Validation of decrees entered prior to January 1, 1941
632.2. Validation of decrees entered prior to January 1, 1951
632.3. Compliance with notice requirements--Form of final decree--Voidable decree

634. Petition and notice for decree of distribution
634.1. Judgment creditor of heir, legatee or devisee—Petition

TX

Texas tends to refer to it as a "closing order."

(d) Discharge When Estate Fully Administered. Whenever the representative of an estate has fully administered the same in accordance with this Code and the orders of the court, and his final account has been approved, and he has delivered all of said estate remaining in his hands to the person or persons entitled to receive the same, it shall be the duty of the court to enter an order discharging such representative from his trust, and declaring the estate closed.

Effect: the probate court no longer has jurisdiction of that proceeding.

IV. Laws Related to Conveyances and Leasing Minerals under Decedents' Estates

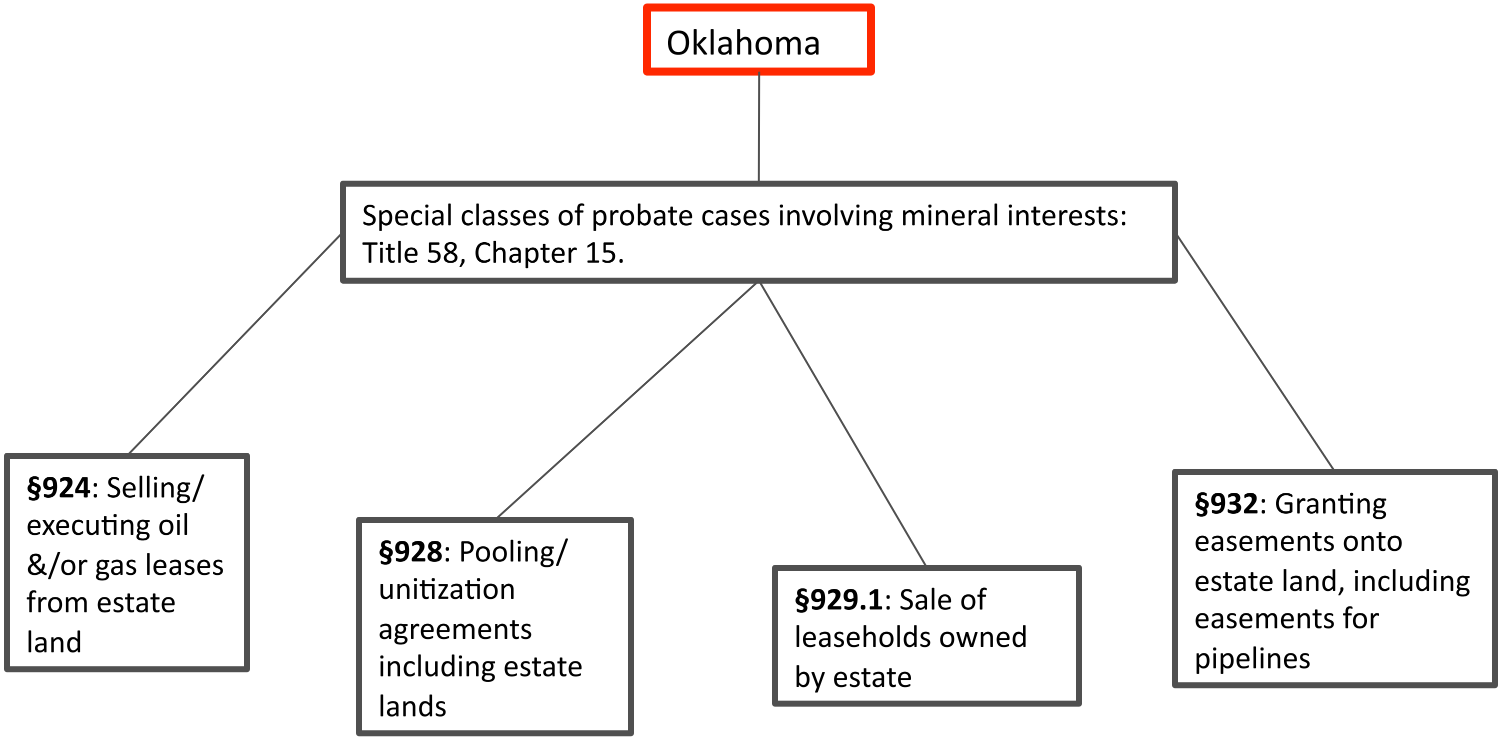
In this section, **Laws Related to Conveyances and Leasing Mineral Rights Under Decedents' Estates**, we are really just concerned with oil and gas-related aspects of administration! Specifically , the issue of what the personal representative can do, oil and gas-wise, with the estate, is relevant after the letters have been approved and before discharge.
(To get there, we have to presume all of the issues in creation of will itself are not issues– i.e., that they have been resolved in favor of: yes, there IS a valid will.)

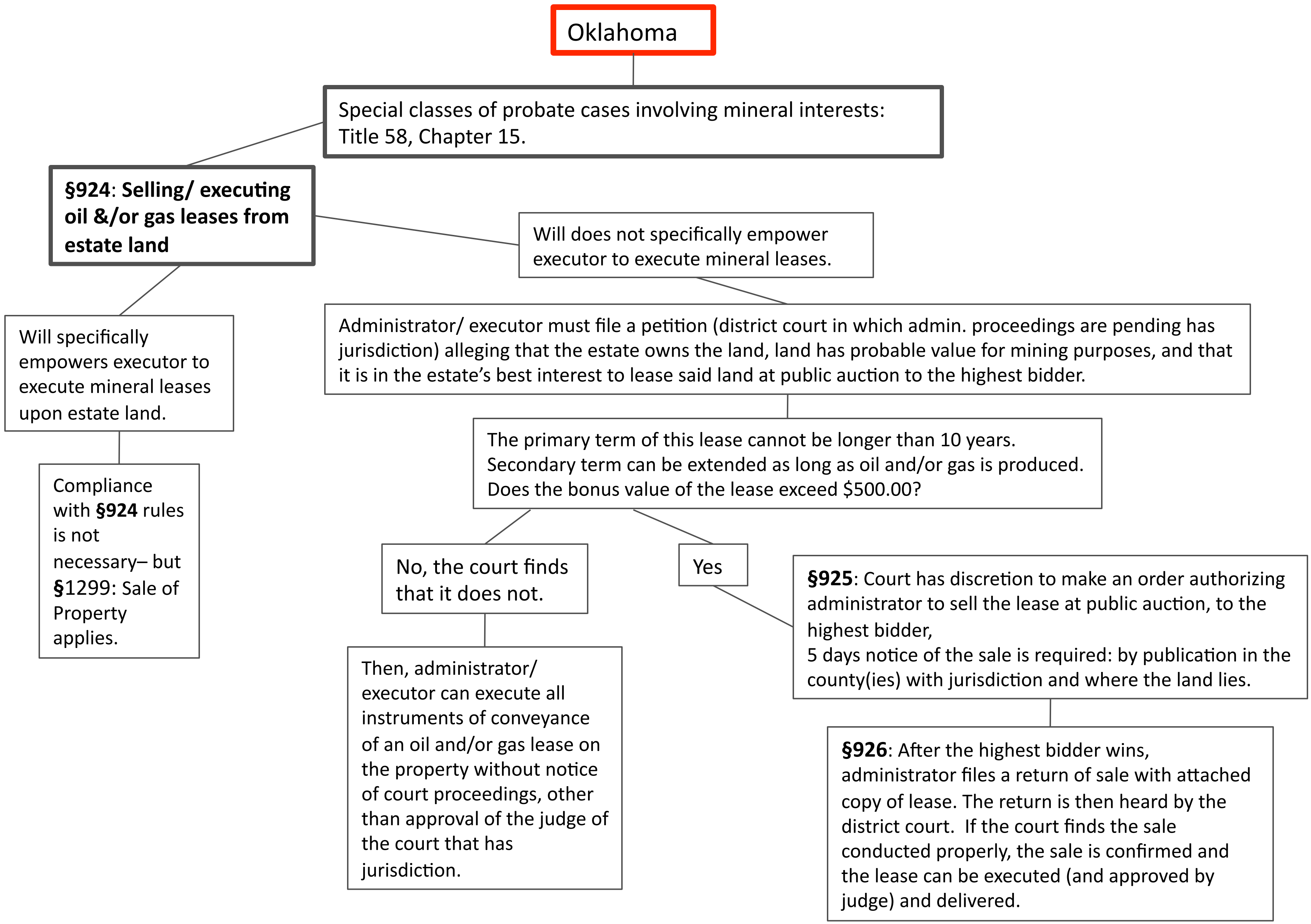
Oklahoma
Title 58, Chapter 15

Special classes of probate cases involving mineral interests.

Texas analog:
Probate Code, §§367- 372.

Proceedings During Administration: Mineral leases, pooling or unitization agreements, and other matters relating to mineral properties.


Oklahoma
Special classes of probate cases involving mineral interests: Title 58, Chapter 15.
§924: Selling/ executing oil &/or gas leases from estate land
§928: Pooling/ unitization agreements including estate lands
§929.1: Sale of leaseholds owned by estate
§932: Granting easements onto estate land, including easements for pipelines


Oklahoma
Special classes of probate cases involving mineral interests: Title 58, Chapter 15.
§924: Selling/ executing oil &/or gas leases from estate land
Will specifically empowers executor to execute mineral leases upon estate land.
Compliance with §924 rules is not necessary– but §1299: Sale of Property applies.
Will does not specifically empower executor to execute mineral leases.
Administrator/ executor must file a petition (district court in which admin. proceedings are pending has jurisdiction) alleging that the estate owns the land, land has probable value for mining purposes, and that it is in the estate's best interest to lease said land at public auction to the highest bidder.
The primary term of this lease cannot be longer than 10 years. Secondary term can be extended as long as oil and/or gas is produced. Does the bonus value of the lease exceed $500.00?
No, the court finds that it does not.
Then, administrator/ executor can execute all instruments of conveyance of an oil and/or gas lease on the property without notice of court proceedings, other than approval of the judge of the court that has jurisdiction.
Yes
§925: Court has discretion to make an order authorizing administrator to sell the lease at public auction, to the highest bidder,
5 days notice of the sale is required: by publication in the county(ies) with jurisdiction and where the land lies.
§926: After the highest bidder wins, administrator files a return of sale with attached copy of lease. The return is then heard by the district court. If the court finds the sale conducted properly, the sale is confirmed and the lease can be executed (and approved by judge) and delivered.

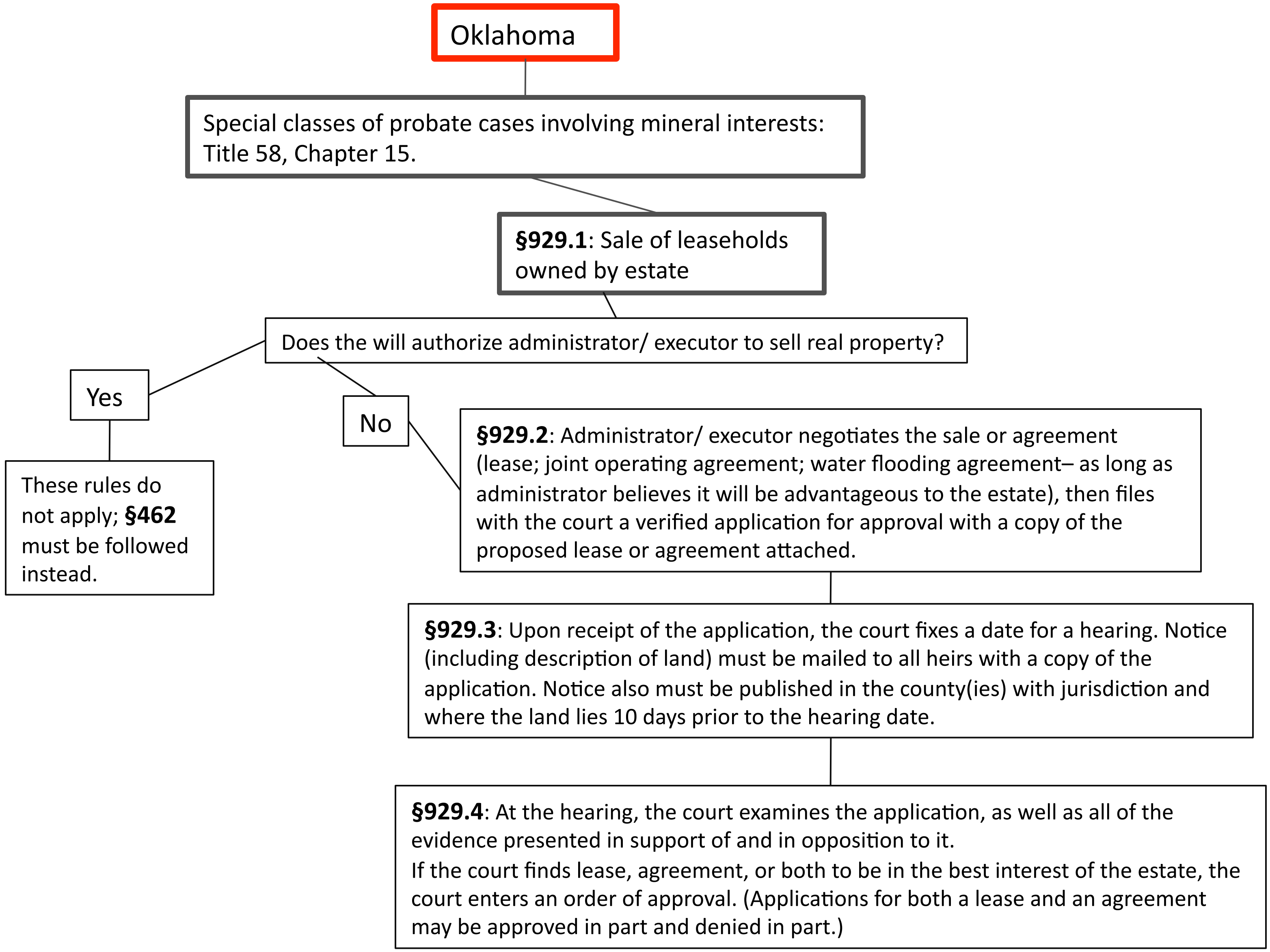
Oklahoma

Special classes of probate cases involving mineral interests: Title 58, Chapter 15.

§928: **Pooling/ unitization agreements including estate lands**

The administrator/executor of an estate including land (already) leased for oil and gas purposes is authorized to enter into agreements unitizing part or all of such land or mineral interests with adjacent land(s) so that the entire unitized tract may be developed and used as a unit for production of oil and/or gas.

Before entering into the agreement, administrator must get approval from the district court with jurisdiction of the estate. (But, this is the only procedural requirement.)


Oklahoma
Special classes of probate cases involving mineral interests: Title 58, Chapter 15.
§929.1: Sale of leaseholds owned by estate
Does the will authorize administrator/ executor to sell real property?
Yes
These rules do not apply; §462 must be followed instead.
No
§929.2: Administrator/ executor negotiates the sale or agreement (lease; joint operating agreement; water flooding agreement– as long as administrator believes it will be advantageous to the estate), then files with the court a verified application for approval with a copy of the proposed lease or agreement attached.
§929.3: Upon receipt of the application, the court fixes a date for a hearing. Notice (including description of land) must be mailed to all heirs with a copy of the application. Notice also must be published in the county(ies) with jurisdiction and where the land lies 10 days prior to the hearing date.
§929.4: At the hearing, the court examines the application, as well as all of the evidence presented in support of and in opposition to it.
If the court finds lease, agreement, or both to be in the best interest of the estate, the court enters an order of approval. (Applications for both a lease and an agreement may be approved in part and denied in part.)

Oklahoma

Special classes of probate cases involving mineral interests: Title 58, Chapter 15.

§932: Granting easements onto estate land, including easements for pipelines

Administrator/executor can enter into contracts for easements.

Procedure:
Administrator/executor must file a petition n in the court where estate proceedings are pending.
The court sets a hearing date, and notice must be given at least 5 days prior to the hearing date, by publication in that county.

At the hearing, if the court finds that the proposed easement will not result in injury to the estate property and that the consideration is adequate, the court MAY approve it and direct the administrator to enter into the contract.

Texas

Probate Code, §§367- 372

Proceedings During Administration: Mineral leases, pooling or unitization agreements, and other matters relating to mineral properties.

We've got an estate involving mineral interests…

There IS NOT an existing lease.

There IS an existing lease.

Probate Code §367(b): "Personal representatives " of decedents' estates MAY be authorized to grant one, with or without a pooling clause.

But, the representative must follow the rules!

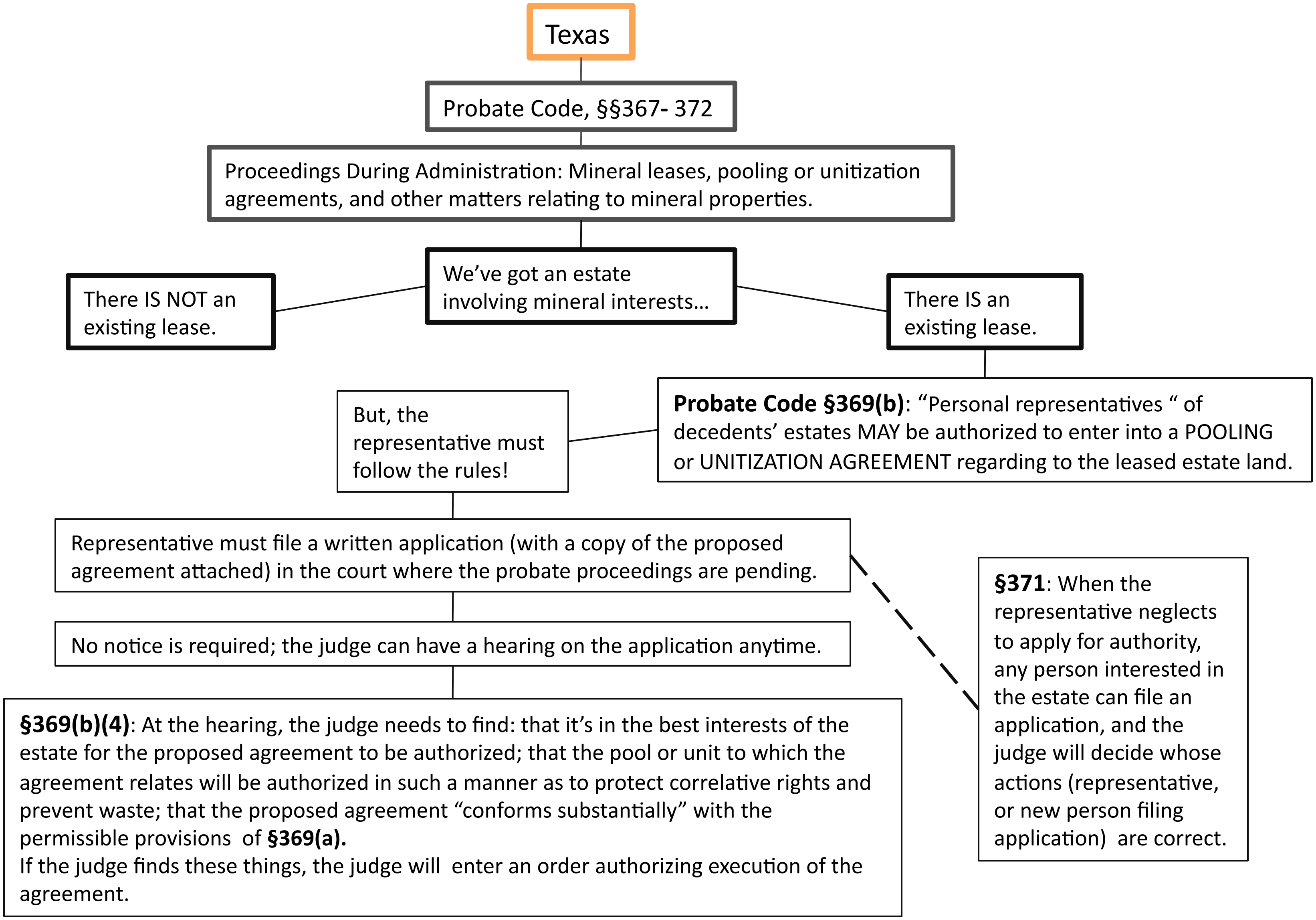
§367(c)(1): Representative must file a written application

§368: Judge either decides to hear the application in private or to set a hearing date. If judge decides to set a hearing date, there are notice requirements – found in **§367(c)(3)**-- that apply.

§367(c)(5): At the hearing, if the notice requirements have been met and the proof as to the advisability/ necessity of the lease is sufficient, then the judge will enter the order granting the application.

§367(c)(7): A lease that is created by this kind of order is valid and binding on the property (or interest therein) owned by the estate, even though the primary term will probably extend beyond the date when the estate is closed. However, the primary term in a lease created this way cannot exceed 5 years, although the secondary term can last as long as oil and/or gas is produced.

§367(c)(8): The lease may be amended by addition of a shut-in royalty provision.


Texas
Probate Code, §§367- 372
Proceedings During Administration: Mineral leases, pooling or unitization agreements, and other matters relating to mineral properties.
We've got an estate involving mineral interests…
There IS NOT an existing lease.
There IS an existing lease.
Probate Code §369(b): "Personal representatives " of decedents' estates MAY be authorized to enter into a POOLING or UNITIZATION AGREEMENT regarding to the leased estate land.
But, the representative must follow the rules!
Representative must file a written application (with a copy of the proposed agreement attached) in the court where the probate proceedings are pending.
No notice is required; the judge can have a hearing on the application anytime.
§369(b)(4): At the hearing, the judge needs to find: that it's in the best interests of the estate for the proposed agreement to be authorized; that the pool or unit to which the agreement relates will be authorized in such a manner as to protect correlative rights and prevent waste; that the proposed agreement "conforms substantially" with the permissible provisions of **§369(a).**
If the judge finds these things, the judge will enter an order authorizing execution of the agreement.
§371: When the representative neglects to apply for authority, any person interested in the estate can file an application, and the judge will decide whose actions (representative, or new person filing application) are correct.

Decedents' Estates- Title Examination Standards

- OK
  - Chapter 17: Title Through Decedents' Estates
    Relevant **standards**:
    - **17.1 Conveyance to Estate**
    - **17.2 Final Account--Tax Finding**
    - **17.3 Reference to Property in Probate Decrees**
- TX
  - Chapter 11: Decedents' Estates
    Relevant **standards**:
    - **11.10. Passage Of Title Upon Death**
    - **11.20. Estate Proceedings**
    - **11.30. Conveyances By An Executor**
    - **11.40. Conveyances By An Administrator**
    - **11.50. Conveyances By Heirs Of An Estate**
    - **11.60. Liens For Debts And Taxes**
    - **11.70. Heirship Affidavits**
    - **11.80. Community Survivors**
    - **11.90. Community Administration**
    - **11.100. Foreign Wills**

OK

Chapter 17: Title Through Decedents' Estates
Relevant **standards**:

17.1 Conveyance to Estate
A conveyance to the estate of a deceased individual, executed prior to November 1, 1995, is inadequate since such a grantee was not an entity capable of holding title prior to November 1, 1995. In such cases, a deed should be obtained from the grantor or the grantor's successors, and, in order to obtain possible equitable interests, a deed also should be obtained from the heirs or devisees of the decedent named. On or after November 1, 1995, a conveyance to the estate of a deceased individual is adequate.

17.2 Final Account--Tax Finding
The provision of the Oklahoma Income Tax Act (68 O.S.A. § 885 (1951)) to the effect that no final account of any fiduciary shall be allowed by any probate court of the state unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of said Act, or prior income tax laws, upon said fiduciary or on the decedent for whose estate he acts, which may have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit or otherwise, is not jurisdictional and failure to comply with said Act does not deprive the probate court of authority to allow any such final account.

17.3 Reference to Property in Probate Decrees
A decree of distribution in a probate case describing property, the record title to which does not appear in the decedent, should be considered an instrument subject to Standard 3.1.

TX

Chapter 11: Decedents' Estates
Relevant **standards**:

11.10. Passage Of Title Upon Death
A decedent's property passes to his or her heirs at law or devisees immediately upon death, subject in each instance, except for exempt property, to payment of debts, including estate and inheritance taxes.

11.20. Estate Proceedings
If an owner of property dies, the examiner must determine whether the owner left a will, whether there is a probate proceeding or administration pending, and whether a personal representative is acting. If the records of the county where the land is located do not indicate that a will has been filed for probate, and in the absence of information to the contrary, the affidavit of a person who has knowledge of the facts is usually accepted as satisfactory evidence that the owner died intestate.

11.30. Conveyances By An Executor
Before accepting an executor's deed, an examiner must be satisfied that all statutory requirements were met in the appointment of the executor and that the executor is qualified to act. A qualified executor, even one under court order, may convey property belonging to the estate if authorized to do so by the will. In addition, a qualified independent executor, even though not authorized by will, may convey if not prohibited by the will and if there are one or more unpaid debts of the estate that are not barred by limitations. In the absence of information to the contrary, the examiner may rely upon an affidavit of an executor or other person who has knowledge of the facts that there are existing debts of the estate.

11.40. Conveyances By An Administrator
An administrator may convey property of a decedent only with authority of the court. Therefore, before accepting an administrator's conveyance, an examiner must determine that all statutory requirements have been met in the appointment of the administrator and that the administrator is qualified to act and is authorized to make the sale.

11.50. Conveyances By Heirs Of An Estate
If the property owner died intestate, or if the owner died testate but the will is not probated, the examiner must, in the absence of administration, identify the heirs of the decedent, along with the devisees in any unprobated will, and require that all of them join in a conveyance of the property of the decedent.

TX

Chapter 11: Decedents' Estates
Relevant **standards**:

11.60. Liens For Debts And Taxes
Property of a decedent passes subject to unpaid debts and taxes of the estate. Therefore, the examiner must determine whether these are unpaid. In the absence of information to the contrary, an examiner may rely upon the affidavit of an executor, administrator, or other person who has knowledge of the facts that all debts of the estate have been paid. As evidence that an estate is not large enough to incur federal estate and Texas inheritance taxes, an examiner may rely upon a court-approved inventory, or in the absence of an inventory, the affidavit of a person who has knowledge of the facts. An order of the court probating a will as a muniment of title may be accepted as evidence that all obligations of the estate have been paid other than debts secured by liens on real property. In the latter case, the examiner must determine that the liens do not affect the property under examination. An examiner may accept, as proof that debts and taxes have been paid, an order closing a court supervised administration or an affidavit closing an independent administration. If federal estate and Texas inheritance taxes are due, satisfaction of the taxes may be proven by a Federal Estate and Generation–Skipping Transfer Tax Closing Letter together with proof of payment of the taxes shown by the letter to be due to the United States and to the State of Texas.

11.70. Heirship Affidavits
In the absence of information to the contrary, an examiner may rely upon an affidavit of heirship with respect to the family history and the identity of heirs of a decedent.

11.80. Community Survivors
If no one has qualified as executor or administrator of the estate of a decedent who was married, the examiner may rely upon a conveyance of community property from the surviving spouse, acting as community survivor pursuant to Tex. Prob. Code Ann. § 160, made for the purpose of paying community debts.

11.90. Community Administration
If a surviving spouse has qualified as community administrator in the manner prescribed in Tex. Prob. Code Ann. §§ 161–177, an examiner

11.100. Foreign Wills
An examiner may rely upon an exemplified copy of a will probated outside of Texas, as being effective to pass title to property in Texas owned by a decedent, if the will and the order admitting the will to probate are probated in Texas pursuant to Tex. Prob. Code Ann. § 95 or are filed in the deed records pursuant to Tex. Prob. Code Ann. § 96.

V. Leasing Minerals under Decedents' Estates– the Modern Reality?

Also something people frequently do in OKLAHOMA (this works a little better): force pooling of estate land!

Although you are either supposed to wait until the end of administration/ probate (when you can go to the new owner) or go through the statutory procedure if administration/probate is still going on, potential lessees sometimes go to the decedent's heirs either before probate or during probate (but not under the statutory procedure).

OK

The title to the real property of a decedent is deemed to pass to decedent's heirs AS OF the death (subject to the required administration of the estate).
-84 O.S. §212 (when the decedent dies intestate), also see 58 O.S. §290.

For an overview of this situation and the concerns it encompasses:
"Risk Analysis of Acquiring an Oil and Gas Lease from Heir or Devisees in the Absence of a Completed Probate Proceeding in Oklahoma"
by Benjamin F. Hackett, 1990

TX

Texas Probate Code §37: title to the decedent's property vests in heirs/devisees at death; however, once letters testamentary (decedent dies testate) or letters of administration (decedent dies intestate) are filed, the executor /administrator has the right to possession and holds the estate to be disposed of in accordance with the law.

OK

For an overview of this situation and the concerns it encompasses: "Risk Analysis of Acquiring an Oil and Gas Lease from Heir or Devisees in the Absence of a Completed Probate Proceeding in Oklahoma" by Benjamin F. Hackett, 1990.

Situation (basically, the topic of section 5.): Someone purchases an oil and gas lease from the heir or devisee of a decedent without commencement or completion of probate proceedings in Oklahoma.

Hopefully, you come out on the safe side of 84 O.S. §8:

The rights of a purchaser or encumbrancer of real property in good faith, and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise has been duly admitted to probate by a court of this state having jurisdiction to administer upon the estate of the decedent within two (2) years after the death of the decedent, or unless within one (1) year after the death of the decedent a petition to admit said will to probate has been duly filed in the court of this state having jurisdiction to admit said will to probate and the proceedings have been pursued by the petitioner with diligence.

But, things to be concerned about!:

more minor concerns

Statutory prohibition against a person causing death being able to inherit means that bona fide purchaser from person causing decedent's death is not protected.

84 O.S. §231

If surviving spouse elects to take under elective share instead of under the will, even the bona fide purchaser will not probably not be protected insofar as his property intersects with spouse's elective share.

MAIN concern

Personal Representative of the estate decides that it is in the best interest of the estate to lease the estate property.

This is when we hit the statutory scheme that is the subject of **section 4.**

But, things to be concerned about!:

MAIN concern

Personal Representative of the estate decides that it is in the best interest of the estate to lease the estate property. (This is when we hit the statutory scheme that is the subject of **section 4.**)

Main point: "…**during the time the Personal representative has possession and control of the decedent's property**, the rights of the heirs/devisees versus the rights of the Personal Representative to lease the property for oil and gas exploration purposes **weigh heavily in favor of the Personal Representative**."

In Re Gentry's Estate, 13 P.2d 156 (Okla. 1932).

Although heirs or devisees may convey their interest prior to, or during the pendency of, the probate proceedings, it is clear that the purchaser under those circumstances takes subject to the rights of the Personal Representative.

…although, there could still be a question about what kind of circumstances it takes for a lease to be properly "in the best interests of the estate." Under the statutory procedure, the court will decide when it approves (or chooses not to approve) the Representative's particular proposed lease of the estate.

Not, though that that court does NOT decide in the event of an executor's sale of a lease (under 58 O.S. §924– see slide #34) when the bonus value does not exceed $500! Remember, when that happens, administrator/ executor can execute all instruments of conveyance of an oil and/or gas lease on the property without notice of court proceedings, other than approval of the judge of the court that has jurisdiction.

When court does decide, what is sufficient? What is a good argument to make?
Is payment of estate debt a worthy goal? In what circumstances?
Is preservation/protection against drainage a worthy goal?

Also something people frequently do in OKLAHOMA (this works a little better): force pooling of estate land!

Although you are either supposed to wait until the end of administration/ probate (when you can go to the new owner) or go through the statutory procedure if administration/probate is still going on, potential lessees sometimes go to the decedent's heirs either before probate or during probate (but not under the statutory procedure).

Owner is dead. Oil and Gas company (that has another lease(s) in the same area– that's how you force pool your way in, remember?) wants to execute a lease on his land.

NO probate pending.

1. Talk to known heirs and try to get a lease from them.

2. Name as respondents in force pooling application: all known heirs that you could not get a lease from PLUS all unknown heirs/ successors & assigns/ devisees that may be out there.

3. Corporation Commission hearing: if Corporation Commission finds that it is in best interests of conservation of mineral estate, etc… to force pool (and that you have followed notice requirements properly), it will issue the force pooling order.

At this point, the respondents have to either participate or elect to relinquish their interest in the drilling and spacing unit (for whatever fair market value the Corporation Commission decides their interest is worth).
They have 15 days to make the choice.
No response by the time the 15 days are up = election not to participate– to take the fair market value of their interest instead.

Probate IS pending.

1. If probate IS pending, oil and gas company MUST first make a diligent effort to lease from the PERSONAL REPRESENTATIVE (this is consistent with the statutes we looked at in **Section 4**).

2. If personal representative refuses (for what company thinks is an unreasonable reason– ie, company has a good conservation-related case to make to the Corporation Commission for why the unit needs to happen), then company will name him as a respondent in a force pooling application.

16 O.S. § 67. Purchase of severed mineral interest from person claiming interest through recorded affidavit or recital of death and heirship.

Any purchaser for value acquiring a severed mineral interest in real estate from a person who claims such interest, immediately or remotely, through a recorded affidavit of death and heirship or a recital of death and heirship in a recorded title transaction, as that term is defined in Section 78 of Title 16 of the Oklahoma Statutes, shall acquire a valid and marketable title to such interest as against any person claiming adversely to such recorded affidavit or recital on the following conditions:

1. The affidavit or recital states that the decedent died without a will;

2. The affidavit or recital lists the names of the decedent's heirs and their relationship to the decedent;

3. The affidavit or recital states that the maker is related to the decedent or otherwise has personal knowledge of the facts stated therein;

4. The affidavit or the title transaction that contains the recital has been recorded for at least ten (10) years in the office of the county clerk in the county in which the real property is located; and

5. No instrument inconsistent with the heirship alleged in the affidavit or recital has been filed in the office of the county clerk in the county in which the real property is located.

This section shall apply to affidavits recorded before the effective date of this act as well as to those recorded thereafter, except that, with respect to those recorded before such date, the ten-year period specified above shall not expire until one (1) year after the effective date of this act. This section shall not apply as against any person in possession of the land, by occupancy or by occupancy of a tenant, at the time such purchaser acquires an interest in such land.