

# 10 THINGS YOU SHOULD KNOW ABOUT TEXAS PROBATE

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## ***Introduction***

It has been said that the only certainties in life are death and taxes. If so, it is a virtual certainty that one day you will encounter the term "probate." If someone dies who was related to you; was in love with you; was in business with you; or owed you money, then you may have an incentive to learn more about probate and what it all means.

Unlike many states, probate in Texas can be a very fast, efficient and cost-effective process. (Notice I didn't say cheap -- nothing that requires a lawyer is cheap.) On the other hand, if the decedent made no effort to plan the settlement of his affairs, the process can be an expensive quagmire.

**Please note that the law applicable to these topics is subject to change as new legislation is passed and judicial decisions are rendered.** This was never intended to be an in-depth legal treatise, and answers to your specific problems may involve considerations not covered here. My simple goal was to educate you enough to start asking the right questions. If you want help finding the answers, talk to a lawyer.

## ***1 Just what is 'Probate' anyway?***

The term probate is generally used today to refer to the entire process of wrapping up the affairs of one who has died, known as the "decedent." To navigate the probate process, you must answer a series of questions, including:

**Is the decedent dead?** Yep, you would think this one would be easy. But what about the fellow who falls off the sailboat on his vacation to the Caribbean and the body cannot be recovered? How long do you have to wait to see if he turns up on some deserted island?

**Did the decedent leave a will?** This requires you to understand what constitutes a valid will. Often, the decedent intended to leave a will, but failed to do it right. Occasionally, he may have left a will without knowing it. If a will was left, proof must be offered that it was never revoked or amended.

**If there is no will, who are the heirs?** When there is no will, the decedent is said to have died "intestate" and

Texas law dictates who gets what. The law may match the testator's wishes; it may not.

**Are there any creditors?** The decedent's property passes subject to the debts he or she owed. The person receiving the property does not become personally liable for the decedent's debt, but the property may have to be sold in order to pay the debt. If there are no debts, there may be no need to administer the estate.

**If an administration is necessary, who gets to handle it?** If the will appoints someone to handle the estate, that person is called an executor. If there is no will (or the will fails to appoint anyone), the court will appoint an administrator. Many families end up fighting over who gets to be appointed. Later, they may wish they had never taken on the job.

**Should the executor/administrator be independent or dependent?** The default rule in Texas and most states is that the probate court supervises the administration of all estates. For example, permission to pay any debt or sell any property must be obtained in advance. Also, the administrator must usually put up a surety bond. The added expense can be hard to justify unless the family likes the idea of having extra protection against mismanagement of the estate. In certain instances, Texas law allows the representative of the estate to be free of court supervision, greatly reducing the cost of probate.

## ***2 What constitutes a valid will?***

A person who writes a will is called the "testator." The will must be signed by the testator and, most importantly, must evidence the testator's intention to make a gift effective at death. This intention is referred to as "testamentary intent" and is an absolute prerequisite to a valid will.

If any part of the will is not in the testator's handwriting, it must be witnessed by two individuals who stand nothing to gain from the will. Those witnesses must sign the will in the testator's presence. If, however, it is completely in the handwriting of the testator, no witnesses are required.

If the testator lacks the mental ability to remember what she owns and to whom she wants to leave her property, then the testator lacks the legal capacity to make a will. When that

nephew claims to have magically induced Aunt Bertha out of her coma just long enough to sign a new will, everyone in the family soon becomes an expert on “testamentary capacity.”

### **3 A will is worthless until probated.**

More than once I have had clients come to me years after a loved one has died claiming rights under a will. Unfortunately the will was never admitted to probate and I have the unpleasant task of explaining the result.

Texas law *requires* you to produce a will in your possession after the decedent dies. You don't have to hire the lawyer to probate it; you can simply present it to the county clerk and wash your hands of the matter if you like. If you fail or refuse to offer up the will, however, some bad things can happen.

You can lose your right to offer the will for probate after four years from the decedent's death. That means that the real estate you thought Uncle Joe left you is really owned by his heirs because he is considered to have died intestate. If you hide a will (maybe because it *didn't* leave you anything) you can be sued and/or prosecuted.

### **4 Who gets your stuff?**

When the testator leaves a will, those who receive the property are known as “beneficiaries.” If the decedent died intestate, all property passes to the “heirs.” So, when there is no will, who gets what?

To answer the question, you must first know if the decedent was married. If so, then everything acquired during the marriage is presumed to be community property. Everything owned prior to marriage, or received as a gift during marriage, is separate property. The distinction is important because different rules apply to each type of property.

First of all, only the decedent's undivided one-half of community property passes as part of his or her estate. The surviving spouse retains the other half. If the decedent left children who are not also children of the surviving spouse, then the kids get all of the decedent's community property. Many widows have been distressed to learn that the step-children inherited one-half of the joint savings account. If the kids are all from the decedent's marriage to the surviving spouse, then the surviving spouse gets all of the community property.

With respect to any separate property, it passes to the kids if decedent was unmarried. If a surviving spouse is left, though, that spouse gets one-third for life of all separate real estate and one-third outright of everything else. The kids get the rest. If there is no spouse or kids but a surviving parent,

or no parents, or brothers and sisters ... it gets a little complicated, so we will stop here. Just bear in mind that the issue of who the decedent would *want* to receive his property is irrelevant – the court just determines what family survives and applies the law.

### **5 Should probate be avoided?**

Probate in Texas does not have to be long and expensive, yet fear of its costs drives many to plan ways to avoid it. Some people execute trusts into which they transfer everything they own so that, when they die, there will be no need to probate their estate. These trusts are called “living” or *inter vivos* trusts because they are established while the person is still alive.

Trusts can be handy tools. Their possible uses are limited only by the imagination and go far beyond the scope of this paper. In my opinion, however, the desire to avoid probate is a lame reason to go to the trouble and expense of a living trust. More often than not, I find the fees for drafting and funding the trust to exceed the total costs of drafting and probating a good will.

In summary, before you buy into some scare tactic about the cost of probate, get a second opinion from a Texas lawyer. Several states' attorneys general, bar associations and even the AARP have issued alerts concerning the unscrupulous sale of living trusts using misleading information to scare the public. Maybe a trust is right for you, maybe it isn't. Estate planning is just not a “one size fits all” business.

### **6 What if decedent owed money?**

The decedent's debts must be settled before property is distributed. If you have a claim against a decedent's estate, it is important that you present that claim correctly and in a timely manner.

An independent executor simply steps into the shoes of the decedent, so a creditor can usually just send the bill to the executor. If the executor doesn't pay, the creditor is usually free to pursue the claim in court. The executor is only obligated to send written notice to secured creditors, but *may* send one to unsecured creditors giving them four months to submit their claims or lose the right to do so.

In a dependent administration, however, there are some tricky rules and deadlines to be followed. Claims must be “authenticated” by attaching an affidavit that sets forth certain sworn facts. If a creditor fails to do it right or within the time required, the claim could be barred.

Estate administration works something like a bankruptcy to the extent that the creditors must present their claims and

stand in line for payment. If the estate's debts exceed the assets, then somebody isn't going to get paid. Also, it is often possible to protect the homestead and certain personal property from the claims of creditors. Such "exempt" property can be set aside for the benefit of the decedent's surviving family.

## **7 *Is there property outside of Texas?***

If the decedent was a resident of Texas, then the Texas probate courts have jurisdiction over the real estate decedent owned in Texas and everything else decedent owned regardless of where it is located. Put another way, Texas courts have no jurisdiction over real estate in another state.

So, if the decedent owned a vacation getaway in Colorado, the estate will have to be probated there as well. Fortunately, this is not necessarily such a big deal. Most states have laws that provide relatively efficient and inexpensive ways of using what the Texas court has done and filing it in the other state. Conversely, if a will has been admitted to probate in another state, it may be a relatively simple task to file a copy of those proceedings in Texas in order to clear title to property here.

## **8 *What about insurance and IRAs?***

A will has no effect on a life insurance policy, IRA, 401(k), or any other "non-probate asset" for which you have executed a proper beneficiary designation. You can even tell your bank how to pay out your account when you die.

If you fail to designate a beneficiary, however, then that asset will pay to your estate. If you divorce after designating a beneficiary, then that designation is nullified. The divorce also nullifies any prior provision in your will that names your ex-spouse as a beneficiary or executor. If you *want* your ex-spouse to remain a beneficiary (maybe the divorce decree requires it), you need to execute a new will and/or sign the appropriate insurance form again.

Generally speaking, non-probate assets immediately become the property of the beneficiary and are not available to pay your debts. So, if you name your brother as the beneficiary of your life insurance because you think he will use the money to settle your debts or support your kids, you may be making a big mistake. He can claim the money as his alone and leave the estate to pay those obligations out of any remaining probate assets.

## **9 *What about gifts to a minor?***

If you want to name a minor as a beneficiary of your will, life insurance or retirement account, provide for a trustee to receive the money for that child's benefit. A minor lacks the legal capacity to sign a binding release, so theoretically

that minor could receive the money, spend it all and then sue the executor for being stupid enough to have handed it over in the first place.

If you name a minor as a direct beneficiary, a guardian of that minor's estate will probably have to be appointed to receive the money. Not only will the guardianship be expensive, but also the child will receive every penny at age 18 – an age that seldom carries sufficient maturity to handle significant sums of money. Amounts under \$100,000 may be paid into the court registry and deposited by the clerk into an interest-bearing account, but again the minor receives it all at age 18. In your will you can provide for the appointment of a trustee to receive the property that would otherwise pass to an underage or incapacitated beneficiary. Your life insurance policy should then be changed to name that trustee to receive the funds on behalf of the beneficiary.

## **10 *How do you choose a lawyer?***

When looking for the right lawyer, first and foremost you should try to find one upon whom you can rely. Why pay money to any professional for advice that will be ignored? Usually the best way to find a lawyer is to ask for a personal referral from someone you trust.

In Travis County, Texas, hourly rates for estate planning and probate attorneys range from \$125.00 to over \$300.00. The median rate is probably just over \$200.00 per hour. Of course, a lawyer can charge whatever that lawyer thinks the market will bear. The value of the legal expertise does not necessarily rise or fall with the hourly rate charged.

Many projects lend themselves to a flat fee arrangement. Much of the work involved in probate and estate planning is often handled on such a basis. Contrary to the practice in some states, very few Texas lawyers charge a percentage fee for probating an estate.

I hope you have found this helpful. If I can ever be of service, please give me a call.

***John Crane***