



LEGAL HOTLINE FOR TEXANS

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HOW TO SELECT THE APPROPRIATE PROBATE PROCEDURE

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HOW TO SELECT THE APPROPRIATE PROBATE PROCEDURE

INTRODUCTION

This pamphlet is one in a series. This particular pamphlet discusses the various procedures for the transfer of property after death. Additional pamphlets discuss the methods of property ownership in Texas that can minimize the need for probate, and the duties of an independent executor.

OVERVIEW

Probate is often described in two different ways. Probate can be that process of proving that the document a decedent left is the last will and testament of the decedent. This “proves” up the will and informs the world that this is the last will and testament. This is often referred to as “admitting the will to probate” or “proving up the will”. Probate can also mean the actual administration of the estate, which includes performing an inventory of the assets, paying debts and taxes and distributing the estate to the heirs.

When a decedent dies and leaves an estate his assets may be probateable or non-probateable assets. Non-probateable assets are those assets that can be transferred without probate procedures. The Legal Hotline's "How Property Can Be Owned in Texas to Minimize the Need for Probate" discusses in detail what type of ownership of property is required to avoid or at least minimize the need for probate. Property that may be transferred without probate may include:

- (1) Community property with right of survivorship;
- (2) Joint tenancy with right of survivorship;
- (3) Payable on death accounts;
- (4) Life estates;
- (5) Life insurance payable to named beneficiaries; and
- (6) Annuities with a survivor's benefit.

Furthermore, if the decedent died leaving a trust, transfer of property in the trust is outside the probate procedures.

Most offices that oversee the records of property (county clerk for real estate, tax assessor for motor vehicle titles, banking institutions, life insurance and annuity companies) would transfer property (held in the above listed ways) to the person(s) entitled to it on presentation of a death certificate. Each office will have its own forms which must be completed to transfer the property, but if the property was owned in one of the described ways, the transfer process often can be completed without the need for a lawyer.

PROCEDURES

Texas has a variety of procedures which can be used to transfer property from a decedent to those surviving persons who are entitled to the property. Although not all of these procedures require the assistance of the probate court, the procedures are all found in the Texas Probate Code and are referred to as “probate procedures.” The particular sections of the Texas Probate Code are identified as each procedure is discussed.

DETERMINATION OF THE PROCEDURE

When a person dies, the facts and circumstances concerning his estate will determine what probate procedure will be applied. Answers to the following questions will affect which probate procedure will be used:

- Is there any property or estate left to probate?
- What assets are non-probateable?
- Is there a valid will?
- Does the estate require administration (i.e. taxes paid, debts paid, property sold)
- Was an executor named in the will?

If the decedent dies without a will, then he has died “intestate.” Furthermore, if he died leaving a will and four years have passed since the date of his death, he is also considered as having died “intestate.” This means that the laws of the state on descent and distribution will determine who inherits his estate. When a person dies without a will, one must also consider whether there is property to be transferred and whether an estate requires administration.

There are a few exceptions to probating the will after four years, but one must prove that one is not in default. In such situations it is best to consult an attorney.

DECEDENT DIES LEAVING A WILL

The two most common procedures used after a decedent has died leaving a will and an estate are: (1) probate of the will and issuance of letters testamentary, and (2) probate of the will as muniment of title.

PROBATE OF THE WILL AND ISSUANCE OF LETTERS TESTAMENTARY

In most instances, where there is a will with a named executor and an estate has property to be administered, “independent administration” is the most appropriate means to probate the estate. Independent administration is described in Texas Probate Code § 145

In independent administration, the will is admitted to probate, the executor is appointed, and letters testamentary are issued. The letters testamentary authorize the executor to deal with those persons and entities holding property in the deceased’s name.

In independent administration, the executor of the estate has broad authority to administer the estate without seeking court approval for every transaction. The duties of the independent executor are listed in the Legal Hotline’s publication “The Duties of the Independent Executor.” They include, presenting an inventory of the estate to the court, notifying creditors, paying debts and taxes, distributing the property of the estate and presenting a final accounting to the court.

Independent administration is distinguished from the more cumbersome “dependent” administration by this fact that the executor does not have to seek specific court orders. “Dependent” administration means that the administrator must seek specific court authority to perform many transactions. Dependent administration often occurs when no executor has been named in the will or the court determines that this estate needs monitoring.

When an estate must be administered, an independent administrator (executor) is usually appointed if the decedent had a valid will and if the will provided for the independent executor. Usually, the language in the will provides that no other action shall be taken in the county court in relation to the settlement of his estate other than the probating and recording of decedent’s will and the return of an inventory, appraisalment, and list of claims of the decedent’s estate.

A typical example where independent administration is appropriate is when the decedent left a valid will, naming an executor, and there was considerable property to administer. For example, land has to be sold or stocks and bonds to pay creditors and the remaining proceeds paid to the heirs.

In Texas, a lawyer's services are typically used in an independent administration. It should be kept in mind that the executor can only be reimbursed for reasonable attorney's fees. Texas Probate Code § 242. Thus, any heir or distributee, who believes the bill for a lawyer's services in an estate administration is unreasonable, can ask the probate court to review the lawyer's fee.

The executor himself or herself is entitled to a commission -- upon court approval -- of 5% of all sums received in cash and all sums paid out in cash. This does not include money on hand at the time of the decedent's death nor cash paid to the heirs. No executor's commission is allowed for receiving bank accounts, nor for collecting the proceeds of any life insurance policy. Overall the executor is entitled to no more than 5% of the gross fair market value of the estate subject to administration. Texas Probate Code § 241. The court, however, must first find that the executor has managed the estate in compliance with the Texas Probate Code.

An executor is subject to removal from office, without notice, for failing to timely file an inventory of the property of the estate and a list of all claims due and owing the estate. Texas Probate Code § 222(a)(1)(B).

The probate court can remove an executor, with notice, for failing to make a final settlement of the estate within three years after the court appointed the executor. Texas Probate Code § 222(b)(6).

NOTE: Independent administration is not limited to only those situations where the independent executor is named in a will. In special situations, the probate court may permit independent administration even if a will did not provide for it or even if the decedent had no valid will. Usually the distributees must agree. In situations such as this, an attorney should be consulted both before applying for a probate procedure and in the administration of an estate.

PROBATE OF WILL AS MUNIMENT OF TITLE

In some situations, the decedent has left a valid will, the debts of the estate have been paid, only title to property needs to be transferred, and there is no real need to administer the estate; then the will can be probated as a Muniment of Title. The word "muniment" means defense of title or claim of right to property.

The requirements for the muniment of title are found in Texas Probate Code §§ 89A, 89B and 89C.

The basic requirements to admit a will to probate as muniment of title are that

- 1) the court be satisfied that the maker of the will is dead but that not more than four years have elapsed since the date of death;
- 2) the court has jurisdiction over the estate, citation has been served and returned;
- 3) there are no unpaid debts owing by the estate of the testator (other than those secured by liens on the real estate); and
- 4) there is no need for an executor or administration.

In this proceeding there is no executor, and no letters testamentary are issued. The order issued by the court as the result of admitting a will to probate as a Muniment of Title is legal authority to all persons holding property belonging to the estate (and to persons receiving property from the estate), to carry out the transfer of the property without the need for an administration of an estate. The person or persons entitled to property under the provisions of a will, which has been

admitted to probate as a Muniment of Title, are entitled to deal with and treat the property in the same manner as if the title were in their names. Texas Probate Code § 89C.

Texas Probate Code § 89B lists in detail what must be proved in court to admit the will to probate.

Once the order admitted a will to probate has been approved it can now be submitted to the county records to change title from the decedent's name to the heirs. Furthermore, the order can be used to collect bank accounts in the decedent's name or to transfer stock. However, out- of-state transfer agents do not always honor the order and will want the traditional letters testamentary. In this case, it may be better to submit a will to probate and seek independent administration.

Two other advantages of the muniment of title is that the admission of a will to probate as a Muniment of Title can be accomplished in one hearing and there is no need to file an inventory of the estate.

In a Muniment of Title proceeding, unless the court waives it, the applicant for probate must file with the clerk of the court an affidavit stating which terms of the will have been fulfilled, and which terms remain unfulfilled. This affidavit must be filed before the 181st day after the order admitting the will to probate as a Muniment of Title.

If several persons are entitled to property under the terms of a will that has been admitted to probate as a Muniment of Title, those entitled can designate one person--such as the applicant for probate--as their attorney in fact under durable powers of attorney. The attorney in fact can then collect and distribute assets (and/or convey real property and distribute the proceeds) in accordance with the terms of the will.

***** Note in certain circumstances even though more than four years have passed since the deceased's death as long as the party is not in default the will can be admitted to probate as muniment of title. Texas Probate Code § 73(a). In situations as this, it is best to consult an attorney.

DECEDENT DIES INTESTATE

When the decedent dies intestate the heirs have several choices with respect to how to handle the estate. As mentioned above, if the estate requires administration and is extremely large, then an administrator (dependent or independent) may need to be appointed, and the advice of an attorney should be consulted. However, many estates are small and uncomplicated. In these situations: small estates affidavit, , the determination of heirship, or the affidavit of heirship may be appropriate.

SMALL ESTATES AFFIDAVIT

The small estates affidavit is most appropriate when the decedent left no will and his estate is under \$50,000. The specifics of the small estates affidavit are spelled out in Texas Probate Code § 137. In particular this procedure requires

- 1) the decedent dies without a will;
- 2) no petition for personal representative is pending or has been granted;
- 3) 30 days have passed since the death of the decedent;
- 4) the value of the entire estate to be probated excluding homestead and exempt property is not greater than \$50,000; and
- 5) two disinterested witnesses file a sworn affidavit concerning heirship.

***** Note: The small estates affidavit, however ,cannot be used when the decedent left a valid will and where the decedent owned non-homestead real property. It will not transfer that

property. Texas Probate Code § 137(c). The only real property that can be transferred is a homestead.*****

The information that must be contained in the small estates affidavit includes the assets and liabilities of the estate, the names of the distributees and all relevant facts of family history. The affidavit is sworn to by two disinterested witnesses by all such distributees that have legal capacity. Texas Probate Code § 137(a)(4).

The judge in the probate court can then issue an order approving the affidavit and a copy of the affidavit, certified by the clerk of the court, can then be presented to persons owing money to the estate or having custody or possession of property of the estate.

If a small estates affidavit is used to transfer title to the homestead it must be recorded in the deed records of the county in which the homestead is located.

Exempt property which does not count towards the \$50,000 limit is that property which is exempt from seizure to pay debts, under the constitution and laws of Texas. The statute providing for exempt property is Texas Property Code § 42. These exemptions are discussed in the Legal Hotline's brochure "Rights of Debtors in Texas".

Texas Probate Code § 138 contains significant protection against the wrongful use of the small estates affidavit. First of all, a person who pays over money, or makes delivery of or transfers other property, pursuant to the court approved small estates affidavit, is released of liability to the same extent as would be the case, if the transfer were to a personal representative. The payor, deliveror, or transferor of property has no responsibility to determine what is done with the property once it is transferred and is not required to determine whether the small estates affidavit is truthful. Rather, those who receive property pursuant to a small estates affidavit are responsible to any party who has a higher right to the property (such as someone having a perfected security interest in the property). Also, the person or persons who execute a small estates affidavit are liable for any damage or loss that arises from any payment, delivery, or transfer pursuant to the small estates affidavit which is improper. Furthermore, Texas Probate Code § 138 provides that if the person to whom the affidavit is delivered refuses to pay, deliver, transfer, or issue the property as required, those who are entitled to the property can sue to recover.

Also, in regard to the homestead, Texas Probate Code § 284 provides that the homestead shall not be partitioned among the heirs of the deceased as long as the surviving spouse (or guardian of the minor children of the deceased) elects to use or occupy the homestead property as permitted by court order.

If a distributee concludes that the small estates affidavit is available, and if the requirements for its use are met in the case of a particular decedent; then the distributees have two choices: (1) use the services of an attorney to prepare and file the small estates affidavit, or (2) inquire of the clerk of the probate court as to whether the clerk can direct the distributee(s) to a model small estates affidavit or a standard form affidavit used in that court (so that the distributees can prepare their own affidavit).

****Caution: Although an estate may appear to qualify for a small estates affidavit, there may be tax reasons why an attorney or other tax professional should be consulted. Although a person may have died without a valid will and had little property requiring probate other than the homestead and exempt property, it might nevertheless be that the gross estate includes enough assets that a federal estate tax must be filed. There may be significant life insurance annuities, payable on death property, community property with right of survivorship and/or joint tenancy without the right of survivorship that a small estate may generate enough earnings that a fiduciary income tax return has to be filed. Also, if the decedent had paid income tax in the year of death, or had enough income to require the filing of a tax return, a professional should be consulted to file for a refund or to pay the

required tax. These matters are discussed in the Legal Hotline's pamphlet "A Few Words About Taxes".*****

Although, the small estates affidavit can be an uncomplicated way of transferring property, it is wise to have the decedent's estate reviewed by an attorney or other tax professional to determine if there are tax matters that require attention. Also, if an attorney's service are used for the preparation and filing of the small estate affidavit, the cost may well be lower than if other probate procedures are used.

DETERMINATION OF HEIRSHIP

The requirements for determination of heirship can be found in Texas Probate Code § 49.

A "Proceeding to Declare Heirship" of "determination of heirship" can be filed in the probate courts when:

- 1) a person dies without a will,
- 2) decedent leaves real or personal property in Texas
- 3) there has been no administration of the estate or the will was probated, but property had been omitted from the will or administration of the estate.

This procedure can be initiated in the probate court of the county where the real property is located or, if no real estate in that county, where the personal property is located.

An heir who is entitled to a portion of the estate can initiate proceedings to declare heirship. Texas Probate Code § 49 states in detail what the application for the procedure must contain. The distributees of the estate must be notified of the proceedings. Texas Probate Code § 50 lists how citation (notice) is to be served. Application to the probate court triggers the clerk citing those distributees.

Other persons who may initiate this proceeding can be a qualified personal representative of the decedent or a person claiming to be a secured creditor.

An applicant must include information about the name and date of death of the decedent, the names and addresses of all the heirs and their relationship to the distributees, information about marriage, a list of all the real and personal property belonging to the decedent.

After the court receives the information the court will hear the evidence and make a determination whether an administration of the estate is needed.

The judgment of the court in a proceeding to declare heirship shall declare who are the heirs of the decedent, and what their respective share is in the property of the decedent. This judgment is usually signed shortly after the one and only hearing in this type of proceeding. At that hearing, the court may require both oral and written testimony concerning the personal and family circumstances of the decedent. Essentially, the applicant must be prepared to prove in court, those matters which Texas Probate Code § 49 required to be in the application.

If the court states that, in its judgment, there is no need to administer the estate, then all persons holding property which the decedent owned are authorized to transfer such property to the persons entitled to it under the judgment. If property is not transferred to those who are entitled to it, they can sue to obtain the property.

The court's order in a proceeding to declare heirship will typically identify the heirs, and the heirs may be numerous. Therefore, it may be efficient for one heir to be named attorney in fact by the other heirs, under durable powers of attorney. The heir who is designated attorney in fact can then deal with those who hold property that belonged to the decedent. The attorney in fact can recover such property and forward it to each heir in the appropriate share, consistent with the court's judgment. In regard to real property, the recording of the court's judgment declaring heirship, with

the clerk of the county where the decedent owned real property, makes clear as a matter of public record who now owns the real property, and in what shares. When it is desired to sell such real property, either all heirs can directly sign deeds, or one heir, designated in proper durable powers of attorney, can convey the real property for himself or herself, and all the other heirs.

The statutory heirship proceeding for the intestate is the equivalent to muniment of title probate of the will under Texas Probate Code [§ 89C](#).

AFFIDAVIT OF HEIRSHIP

When a decedent dies without a will and the family members want to make a record of who the decedent's heirs are, this can be done by a sworn affidavit which is notarized. After the affidavit has been of record in the deed records of the county for five years or more, the affidavit is prima facie evidence of the facts. The specifics of the affidavit of heirship are found in [Texas Probate Code § 52](#). Furthermore, this section states that an affidavit may be made in the statutory form now found in [Texas Probate Code § 52A](#).

Moreover the facts concerning the identity of heirs of a decedent do not affect the rights of an omitted heir or creditor of the decedent. [Texas Probate Code § 52\(c\)](#).

*****NOTE: The affidavit of heirship is not an actual probate court procedure. It is a sworn affidavit that is filed in the deeds records of the county. A major concern in using the affidavit of heirship is that it does not become prima facie evidence of the facts set forth in it, until it has been of record for **five** years. Before it has been of record for five years, title insurance companies and others who would have to be convinced of the facts in the affidavit may not honor it. The affidavit can be used in a proceeding to declare heirship on in a suit involving title to real or personal property, but it has to be on record for five years. [Texas Probate Code § 52\(a\)](#).

Often, the tax assessor's office (also known as the tax collector's office or called the tax assessor's collection office) will honor affidavits of heirship; so this procedure can be a useful way of quickly transferring title to motor vehicles. In fact, many tax assessor's offices will have form affidavits of heirship, which can be completed by the person to whom a vehicle should be transferred. If the affidavit of heirship is properly completed, motor vehicles can be transferred by this method as long as the transfer does not contradict who was to get the motor vehicle under a will

Although an affidavit of heirship can be used to transfer title to other property, including real property, the affidavit of heirship may not always be honored outside of the motor vehicle context. For instance, a bank might be unwilling to transfer a bank account solely on the basis of an affidavit of heirship. Also, in regard to real property, the affidavit of heirship is certainly subject to being questioned within its first five years on record. Thus, a survivor who would want to sell real property and who bases his or her title on an affidavit of heirship may have trouble selling the property (especially if a title insurance company refuses to insure title), if the sale is within five years of when the affidavit has been recorded.

Although affidavits of heirship are not widely used they assist in long standing gaps in title of the property and are often honored by title companies.

PROCEDURES FOR THE SURVIVING SPOUSE

In addition to the procedures mentioned above, there are some other procedures that are especially helpful to a surviving spouse. In some situations there may be a need to request a family allowance for the surviving spouse, in another situation there may be a need for administration of the community property.

APPLICATION FOR ORDER OF NO ADMINISTRATION

An application for order of no administration found in Texas Probate Code § 139 is applicable in situations where there may be no need to administer an estate and a need for a family allowance. As in the small estates affidavit, the homestead and exempt property under the Texas Property Code do not factor in when deciding if this application should be used. The real question is: once the homestead and exempt property have been excluded, is the estate's value equal to or less than the amount to which the surviving spouse and minor children of the decedent are entitled to as a family allowance? The family allowance is not a fixed sum. Texas Probate Code § 287 states that the family allowance "shall be of an amount sufficient for the maintenance of such surviving spouse and minor children for one year from the time of the death of the testator or intestate. The allowance shall be fixed with regard to the facts or circumstances then existing and those anticipated to exist during the first year after such death."

When an application for Order of No Administration has been filed, the probate court must hold a hearing. If the court decides that the application is true, and the expenses of the last illness, funeral charges and expenses of the court proceeding have been "paid or secured," the court is to make a family allowance. If the family allowance exhausts the entire assets of the estate (other than the homestead and exempt property), the court shall rule that no administration of the estate occur, but that the estate be assigned to the surviving spouse and/or minor children. (Texas Probate Code § 140). Anyone holding property of the decedent that has been assigned to the surviving spouse and/or minor children must transfer it pursuant to the court's order, and the persons entitled to the decedent's property can sue to enforce the court's order.

A drawback to the request for the family allowance is that, within one year after the entry of the order of no administration, any "interested person" can file an application to revoke the order. Sometimes other property is discovered or the property is not correctly valued. If the court finds that the total value of the property would exceed the amount of the family allowance, the court shall revoke the order of no administration. Texas Probate Code § 142. "Interested persons" under the probate code means heirs, devisees, spouse, creditors, anyone who has a property right, in, or a claim against the estate, and anyone interested in the welfare of a minor or incompetent ward. Texas Probate Code § 3(r).

ADMINISTRATION OF COMMUNITY PROPERTY

In many situations a surviving spouse is left with only community property. Texas Probate Code § 155 provides that: "When a husband or wife dies intestate and the community property passes to the survivor, no administration thereon, community or otherwise, shall be necessary."

Since 1993, the surviving spouse in cases of *intestacy* inherits the decedent's community interest if all of the decedent's descendants were also the spouse's descendants. Despite what the statute states, if there are title problems in the estate (e.g., if real property was titled in the decedent's name), it will be necessary to take steps to clear title. One would then have to choose a statutory heirship proceeding under Texas Probate Code § 48, a nonstatutory affidavit of heirship Texas Probate Code § 52 or if the homestead is the only property, a small estate administration affidavit under Texas Probate Code § 137. Texas Probate Code § 156 addresses the liabilities of the community property for debts. The survivor or personal representative in the administration of a community estate shall keep a separate, distinct account of all community debts allowed or paid in the administration and settlement of such an estate.

When no administration of the estate is necessary the surviving spouse still has power to sue and be sued for the recovery of community property and dispose of community property to pay for debts. Texas Probate Code § 160. If the deceased is owed current wages, Texas Probate Code § 160

provides that the surviving spouse submit an affidavit to the person who should deliver the final paycheck for wages, unpaid sick pay, vacation, etc. This can be done even if no one has qualified as the executor of the estate. This affidavit provided in Texas Probate Code § 160(b) is often the only way a low level payee and family of small means may be able to obtain the final paycheck of the deceased.

The spouse cannot however sell community property if there is no community debt. Moreover, this section of the code does not affect any separate property of the deceased. Note: This section of the code is rarely used.

HOMESTEAD CLAIMS

It should be kept in mind that the surviving spouse has certain probate homestead rights described in the Texas Probate Code §§ 282-285. If the deceased died leaving a surviving spouse and children who are not children of the surviving spouse and the homestead was the separate property of the deceased, the surviving spouse is entitled to a life estate in one-third (1/3) plus a survivor homestead in the home. As long as the surviving spouse elects to use or occupy the homestead property as permitted by court order, it cannot be partitioned among the heirs of the deceased. The property cannot be sold independent of the title. The right is also not extinguished by marriage. If the underlying title is in another's name, the surviving spouse is liable for all property taxes and mortgage interest, but not for the casualty insurance and the mortgage principal. This is the duty of the titleholder.