

How to Minimize the Need for Probate in Texas



How can property be owned to avoid the need for probate after a person dies?

Think of the word “probate” as meaning “transfer of title.” There are several ways that property can be owned so that property automatically goes to the family or to a co-owner when a person dies without having to file a court application for probate.

Information Not Legal Advice

This pamphlet is for information only and is not a substitute for the advice of an attorney.

What is property in Texas?

There are two basic kinds of property. A person can have personal property or real property. Personal property includes “things” such as a car, furniture, jewelry, clothes, or even a bank account. Real property means land and includes land that has buildings on it, like a person’s house. Real property also includes mineral interests.

Property is either separate property or community property. Separate property is owned by an unmarried person or is owned by a person before being married. A gift or inheritance to a married person is separate property. Community property is acquired by a married person during the marriage.

The total amount of property a person owns is called the estate. The community estate of a married couple is owned by both persons. In other words, each spouse owns one half of the community estate. When a married person dies, only one half of the community estate can be given away because the other half is still owned by the living spouse. The spouse that has died (called the decedent) could own a separate estate in addition to one-half of the community estate.

The following is a list of how property can be owned:

- Separate property
- Joint ownership (sometimes called joint tenancy)
- Joint ownership with right of survivorship
- Payable on death
- Life estate
- Community property
- Community property with right of survivorship

Can a married person still have separate property?

Yes. Property owned before a marriage is separate property. Property that is given as a gift to or that is inherited by a married person is also separate property.

What if a person dies without a will?

If a person dies without a will, the law decides how property is divided. The person who has died is called the *decedent*. When a married person dies, the person's living spouse is called the *surviving spouse*.

For example, if a married person dies without a will, the law says the decedent's community property goes to the surviving spouse if:

- The decedent had no children or other descendants;
- All the decedent's children are also the children of the surviving spouse;
- If the decedent had children with more than one person, the surviving spouse keeps his or her one half of the community property and the children get the decedent's one half of the community property.

What if the person had a will?

A valid will controls how a person's estate is handled after the person dies. However, to change the title to some property, the will must be admitted to probate. This means that an application to admit the will for probate must be filed with the probate court where the person lived or died, or in the county where the property is located; and the probate judge must find that the will is valid. The cost to file an application in the probate court varies depending on the county. Most probate courts will not allow pro se litigants, which means that you must hire an attorney. This adds to the cost. To save money for their family, many people attempt to own property in a way that makes it unnecessary to probate the will. For example, if a married person dies, and the couple's property is owned with right of survivorship, the property automatically goes to the surviving spouse.

Can I avoid probate if I own real estate?

Absolutely. As of September 1, 2015, Texas law says that an owner can prepare a Transfer on Death Deed (TODD). A TODD allows the owner, the transferor, to name a beneficiary who will receive the property described in the deed after the transferor has died. The TODD must be recorded in the deed records of the county where the property is located prior to the transferor's death.

Can I continue living in my home after I execute a TODD?

Yes. Nothing changes as long as you, the transferor, is living. You are still the full owner; which means that you must continue to maintain the property and pay the taxes unless you have deferred them. You can even sell the property if you need to do so. The beneficiary would receive nothing at the time of your death if the property has been sold.

What if I have a will? How does a TODD affect my will?

A TODD will rule; it governs over the will. If your will states Property A goes to my daughter and the TODD names son as the beneficiary of Property A, son will be the new owner regardless of which of the two documents was executed first. Property A's title can transfer without the need for probate.

Can a TODD be executed for any real estate?

Real estate, with or without a mortgage, can be transferred at death when the owner properly drafts and records a TODD. It is not limited to one's homestead.

What about premarital agreements?

Persons who are planning to be married can prepare a written premarital agreement that says that certain property will remain separate property even after the marriage. Unless there is a will that states who will get the property, the property mentioned in the premarital agreement will not go to the surviving spouse.

What is a joint tenancy?

A joint tenancy means more than one person owns a certain item of property. Both real property (land) and personal property (things) can be owned jointly.

There are two kinds of joint tenancy. People can own property as joint tenants or as joint tenants with right of survivorship. In a joint tenancy, when one owner dies, his or her share of the property passes to the decedent's heirs or to the persons named in the decedent's will. In a joint tenancy with right of survivorship, when an owner dies, his or her share of the property goes to the other owners.

A joint tenancy with right of survivorship has to be created by a *written agreement*.

What about community property with right of survivorship?

When a married person has children who are not the children of the surviving spouse, his or her half of the community property does not automatically go to the surviving spouse when the person dies. In Texas, a married couple can agree *in writing* that all or part of their community property will go to the surviving spouse when one person dies. This is called a right of survivorship agreement. The right of survivorship agreement must be filed with the county court records where the couple lives. This can be a way that married couples can see to it that all community property stated in the agreement automatically belongs to the surviving spouse without having to go to probate court.

What are the different types of joint bank accounts that I need to know about?

Generally, there are two types of joint bank accounts. If all parties to a joint account are living and it is set up under the names of Owner A **or** Owner B, then either Owner A or Owner B can take money out of the account without getting permission from the other owner. If the account is set up under the names of Owner A **and** Owner B, then both owners must sign to take money out of the account.

Is payable on death a good idea?

Another way of owning financial accounts, so that they will pass automatically without probate is called *payable on death (POD)*. Payable on death accounts are not joint accounts because during your life you have total ownership of the account. After your death the person you chose becomes the owner of the account. An example of this type of account is an individual retirement account. To set up a payable on death account, contact your bank or financial institution.

What is a life estate in real property?

A *life estate* gives a person the right to live on or use property during the life estate owner's lifetime or until his or her death. Someone else is the full owner of the property. The person only has an ownership interest in the property as long as he or she is alive. Some people will use a life estate to avoid probate.

The way this works is that the property owner (grantor) has a deed prepared that gives the property to someone else (grantee) when the owner dies. The grantor has the right to live on and use the real property until death. At the grantor's death the real property automatically goes to the grantee. After the life estate is created, generally the grantor cannot sell the property without the consent of the other person. This kind of deed should only be prepared by an attorney.

What is the difference between term insurance and whole life insurance?

Term insurance does not have any cash value until the insured person dies. The policy benefit is paid to your beneficiary when you die. Whole life insurance has some cash value during the lifetime of the insured and will pay benefits when the insured dies. You should review the terms of any insurance policy to see if the benefits are worth the higher premiums of a whole life policy.

When you fill out the forms for a life insurance policy, you are asked to name a beneficiary; that is, to name the person who gets the benefits when you die. Make sure to fill in the name of a specific person to be your beneficiary. If you fill in the blank with something like, "my estate" or "all my heirs," your family will have to go to the probate court to get the insurance policy benefits. Naming a specific beneficiary keeps an insurance policy out of your probate estate.

What happens to a car when its owner dies?

During the owner's life he or she can designate a co-owner as joint with right of survivorship. This is done by using Texas Department of Motor Vehicles (DMV) Form #VTR-122. If that hasn't been done prior to the owner's death, there is a DMV form called Affidavit of Heirship that can be used to transfer the title. This is done by using Form #VTR-262.

As noted, this publication is general in nature and should not be relied on as advice for your particular circumstances. For specific advice about your individual situation, it is always best to talk to an attorney.

For more information...

Texas Law Help has useful information on many areas of the law. Go to www.texaslawhelp.org.

Legal Hotline for Texans: (800) 622-2520

Call our attorney-staffed legal hotline. Advice is free for Texans 60 years of age or older and for anyone receiving Medicare.

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