

# **DEATH, WILLS, PROBATE and TRUSTS IN TEXAS**



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## **SECTION 1 – You Can’t Take It With You**

Death affects people in many ways. It is never timely. Death confronts the family with bereavement, with the need to readjust emotionally and financially, and often with an unknown future. Death is not only a personal issue but a legal one as well. A death certificate must be issued, and the estate of the deceased individual (the decedent) must pass to others.

An estate consists of the property, both real and personal, which the decedent owns at the time of death. Real property includes land and improvements located on the land. Real property also includes oil, gas, and other mineral interests. Personal property is all property other than real property, including cash and bank accounts, clothing and personal effects, household furnishings, motor vehicles, stocks and bonds, life insurance policies, and government, retirement, or employee benefits.

Upon death, title to the decedent’s property passes immediately to the beneficiaries under the decedent’s will or to the heirs-at-law if the decedent died without a will. However, there must be an actual transfer of ownership of the property by proving the will in court or, if there is no will, by having a court determine who are the decedent’s heirs. The purpose of court involvement is to protect the rights of the family, those entitled to receive property, and the creditors of the decedent’s estate.

Therefore, although title to property passes immediately at death, the assets of the estate are subject to the control of the executor or administrator of the estate for the purpose of settling the debts of, and claims against, the estate. After the payment of debts and claims, the remaining assets are distributed to the decedent’s beneficiaries or heirs-at-law. If the decedent died with a legally valid will, then his or her property is distributed according to his or her wishes as expressed in the will. On the other hand, if the decedent died without a will or if the will is declared invalid, the estate is distributed to the decedent’s heirs as determined under Texas law. The decedent’s heirs may not be the persons to whom the decedent wished for his or her property to pass.

## **SECTION 2 – Dying Intestate (Without A Will)**

In Texas, property is characterized as separate or community. Separate property is that which is owned before marriage or acquired during marriage by gift or inheritance. Damages awarded during marriage from a personal injury lawsuit, except damages representing the loss of earning capacity, also are separate property. Community property is all property, other than separate property, which is acquired by either spouse during marriage. Thus, there can be separate real property, separate personal property, community real property and community personal property. When a person dies without a will, the law determines who are the heirs, and assets are disposed of according to whether they are community or separate property.

## **SECTION 3 – Distribution of Community Property**

Community property, whether real or personal, is distributed in this manner:

1. If the decedent is survived by a spouse and children (or descendants of deceased children):

- If all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse, all of the community property passes to the surviving spouse.
- If any surviving child or descendant of the deceased spouse is not also a child or descendant of the surviving spouse, the deceased spouse’s one-half of the community property passes to his or her children (and the descendants of any deceased child), and the surviving spouse retains the one-half of the community property he or she owned prior to the deceased spouse’s death. However, the surviving spouse has the right under Texas law to use

and occupy the homestead during his or her life and may have the right to use or own certain items of personal property that are exempt from creditors' claims.

- Example 1: Husband (H) dies without a will. H is survived by Wife (W) and by his three children (A, B, and C). A, B, and C also are the children of W. In this case, all of the community property passes to W.
- Example 2: Same as Example 1, except H is survived by a child (D) who is not also a child of W. Now, A, B, C, and D share equally in H's one-half of the community property, and W simply keeps the one-half of the community property that she owned prior to H's death. To illustrate, let's apply this rule to a community bank account with \$1,000 in it. The \$1,000 is distributed as follows:

W: \$500 (Many people incorrectly think that W gets the entire \$1,000.)

A, B, C, and D: Each receives \$125 (1/4 of \$500)

- Example 3: Same as Example 1, except W has a child (E) by a prior marriage. E is alive at H's death. All of the community property still passes to W. It does not matter that W has children who are not also H's children.
2. If the decedent is survived by a spouse but not by any children or descendants, all of the community property passes to the surviving spouse.
  3. If the decedent is not survived by a spouse, all property is separate property. The following section discusses the intestate distribution of separate property.

#### **SECTION 4—Distribution of Separate Property**

The distribution of separate property of a person who dies without a will depends on whether it is real or personal property. Separate property is distributed in this manner:

1. If the decedent is survived by a spouse and children (or descendants of deceased children), then subject to the surviving spouse's rights with respect to the homestead and exempt personal property:
  - Separate personal property passes one-third to the spouse and two-thirds to the children (and the descendants of deceased children).
  - Separate real property passes to the children (and the descendants of deceased children) subject to a life estate in one-third of the property in favor of the surviving spouse. This means that the surviving spouse is entitled to use one-third of the real property during his or her lifetime, and upon his or her death, the children (or descendants) will have full title to the separate real property of the decedent.
2. If the decedent is survived by a spouse but not by any children or descendants, then subject to the surviving spouse's rights with respect to the homestead and exempt personal property:
  - All separate personal property passes to the spouse.
  - Separate real property passes one-half to the spouse and one-half to the decedent's parents or collateral relatives, such as brothers and sisters or their descendants.

- If no parents, brothers, sisters, or their descendants survive, then all separate real property passes to the surviving spouse.
3. If only children or their descendants survive, all separate personal and real property passes to the children or their descendants.
  4. If both parents survive, but not the spouse or children or children's descendants, all separate personal and real property passes one-half to each parent.
  5. If only one parent and brothers or sisters survive, separate personal and real property passes one-half to the surviving parent and the remaining one-half is divided equally among the brothers and sisters or their descendants. However, if no brothers or sisters or their descendants survive, then all separate property passes to the surviving parent.
  6. If no spouse, children or children's descendants, or parents of the decedent survive, all separate property is divided equally among the decedent's brothers and sisters or their descendants.
  7. If none of the above relatives survive, then all separate property passes generally to the decedent's grandparents. If no grandparents survive, the law provides for distribution of separate property to more distant relatives.

In Texas, no matter how remotely related one is to a person who dies without a will, potentially he or she is an heir-at-law. Notice that the decedent's property passes to the State of Texas only if none of his or her heirs, including very remote heirs (such as uncles, aunts, or cousins), are living. Indeed, the State rarely benefits from the estate of an intestate decedent.

Examine the rules above to see how your community and separate property would be distributed if you died without a will. Would the persons you desire to receive your property actually receive it?

## **SECTION 5 – Disadvantages Of Dying Without A Will**

If a person dies without a will, the law disposes of his or her property. The public policy of statutes governing the intestate distribution of property is to provide for the orderly distribution of property at death. The law does not play favorites, so the distribution is determined by how closely the heir was related to the decedent, not by the nature or quality of any relationship between the heir and the decedent. Dying without a will may trigger undesired results and unexpected costs and delays.

### **Undesired Results**

Because one usually has an idea of how he or she would like his or her property to pass to others, undesired results can arise if he or she dies without a will. Dying without a will risks that the property will not be inherited as the decedent wished.

For example, very often one spouse may prefer to leave everything to the surviving spouse who will provide for and take care of the children, but this may not happen if there is no will. If a person dies without a will survived by a spouse and children, including one or more children who are not also children of the surviving spouse, the surviving spouse receives only his or her one-half share of the community property, perhaps including the family home. Further, under these circumstances, the surviving spouse inherits only one-third of any separate personal property and only a life interest in one-third of any separate real property. If there is any animosity between, for example, the surviving spouse and the deceased spouse's children by a prior marriage (who are now co-owners of property), conflicts or disputes may arise. Surely this is not what the deceased spouse wanted.

Another example of unintended results of dying without a will relates to the treatment of lifetime gifts to heirs. Texas law presumes that a gift to an heir is not an advancement of his or her inheritance. This may present a problem where a parent with two children makes a lifetime gift of a sizeable part (say, one-half) of the estate to one child (perhaps to help the child start a business or purchase a home) with the understanding that the gift is an advancement of his or her inheritance. If that parent then dies without a will and is not survived by a spouse, the remaining one-half of the estate is divided equally among the two children. The child who received the lifetime gift in effect takes three-fourths of the total estate, and the other receives only one-fourth instead of one-half, unless an advancement of the one child's inheritance can be proved in court.

If the most special people in a person's life are not among those who would be his or her heirs-at-law, they will not share in the estate if he or she dies without a will. If an unmarried person dies without a will, friends and roommates will inherit nothing. Thus, a devoted friend, who perhaps cared for the decedent for years, will not inherit property, no matter how unfair it might seem, unless the friend is provided for in the decedent's will. Also, without a will, property cannot pass to a charitable organization, no matter how committed the decedent was to its purpose.

In Texas, there is no forced heirship. In other words, a parent is not required to leave property to his or her children. However, one cannot disinherit heirs if he or she dies without a will. Under the intestate distribution statutes, property may pass to undesired heirs instead of those the decedent would have chosen.

## **Costs and Delays**

Dying without a will can tie up assets for an undetermined period of time. A court proceeding often is required to determine who are the heirs, although in certain limited circumstances it may be possible to clear title to the assets without an heirship proceeding. An administrator, who may be responsible to the court for settling the estate, may have to be appointed. The administrator may be required to post a bond to insure that the duties are performed properly. The administrator's duties include locating the heirs, inventorying the assets, classifying and paying off debts of and claims against the estate, and distributing the property to the heirs.

Transfer of ownership of some of the assets by legal documents, such as deeds and certificates of title, may be necessary. If the estate cannot be settled amicably, the court will resolve the disputes. Because of congested dockets, court proceedings often are slow. Legal fees and court costs may begin to mount. Depending on how difficult it is to divide the property and whether the heirs agree on the value assigned to it, court proceedings could be so lengthy and costly that the estate is depleted. The bottom line is that dying without a will costs time and money and causes frustration for the family of the decedent.

## **SECTION 6 – Children And Intestacy**

### **Adopted Children**

The inheritance rights of adopted children are protected when a parent dies without a will. Under the Texas Estates Code, an adopted child is treated the same as a natural born child. Therefore, the adopted child can inherit from his or her adopted parents and vice versa. The adopted child can also inherit from his or her natural parents, but the natural parents cannot inherit from the child if the child dies without a will. This is an important consideration today when often an adopted child seeks and discovers the identity of a natural parent and then establishes a relationship with that parent. It should be noted that a person who is adopted as an adult may not inherit from his or her natural parents and vice versa.



## **Illegitimate Children**

An illegitimate child (one born out of wedlock) can inherit from his or her natural mother and vice versa when either dies without a will. By contrast, the illegitimate child cannot inherit from the natural father or the father's family members who die without a will, except upon the occurrence of one of certain specified events, including:

1. The father consents in writing to be named as the child's father on the child's birth certificate.
2. Paternity is established in a paternity suit brought generally before the child's twentieth birthday.
3. The father legally adopts the child.
4. The father voluntarily signs a written notarized statement of paternity acknowledging that the child is his.
5. After the child's birth, the father marries the biological mother and either signs a written acknowledgment of paternity, consents to be named and is named as the child's father on the birth certificate, or is obligated under a written voluntary promise or by court order to support the child.
6. After the father's death, the probate court determines that the father was the child's biological father.

This means that even if a father maintains ties with his illegitimate child, that child will not inherit from him if he dies without a will, except under limited circumstances such as those discussed above.

## **Stepchildren**

The stepchild does not inherit from a stepparent who dies without a will because he or she is not considered to be legally related to that stepparent. This is unfortunate where the stepchild was raised by a natural parent and/or a stepparent. A stepchild can inherit from a stepparent who dies without a will only if the stepparent adopted the stepchild or if the stepchild proves in court the existence of a written or oral agreement to adopt which was not executed. This latter method often is used when foster parents do not adopt a child even though they had an agreement with the natural parent(s) that they would adopt.

## **Children of the Half-Blood**

Half-blood children share the same natural mother or father, but not the same two natural parents. A half-blood child inherits only half as much as a whole blood child. For example, if a decedent's only heirs are a half-blood brother or sister and a whole blood brother or sister, the half-blood heir takes one-third of the estate and the whole blood heir takes two-thirds. However, if all of the heirs are half-blooded heirs, then each will take a whole share.

## **After-Born or After-Adopted Children**

After-born or after-adopted children are children who are born to or adopted by a person after he or she executed a will in which such children were not provided for or mentioned at all. After-born or after-adopted children in this situation inherit only under limited circumstances, so it is best to execute a new will or an amendment to the existing will to provide for the after-born or after-adopted children.

## **SECTION 7 – Executing A Will To Achieve Desired Property Distribution**

### **What A Will Can Do**

A testator is a person who leaves a will in force at his or her death. A will is a legal instrument which states how the testator's property is to be distributed at death. A valid will avoids many of the problems that may arise from dying without a will and allows a person to leave property to the persons he or she desires. In addition to naming the recipients of the testator's property, the will also designates the individual(s) who will manage the property and care for minor children. In larger estates, the will often contains provisions that minimize estate taxes.

A will can also set up a trust, a method by which property is held by one party (the trustee) for the benefit of another (the beneficiary). To establish a trust, the testator transfers property, with the specific intent to create a trust, to the trustee who manages and administers the property for the benefit of named beneficiaries. A testamentary trust arises under a will and becomes effective when the testator dies. A trust is an effective way of managing property for the benefit of minor or incapacitated persons or persons who are incapable of managing their own financial affairs. A trust also is useful to prevent a spendthrift child from immediately spending his or her inheritance by preserving the funds for the child's education or other important needs. Further, a trust may be used to protect the child's inheritance from the claims of his or her creditors because property placed in a trust generally may not be reached by a beneficiary's creditors until it is distributed to the beneficiary. There also are many other legitimate reasons to create a trust in a will.

### **Requirements for Execution**

For a will to accomplish any or all of these results, it must have been properly signed. Texas recognizes handwritten wills (holographic wills) and typewritten wills (formal wills).

To execute a will, the testator must meet the following requirements:

1. is at least 18 years of age, is or has been lawfully married, or is serving in the armed forces;
2. be of sound mind at the time of execution;
3. not be unduly or fraudulently induced (forced or deceived) to make the will; and
4. have testamentary intent (present intent to bequeath property at death).

Additional requirements as noted below must be met for each type of will.

### **Handwritten (Holographic) Will**

Under the Texas Estates Code, a valid handwritten will must be wholly in the handwriting of the testator and signed by him or her. It does not need to be witnessed and can be written on anything, including stationery. Typewritten words may not be incorporated into the will. The wording must reflect a present intent to dispose of property at death. The words, "This is my last will and testament," generally are sufficient to show testamentary intent.

While executing a handwritten will sounds easy enough, problems can arise from its interpretation, especially when written by a lay person. If the instrument does not dispose of all of the decedent's property, the undisposed property will pass according to the statutes regarding intestate distribution. If the handwritten will disposes of more property than the testator owns, complications may arise.



Remember, a spouse has only one-half of the community property to give to anyone because the other spouse owns the remaining half. If a will attempts to give all the community property to one or more persons, the surviving spouse is placed in the awkward position of having either to accept whatever bequests are made to him or her in the will or to renounce the entire will and instead claim his or her one-half community share.

If the bequests in a handwritten will are not written in clear language, then it may be necessary for the court to construe the meaning of ambiguous terms. As a general rule, the less clear the language and the more property and heirs involved, the more likely the will may be contested in court. Contesting a will is usually a very lengthy and costly process and may result in defeating the testator's intent.

Further, if the handwritten will does not contain the proper language allowing the executor to serve without court supervision and waiving bond, the executor may be required to obtain court approval of many actions and to post an executor's bond. This causes unnecessary delays and expenses in administering the estate.

For these reasons the best approach is to have an attorney prepare a typewritten (or formal) will.

### **Typewritten (Formal) Will**

A typewritten will sometimes is referred to as a formal will. A well-drafted typewritten will is more apt to carry out the decedent's intent. Although a typewritten will may be prepared by a lay person, an experienced attorney should draft the will.

For a typewritten will to be valid, it must meet these requirements:

1. be signed by the testator or another person at his or her direction and in his or her presence;
2. be attested by two credible witnesses above the age of 14; and
3. be signed by the witnesses in the presence of the testator.

A beneficiary under a typewritten will should not serve as a witness to the execution of the will because this may preclude the beneficiary from receiving any property under the will.

### **Nuncupative Will (Oral Will)**

After September 1, 2007, oral wills, also called nuncupative wills, are no longer recognized under Texas law. Oral wills are not valid, the oral will could be made in the testator's last sickness, meaning they must be on their deathbed.

**Will Revisions- Codicil (amendment to a will)** *-from Latin, literally 'block of wood', later denoting a block split into leaves or tablets for writing on, hence a book.*

Executing a will that stands up in court is only one aspect of "getting your affairs in order." After execution, the original document should be safeguarded so that it is not lost, destroyed, or mutilated, which might result in complications in probate court as to the proof of its contents. Further, a will should be updated when there are changes in the testator's heirs, property, or marital status. This can be accomplished by executing a proper amendment (a codicil) to modify the existing will or by canceling (revoking) the existing will and then executing a new one. It is not advisable to update a will by writing or making changes on it because such revisions may be totally ineffective.

Be aware that a will can also be canceled to some extent if the testator is divorced after making the will. In such a case, gifts to the ex-spouse in the will, as well as appointments of the ex-spouse as executor or trustee, are void and will not be recognized. Similarly, an ex-spouse who was designated during marriage as a beneficiary under the decedent's life insurance policies generally is not entitled to the life insurance proceeds upon the decedent's death. A temporary order issued by a divorce court prohibiting a party to a pending divorce case from changing his or her will until the divorce is final is unenforceable.

The subsequent marriage of a single testator will not cancel his or her will. If a person who signs a will before marriage wishes to give all or any portion of his or her property to the new spouse, he or she should sign a new will. Otherwise, the property will pass according to the provisions contained in the will that was signed before marriage, and the new spouse will receive no portion of the deceased spouse's property.

## **Non probate Assets**

Only property owned by the decedent at death can be disposed of by a will. A will cannot dispose of "nonprobate assets" assets which pass at death other than by will or intestacy. The principal types of nonprobate assets include property passing by contract, property passing by survivorship, and property held in trust.

Property passing by contract includes life insurance proceeds, IRAs, and employee benefit plan proceeds, such as the proceeds payable under a pension, profit-sharing, or employee retirement plan. These assets pass outside the will to the persons named by the decedent in the appropriate beneficiary designations. Thus, it is important to periodically review the beneficiary designations with respect to these types of assets and to update them as necessary.

Property held by the decedent and another person as joint tenants with right of survivorship or in a pay on death account passes outside the will directly to the survivor. Survivorship assets typically include certain types of bank accounts, certificates of deposit, stocks and bonds, and certain savings bonds issued by the United States Government, such as Series EE savings bonds.

Another category of property that passes outside of probate is property held in a trust for the benefit of the decedent. The trust may have been created by the decedent during his or her lifetime for property management purposes or by someone else, such as a parent of the decedent. Trust assets pass under the terms of the trust rather than under the terms of the decedent's will.

It is important to determine the extent of one's non-probate assets when planning the disposition of one's property at death. If a substantial portion of the assets are non-probate assets that do not pass under the will, even a well-drafted will may be insufficient to carry out the testator's intent in disposing of his or her property.

## **Tax Considerations**

Depending upon the value of the decedent's property, a will may be necessary to avoid, minimize, or defer federal estate and state inheritance taxes. These taxes generally are imposed if the value of the decedent's property exceeds the limitation imposed by the law at the time of the decedent's death, reduced by the amount of any lifetime taxable gifts. The limits imposed by law vary, so it is important that you check with an attorney to determine if an estate is taxable. When determining if an estate is taxable, it is important to look at the value of the decedent's property. For these purposes, the decedent's property includes his or her separate property and one-half of all community property. Life insurance and other non-probate assets are considered in determining the value of the decedent's property unless certain steps were taken during life to prevent such assets from being subject to estate tax at death (e.g., placing life insurance in a trust).

Without proper planning, a significant portion of the decedent's property may go toward the payment of death taxes rather than to the decedent's intended recipients. Estate planning techniques are available to minimize death taxes and, in the case of a married individual, to defer payment of any taxes until after the death of his or her spouse. The ability to take full advantage of such techniques is not possible without a will.

## **Probate of Wills**

Whether you have a handwritten or typewritten will, its validity must be proved in court. This procedure is known as probate, and it generally must take place within four years after death.

To probate a will, it must be established in court that the will meets the requirements of execution (see earlier discussion) and that the will was not canceled or revoked. Additionally, unless the will is “self-proved,” proof of a handwritten will requires the testimony of two witnesses to the testator’s handwriting and proof of a typewritten will requires the testimony of one of the attesting witnesses.

A self-proved will is one that has attached or incorporated a specific form of affidavit containing certain required statements which is executed before a notary public at the time the will is signed or anytime thereafter but before the testator dies. A standard notary acknowledgment alone is insufficient to make the will “self-proved.” A self-proved will is admitted to probate based on the self-proving affidavit and there is no need to call witnesses.

A will that is not proved in court is denied probate. In this event, the decedent’s property passes to his or her heirs as if he or she died without a will. Again, this further emphasizes how important it is to execute a will which meets all legal requirements so that property will pass as the testator wishes. After proving the validity of a will, the next step in the probate process is the administration of the estate.

## **Estate Administration**

Estate administration is the management and settlement of an estate by a personal representative approved by the court. Estate administration may not be necessary when the decedent’s estate is so small that no action is necessary to distribute the property to the beneficiaries or heirs. However, estate administration is required in most other circumstances.

Estate administration involves the following steps:

1. collection of the decedent’s assets.
2. payment of debts and claims against the estate.
3. payment of estate taxes, if any.
4. determination of heirs if the decedent died without a will; and
5. distribution of the remainder of the estate to those entitled to it.

If the will names an individual to carry out these duties, he or she is called an executor. If the court appoints such a person because the will does not name an executor or the decedent died without a will, that person is called an administrator. Either way, the executor or administrator must be approved by the court and has legal obligations and duties to the court and those who receive property from the estate. If the executor or administrator acts improperly, he or she may be held liable for any resulting damages and his or her appointment may be terminated by the court.

In Texas, there are several different methods of administering an estate, some of the more common of which are discussed below.

## Independent Administration

Texas is one of the states that provides for independent administration free of court supervision. This means that after an independent executor or administrator is approved and an inventory of estate assets or an affidavit in lieu of an inventory, is filed with the court, the executor or administrator can simply take care of the administration of the estate without any further court involvement or supervision. The independent executor or administrator is free to settle with creditors, set aside the homestead and other exempt property, manage the property of the estate, sell assets for payment of debts or taxes, and distribute the remaining estate to those entitled to it. Thus, independent administration avoids the costs and delays associated with a court-supervised estate administration in which the executor or administrator must seek court approval before doing any of these acts.

A testator can provide for independent administration of his or her estate by inserting in the will a clause such as the following:

“I appoint \_\_\_\_\_ as independent executor of my estate to serve without bond, and I direct that no other action shall be had in the probate court in relation to the settlement of my estate other than the probating and recording of this will and the return of the any required inventory, appraisement, and list of claims of my estate.”

If the decedent did not provide for independent administration in the will but all distributees under the will agree to it, independent administration may be created upon court approval. If the decedent died without a will, independent administration may be created when all heirs agree. Although a court usually permits independent administration, it has the power to deny the request. If the court denies independent administration, many of the actions of the executor or administrator will require court approval, resulting in unnecessary costs and delays in administering the estate.

## Muniment of Title

If there is no need for the appointment of an executor or administrator and the only reason for probating a will is to clear title to property, a will can be admitted to probate as a muniment of title. Under this procedure, there is no executor or administrator appointed. It is a somewhat more simplified method of administering an estate than the traditional formal administration. It is generally used only when there are no debts of the estate to be paid and no other actions that require the appointment of an executor or administrator.

## Small Estate Affidavit

When someone dies without a will, one possible alternative is the Small Estate Affidavit.

If the value of the estate, excluding the homestead, exempt personal property, and nonprobative assets, does not exceed \$75,000, no formal administration is necessary if the heirs file an affidavit with the court showing that they are entitled to receive the property of the estate. As mentioned, the values of the homestead and exempt personal property are not included in the \$75,000 figure. Up to 10 acres of land with improvements qualifies as an urban homestead of a family or single adult person regardless of its value. Up to 200 acres with improvements for a family or up to 100 acres with improvements for a single adult person qualifies as a rural homestead regardless of its value. Exempt personal property includes items of tangible personal property valued at up to \$60,000 per family or \$30,000 per single person. The law specifies the extent to which certain types of personal property are exempt. For example, there is no limit up to the maximum on household furnishings, tools, or clothing, but only two firearms are exempt.

In sum, the small estate affidavit is not necessarily limited to small estates and may be a useful alternative to a formal administration in certain estates where, for example, the residence and non-probate assets comprise much of the estate and the remaining assets are valued at less than \$75,000.

In addition to the \$75,000 ceiling, the small estate affidavit procedure is available only if the assets of the estate, excluding the homestead and exempt personal property, exceed the known liabilities of the estate.

One limitation on the small estate affidavit is its general ineffectiveness to transfer title to real property. The small estate affidavit is effective to transfer title to a homestead if the homestead is the only real property in the estate. However, if the estate contains any real property other than just the homestead, the affidavit will not clear title to any of the real property, including the homestead.

### **Collection of Final Paycheck**

The Probate Code provides for a relatively quick and inexpensive procedure for a surviving spouse to collect the final paycheck of the deceased spouse by affidavit of the surviving spouse when there is no administration pending of the deceased spouse's estate. This procedure is useful where the only asset of the estate is a final paycheck.

### **Informal Family Settlements**

Informal family settlements are permissible where the estate is small and consists only of personal property, such as personal effects and household furnishings, but generally not where the estate includes bank accounts, stocks, and bonds. If a motor vehicle is involved, a new certificate of title may be applied for by filing an affidavit of heirship with the county tax assessor's office.

### **Directive To Physicians And Family or Surrogates (Living Will)**

Texas law allows any competent adult, by signing a Directive to Physicians and Family or Surrogates (or "living will," as it often is called), to instruct his or her physician to withhold or withdraw artificial life-sustaining procedures in the event of a terminal or irreversible condition. The directive takes effect only after the patient's physician determines that the patient is terminally ill and that death is expected within six months without application of artificial life-sustaining procedures or the patient has a condition that may be treated, but never cured and that leaves the patient unable to care for or make decisions for himself or herself and that without life-sustaining treatment, is fatal.

The form and contents of the directive are prescribed by Texas law. The directive should be in writing, signed by the patient, and witnessed by two competent adults. One of the witnesses cannot be the person designated to make a treatment decision for the patient, related to the patient by blood or marriage, the patient's heirs, the attending physician or an employee of the physician, a person who would have a claim against the patient's estate upon his or her death, or an employee of the patient's health care facility who is providing direct care to the patient or who is involved in the financial affairs of the facility. In lieu of signing in the presence of witnesses, the patient may sign the directive and have the signature acknowledged before a notary public.

The directive may include a designation of another person to make a treatment decision for the patient if the patient is comatose, incompetent, or otherwise mentally or physically incapable of communication.

If you desire that your life not be artificially prolonged in the event of a terminal illness, you should consult with an attorney to have a directive prepared for you. It may also be desirable to inform your physician of your wishes and to provide him or her with a copy of the directive. Failure to sign a directive may result in disagreements among your family in carrying out your wishes with respect to terminating artificial life-sustaining procedures.



## **Powers Of Attorney**

A power of attorney is an instrument by which one-person (the principal) grants to another (the agent) the power to perform certain acts on his or her behalf. Two types of powers of attorney are common in the estate planning field, namely the medical power of attorney and the durable power of attorney.

The medical power of attorney grants the agent the power to make health care decisions for the principal if he or she is unable to make them. The agent may exercise his or her authority only if the principal's attending physician certifies that, in the physician's opinion, the principal lacks the capacity to make health care decisions. The principal can revoke the power of attorney at any time, orally or in writing, and regardless of the principal's mental state. The medical power of attorney may be signed by two witnesses, one of which is not:

1. the person designated as agent;
2. related to the principal by blood or marriage;
3. an employee of the principal's health care facility who is providing direct care to the principal or who is involved in the financial affairs of the facility;
4. the principal's attending physician or an employee of the physician;
5. the principal's heirs; or
6. a person who would have a claim against the principal's estate upon his or her death.

In lieu of signing in the presence of the witnesses, the principal may sign the medical power of attorney and have the signature acknowledged before a notary public.

The second type of power of attorney is the durable power of attorney. This instrument grants authority to a designated agent to manage the principal's property on his or her behalf. It can be distinguished from the medical power of attorney which relates to health care decisions rather than to decisions concerning the management of property. The principal can either grant the agent one or more specific powers or grant the agent all of the powers listed in the power of attorney form. In addition, the principal can elect to have the power of attorney become effective immediately upon signing it or only upon the principal's future disability or incapacity. The durable power of attorney must be notarized, but it need not be witnessed.

The forms of both the medical power of attorney and the durable power of attorney are prescribed by statute. You should consult an attorney if you desire to have either of these documents prepared for you.

## **SECTION 8 – Conclusion**

If you die without leaving a will, you risk that your property will not be distributed as you desire. Even when the heirs at law are the same as you would have selected yourself, there is no advantage to letting the law take its own course. The advantage lies in dying with a will. With a well-drafted you can avoid legal pitfalls, name an executor of your estate, name a guardian for your minor children, establish trusts, minimize estate tax liability, and minimize probate-related costs by providing for independent administration. Although a will can be challenged in court, the grounds for contest

in Texas are few, and the law favors carrying out the decedent's intent.

# **PROBATE IN TEXAS**

## **Learning Objectives:**

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## **SECTION 1 – What to do after someone passes away**

If you are reading this tab of the Probate Passport, it is likely that someone you care about has recently passed away and you are being faced with the sometimes-overwhelming task of moving forward. It is typical for the probate process to be a stop on your journey.

This Probate in Texas tab of the Probate Passport is intended to be an informative resource upon which you can rely to answer legal questions like, “What do I need to do now that my loved one has passed away?”, “What is probate?”, “Do I have to go through probate?”, and “What do I need to get started?” We hope the Probate Passport answers many of the legal questions that are on your mind.

When someone close to you passes away, it is normal and important to take time to grieve your loss. However, there are a number of administrative matters that should be addressed without unnecessary delay. Some of the more important notifications and legal matters that should be addressed, and tasks that must be completed include:

- 1) Beginning funeral and burial arrangements.
- 2) Obtaining several copies of the death certificate, which can be obtained from the Texas Department of State Health Services Vital Statistics Unit at 1-888-963-7111 or [www.dshs.tx.us/vs/reqproc/deathcert.shtm](http://www.dshs.tx.us/vs/reqproc/deathcert.shtm).
- 3) Locating and gathering important documents pertaining to the Will, any Trusts that may exist, stocks, bank accounts and insurance policies.
- 4) If the deceased was eligible to receive Social Security, contacting the Social Security Administration at 1-800-772-1213 to give notice of the death.
- 5) Notifying any life insurance companies of the death.
- 6) Contacting the Executor named in the deceased’s Will and/or the attorney who prepared it.
- 7) Contacting the Trustee of any Trust created by the deceased and/or the attorney who prepared it.
- 8) Calling the Administrator of the Decedent’s pension plan.
- 9) Notifying the Decedent’s banks and financial institutions.
- 10) Notifying any credit card companies in which the deceased had an account.
- 11) Before paying any medical bills, verifying that all insurance and Medicare claims have been processed.

### **Accessing Documents in a Safe Deposit Box**

Many people keep their estate planning documents in safe deposit boxes; considering the importance of these documents, these are some of the most secure places. However, problems often arise when a person dies and leaves his or her Will in a safe deposit box that no one else can access. Luckily, the Texas Estates Code provides a method for banks to allow certain individuals access or for a court to order the box opened to retrieve the Will.

Financial institutions may permit the following persons to examine the contents of a safe deposit box:

- 1) The spouse of the Decedent;
- 2) A parent of the Decedent;
- 3) A descendant who is at least 18 years of age; or
- 4) A person named as Executor of the Decedent's estate in a copy of a document that appears to be the Last Will and Testament of the Decedent.

However, the Estates Code requires the examination of the contents of the safe deposit box to occur in the presence of the bank employee allowing access to the box. If the Will is located during this examination, the bank employee may deliver the Will to the clerk of the Court or to the person designated as the Executor in the Will. A deed to the Decedent's burial plot or a document that appears to give burial instructions can also be delivered by the person permitting access to the box. Insurance policies located in the safe deposit box can also be delivered to the beneficiary or beneficiaries named in the policies, but no other documents located in the safe deposit box may be removed unless another law provides for their removal or until an Executor is appointed.

If the bank does not grant access to the safe deposit box, it may be necessary to obtain an order from the Court granting permission to access the box. The Estates Code allows a Court with jurisdiction over probate matters to order the bank to permit a representative appointed by the Court to examine the safe deposit box if it is shown to the Court that: (1) the bank leased a safe deposit box to the Decedent; and (2) the box may contain the Last Will and Testament of the Decedent, a deed to the Decedent's burial plot, or an insurance policy issued in the Decedent's name that is payable to a beneficiary or beneficiaries named in the policy. The Court representative may then examine the contents of the box in the presence of the judge ordering the examination (or the judge's agent). If the Will, a burial plot deed, or insurance policies are found during the inspection, the Court may order the bank employee to permit the Court representative to take possession of these documents. No other contents of the safe deposit box may be removed by the Court representative, except as provided by law. The Estates Code requires the Court representative to deliver the Will to the clerk of the Court that has jurisdiction over the probate matter and obtain a receipt from the clerk for its delivery. The Court representative must deliver a burial plot deed to the person designated in the Court's order for examination and any insurance policies located must be delivered to the beneficiary or beneficiaries named in the policies.

### **What Happens if There is No Will?**

If a person dies without a Will, the law determines the disposition of his or her property. The public policy of statutes governing the intestate distribution of property is to provide for the orderly distribution of property at death. The law does not play favorites, so the distribution is determined by how closely the heir was related to the Decedent, not by the nature or quality of any relationship between the heir and the Decedent. Dying without a Will may trigger undesired results, as well as unexpected costs and delays.

In Texas, property is characterized as separate or community. Separate property is that which is owned before marriage or acquired during marriage by gift or inheritance. Damages awarded during marriage from a personal injury lawsuit, except damages representing the loss of earning capacity, also are separate property. Community property is all property, other than separate property, which is acquired by either spouse during marriage. Thus, there can be separate real property, separate personal property, community real property and community personal property. When a person dies without a Will, the law determines who the heirs will be, and how assets are distributed, according to whether the assets are community or separate property.



### **Division of Real and Personal Community Property –**

	<b>If the Decedent is survived by:</b>	<b>The recipient of the Decedent's property is:</b>
1.	Spouse and Children (and all surviving children are also children of surviving spouse)	<ul style="list-style-type: none"><li>• Surviving spouse</li></ul>
2.	Spouse and Children (but not all surviving children are also children of surviving spouse)	<ul style="list-style-type: none"><li>• Surviving children (and the descendants of any deceased child) shall receive the Decedent's share in one-half of the community property.</li><li>• Surviving spouse retains the remaining one-half of the community property he or she owned prior to the other spouse's death. The surviving spouse also has the right to use and occupy the homestead during his or her life and may have the right to use or own certain items of personal property that are exempt from creditor's claims.</li></ul>

### **Division of Real and Personal Separate Property –**

	<b>If the Decedent is survived by:</b>	<b>The recipient of the Decedent's property is:</b>
1.	Spouse and Children (or the descendants of any deceased child)	<ul style="list-style-type: none"><li>• Separate personal property passes 1/3 to the surviving spouse and 2/3 to the children (or descendants).</li><li>• Separate real property passes to the children (or descendants) subject to a life estate in 1/3 of the property in favor of the surviving spouse. A life estate gives you the right to live in, use, and enjoy property during your lifetime, but the ownership in a life estate is temporary and ends upon death. Surviving spouse is entitled to 1/3 of the real property during his or her lifetime, and upon his or her death, the children (or descendants) will have full title to any separate real property of the Decedent.</li></ul>
2.	Spouse and NO Children	<ul style="list-style-type: none"><li>• All separate personal property passes to the surviving spouse.</li><li>• Separate real property passes 1/2 to the surviving spouse and 1/2 to the Decedent's parents or collateral relatives, such as brothers and sisters or their descendants. If no parents or collateral relatives survives Decedent, then all separate real property passes to the surviving spouse.</li></ul>

	<b>If the Decedent is survived by:</b>	<b>The recipient of the Decedent's property is:</b>
3.	Children (or their descendants) and, NO Spouse	<ul style="list-style-type: none"> <li>All separate personal and real property passes to the children or their descendants.</li> </ul>
4.	Parents, and NO spouse and NO children	<ul style="list-style-type: none"> <li>All separate personal and real property passes 1/2 to each parent.</li> </ul>
5.	Only one Parent and Siblings and NO spouse and NO children	<ul style="list-style-type: none"> <li>All separate personal and real property passes 1/2 to surviving parent and the remaining 1/2 is divided equally among the siblings (or descendants of a deceased sibling). However, if no brother or sisters (or descendants of a deceased sibling) survive, then all separate property passes to the surviving parent.</li> </ul>
6.	Siblings (or their descendants), and NO spouse, NO children, and NO parents	<ul style="list-style-type: none"> <li>All separate and personal and real property is divided equally among the siblings (or descendants of a deceased sibling).</li> </ul>
7.	Grandparents and NO spouse, NO children, NO parents, NO siblings or descendants of deceased siblings	<ul style="list-style-type: none"> <li>All separate property passes generally to the Decedent's grandparents. If no grandparents survive, the law provides for distribution of separate property to more distant relatives.</li> </ul>

### **The Difference between Probate and Non-Probate Assets**

While a Will is important for directing the disposition of a Decedent's assets, it does not control the disposition of all assets held by the deceased. Assets that pass by a Will are probate assets. But there are non-probate assets too. Non-probate assets are assets that disposition is not controlled by the Decedent's Will or estate. Non-probate assets include, but are not limited to:

- 1) Joint accounts with rights of survivorship;
- 2) Assets with designated beneficiaries, including retirement accounts, IRAs, and life insurance policies;
- 3) Assets owned with a pay-on-death (P.O.D.) designation;
- 4) Assets owned with a transfer-on-death (T.O.D.) designation;
- 5) Real property owned as Tenants by the Entirety; and
- 6) Assets owned by the Trustee of a Decedent's Revocable Trust.

Probate assets include those assets titled in the Decedent's name only with no beneficiary designation or rights of survivorship, the Decedent's portion of assets owned as tenants-in-common and the assets owned as joint tenants without rights of survivorship.

Many times, a surviving spouse opts not to probate the estate of the deceased spouse when all or most of the Decedent's assets pass to the surviving spouse outside of the probate process. However, community property residences are generally owned as tenants-in-common; thus, if the surviving spouse later attempts to sell the home, some form of probate or estate administration must be initiated to transfer full title on the house into the surviving spouse's name. In order to ensure that all estate property is fully and efficiently distributed, it is recommended that the surviving spouse probate the Will at the death of the first spouse. The Texas Estates Code only provides four (4) years to probate a Will. After four (4) years, all heirs must be notified of any attempt to probate a Will, which often leads to complications.

### **Do All Estates Need to Be Probated?**

Not necessarily; as discussed above, an estate that consists only of non-probate assets does not need to be probated. Also, some estates consisting of only a few assets or estates that fall below a certain amount of value can be handled without a full probate administration. These options will be discussed in greater detail in the section titled "Alternatives to Probate."

## **SECTION 2: The Probate Process**

### **What is Probate?**

Probate is the orderly process of winding up the business affairs of a person who has passed away. The Court determines whether a testamentary document is the true last and valid Will of a Decedent through the completion of certain requirements. Probate assets are assets controlled by the Decedent's Will and/or estate, including assets titled in the Decedent's name without a designated beneficiary. The successful completion of probate distributes probate assets amongst beneficiaries, creditors, and any others with a valid interest in a Decedent's estate.

### **When Do You Apply for Probate?**

The probate of a Will is available when a Decedent dies testate, i.e. with a valid Last Will and Testament. Usually, it is necessary to probate a Will if creditors need to be paid, property needs to be collected, or if assets need to be distributed to beneficiaries. The most common form of probate occurs when a Will nominates an Executor to administer the estate in accordance with the provisions of the Will.

### **How Do You Apply for Probate?**

The judicial probate process begins with the filing of an Application to Probate Will and for Issuance of Letters Testamentary (Application). This application is filed with the county clerk. Typically, an Executor named in a Will applies to the Court requesting the admission of the Will to probate. However, Texas Estates Code (TEC) allows any "interested person" also to apply. The TEC definition of "interested persons" includes heirs, spouses, devisees, creditors and any others having a claim against the estate being administered.

Section 256.052 of the Texas Estates Code lists the requirements for the Application. These requirements include the name and domicile of each applicant, name and age of the Decedent, facts establishing venue, a description of the Decedent's property, and information about the Executor. The original Will and any codicils should also be attached to the Application.

Following filing of the Application, the Clerk will post citation to all parties having an interest in the estate to appear in the case if the party wishes to do so. The Clerk also sets a return date for the Application. The return date is

the date that the Application is returned to the Clerk's office following the posting period. No hearing to probate the Will can be held until after the return date. At the hearing to actually "probate" the Will, the Executor presents proof to the Court regarding the Decedent's death and the Will. Following a determination that the Will should be admitted to probate, the judge issues an order probating the Will and appointing the Executor. The Executor then takes an oath to well and truly perform his or her duties as Executor. Finally, the Court issues Letters Testamentary to the Executor, certifying the Executor's authority to settle the assets of the estate.

### **What are Letters Testamentary?**

Letters Testamentary are official documents issued by the Court authorizing the Executor to act for the estate. They are proof to others that the Executor has been qualified by the Court.

### **Who Can Apply for Probate – Is Anyone Qualified?**

The Executor named in the Will or any interested party may make application for probate to the Court. A person can file a Will for probate if he or she is an interested party. Simply filing the application for probate does not make a person the Executor or Administrator of the estate. The Court will decide who is legally entitled to be in charge of the estate.

The Court will grant Letters Testamentary or Letters of Administration to the persons qualified to act in the following order:

- a) To the person named as Executor in the Will of the deceased;
- b) To the surviving spouse;
- c) To the principal beneficiary of the estate;
- d) To any beneficiary of the estate;
- e) To the next of kin of the deceased, the nearest in order of descent first, and so on.  
(Note the next of kin includes those who have been legally adopted by the deceased.)
- f) ) To a creditor of the deceased;
- g) To any person of good character residing in the county who applies; and
- h) To any other person not disqualified to serve as the personal representative of the Estate.

If there are multiple applicants who are all equally entitled to be appointed, then the judge will appoint co-Executors or co-Administrators, or will determine who is to receive the Letters Testamentary or Letters of Administration.

The Texas Estates Code specifically excludes the following persons from qualifying to serve as an Executor or Administrator:

- a) An incapacitated person;
- b) A convicted felon, unless such person has been duly pardoned, or his or her civil rights restored;

- c) A non-resident of the State of Texas who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate;
- d) A corporation not authorized to act as a fiduciary in the State of Texas; or
- e) A person the Court finds to be unsuitable.

The person named as Executor in a Will can decline the position by signing a Waiver and Renunciation of Right to Letters. Once such Waiver has been executed and filed, the Court will look to the successor Executor named in the Will. If there is none, the Will can still be probated, but the Court or all the distributees of the Estate selects the Administrator.

Additional discussion on persons qualified to serve can be found in The Estates Code Sections 256.051, 301.051, and 304.001 through 304.003.

### **Cost of Probate**

One of the biggest concerns for people contemplating the probate process is the expense required in fully probating an estate. Luckily, Texas has simplified the probate process through its system of independent administration. While many other states have probate procedures that are both cumbersome and costly, independent administration in Texas allows Executors and Administrators to serve largely independent of Court supervision. As a result, the probate process in Texas is streamlined and efficient, thus reducing the cost of probate administration.

In a dependent administration, the Administrator is required to post bond and obtain Court approval for all actions he or she takes as the estate Administrator. The bond operates like an insurance policy, and requires that a premium be paid to an insurance company to guard against mismanagement, theft, or misappropriation of estate assets by the Executor. When the Court must approve and supervise all Administrator actions in probating an estate, the Administrator must rely on an attorney to spend significant time requesting Court approval to sell assets and pay claims. Administrators must also provide accounting reports and other information to the Court about the Administrator's actions. On the other hand, an independent administration relieves the Executor having to post bond in most cases, and it also relieves the Executor from the duty to obtain prior approval from the Court when the Executor is performing his or her probate administration duties. The simple act of designating that the Executor shall perform his or her duties under an independent administration can make the probate process significantly less expensive than it might be for a dependent administration.

There are still some important requirements for independent administration. In order for an Executor to probate an estate through an independent administration, the Will must either specifically state that the Decedent intends for his Executor to serve independently. In the event the Decedent died without a Will, or with a Will that did not specifically allow for an independent Executor, all of the estate heirs or beneficiaries named in the Will can agree to allow the Executor to serve independently and free of court control. And while an independent Executor is allowed to perform his or her duties largely outside of the Court's supervision, he or she still has the same responsibilities of all estate personal representatives. Thus, the Court's requirements for probate administration must be satisfied and the Executor must responsibly perform his or her duties to creditors and the beneficiaries of the estate, including collecting estate assets, paying off estate debts, and distributing the assets per the instructions contained in the Will, or under intestacy laws if the Decedent did not leave a valid Will. At the very least, independent administration requires the Executor to publish notice to potential creditors in a newspaper, in some cases file an inventory with the Court that identifies the assets of the estate, and file an Affidavit regarding notice.

While independent administration is clearly a great way to probate an estate without incurring significant costs, there may be times that it may be better for the Executor to use dependent administration. For example, estates with numerous creditors may find dependent administration advantageous. The presentment and acceptance of claims in dependent administration are more treacherous for creditors. If it is not done properly, some creditors may not be able to collect money from the estate. Also, if there are conflicts between heirs of the estate, the Executor may prefer dependent administration to ensure that the Court resolves disputes regarding the disposition of property throughout the administration process rather than through subsequent litigation involving the Executor.

### **Timeline for Probating a Simple Estate in Texas**

1. Find the original Will.
2. File the original Will with an Application for Probate of Will and Issuance of Letters Testamentary.
3. The County Clerk issues citation and also posts notice at the courthouse that an Application for Probate of Will has been filed.
4. After notice has been posted for the requisite time, a hearing is scheduled to ask the Court to admit the Will to probate and to issue Letters Testamentary.
5. At the hearing, the named Executor provides the Court with facts of death and proves up the validity of the Will. If the Will is self-proven, the Executor will be the only one to give testimony. In Texas, a Will is self-proven when an affidavit containing specific language is attached to or incorporated into the Will, which enables the Will to be proven valid without the necessity of witness testimony. However, if the Will is not self-proven, witnesses will be called to testify at the hearing as required by law. Written testimony of the Executor's oral testimony (and any witnesses) is prepared before the hearing, and that written version is signed in the presence of the judge or clerk immediately after the oral testimony.
6. After the judge signs the order admitting the Will to probate, the Executor takes the Oath to perform his or her duties front of the judge (or the county clerk) and receives Letters Testamentary.
7. A Notice of Creditors is prepared and sent to a newspaper for publication within one month after receiving Letters Testamentary. The newspaper will send a copy of the notice that was published and will execute a Publisher's Affidavit verifying that the notice was properly published by law.
8. The Executor provides and sends notice that Letters Testamentary have been issued to creditors with liens against real or personal property of the estate within two months after receiving Letters Testamentary.
9. The Executor sends certified letters to each beneficiary named in the Will to provide a copy of the Court order admitting the Will along with a copy of the Will not later than 60 days from the date the judge signed the order admitting the Will to probate.
10. The Executor prepares and files a sworn affidavit with the Court stating that the notice to beneficiaries was completed. This affidavit is filed no later than 90 days from the date the judge signed the order admitting the Will to probate.
11. The Executor prepares an Inventory, Appraisement, and List of Claims that shows the assets of and claims against the estate and the value of each asset, as of the Decedent's date of death. This inventory will be filed



with the Court no later than 90 days from the date the judge signed the order admitting the Will to probate, or if the inventory has been delivered to all estate beneficiaries an affidavit stating that fact in lieu of filing the inventory in the public records.

12. A final federal income tax return (form 1040) for the year the Decedent died is due by April 15th of the following year.
13. Federal estate taxes may be due for larger estates.
14. If any creditor makes a claim on the estate, the Administrator must, within 30 days, either accept or reject the claim or any part of it.
15. Creditors are lined up in the classes set out by the Texas Estates Code and paid in order of their class.
16. The estate is disbursed as provided for in the Will.
17. New titles are issued for cars, boats, and other titled property.

### **SECTION 3 – Alternatives to Probate**

The probate process is a necessary process in many cases, but there are occasions when probate is not the best option. Below are some alternatives that might better fit your situation:

#### **Collection of Final Paycheck**

The Estates Code provides for a relatively quick and inexpensive procedure for a surviving spouse to collect the final paycheck of the deceased spouse by the execution of an affidavit when there is no administration pending of the deceased spouse's estate. This procedure is useful where the only asset of the estate is a final paycheck.

#### **Small Estate Affidavit**

The small estate affidavit is a more economical alternative to probate. If the Decedent dies intestate (without a Will), and the total value of the estate, not counting the value of the Decedent's homestead and other exempt property, is less than \$50,000, then one can file an affidavit in the Probate Court in the county where the Decedent resided, identifying the heirs of the Decedent's estate under oath, and by having the affidavit witnessed by two disinterested people that swear that the family history information contained in the affidavit is accurate. The affidavit must also be sworn to by all distributees (beneficiaries) that have legal capacity and possibly by the natural guardian of any minor or incapacitated person who is a distributee. To determine the proper heirs, refer to Texas Estates Code Sections § 201.001 and 201.002.

Once the Probate Court approves the Small Estate Affidavit, the distributees of an estate can request that assets of the estate be delivered to them. Anyone who receives assets remains liable to any creditors or anyone else having a prior right to the property.

Utilizing a Small Estate Affidavit is beneficial when the Decedent had very few assets: bank accounts, savings bonds, an automobile and homestead. Note that the use of a Small Estate Affidavit does not transfer the title to any other real property owned by the Decedent that was not the Decedent's home. If the Decedent also owned real property other

than a homestead, then a Determination of Heirship proceeding will be needed. Due to other states' lack of familiarity with how the Small Estate Affidavit works, be prepared to educate transfer agents regarding how a Small Estate Affidavit functions if the Decedent was the owner of publicly traded stocks or bonds, brokerage accounts, or partnership accounts. Some transfer agents might require a Court order to transfer the stock or bond.

Additional discussion of the Small Estate Affidavit can be found in Texas Estates Code chapter 205. Included on page 28 of this booklet is a form Small Estate Affidavit and Order.

### **Muniment of Title**

If the Decedent had a Will, but did not have any creditors whose loan was not secured by real property belonging to the estate, there is no need for administration of the Decedent's estate. The Will can be probated as a Muniment of Title.

Like the probate process, the Court must rule on whether the Will is valid, therefore, a hearing is necessary with a Muniment of Title, thus the Applicant, who could be the Executor named in the Will or any interested party, may make application and schedule a hearing with the Court. However, unlike probate, with a Muniment of Title, no Administrator/Executor will be appointed. Instead the Will itself shows who owns estate assets. A Court will approve a Will as a Muniment of Title if the Applicant can show the following:

- (1) That the estate has no unpaid debts, except for debts secured by liens on real estate; and
- (2) That there is no necessity for administration, because there are no creditors.

Once the Court enters an order admitting the Will to probate as a Muniment of Title, the estate beneficiaries can move forward to transfer the Decedent's assets into their names with legal authority. For example, the Court's order is the legal authority the Applicant provides to:

- (1) All persons owing any money to the estate of the Decedent;
- (2) All persons having custody of any property of the Decedent;
- (3) All persons acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate; and
- (4) All persons purchasing from or otherwise dealing with the estate, for payment or transfer, without liability, to the persons described in such Will as entitled to receive the particular asset without administration.

Other states are not familiar with the Muniment of Title process. You should be prepared to educate transfer agents on how a Muniment of Title functions. Additional discussion of the Muniment of Title can be found in Texas Estates Code chapter 257.

### **Affidavit of Heirship**

An Affidavit of Heirship is generally used when someone dies without a Will and the estate consists primarily of real property titled in his or her name. An Affidavit of Heirship transfers title from the Decedent's name into the names of the heirs without having to go through the probate process. The Affidavit is filed and recorded with deed records in the county where the Decedent's real property is located. The legal effect of the Affidavit of Heirship is that it creates a clean chain of title transfer to the Decedent's heirs.

The Estates Code requires that the Affidavit of Heirship be signed by two disinterested witnesses. Essentially, to qualify as a disinterested witness one must be knowledgeable about the Decedent and his or her family history, but not someone who will benefit financially from the estate. Each disinterested witness must swear under oath to the following:

- (1) That he or she knew the Decedent and how long he or she knew the Decedent;
- (2) That the Decedent died and where the Decedent passed away;
- (3) That he or she knew where Decedent resided;
- (4) He or she was familiar with the Decedent's marital history;
- (5) He or she was familiar with the Decedent's family history: the names and birthdates of every child of Decedent (born or adopted) or the names and birthdates of Decedent's parents or siblings;
- (6) The Decedent died without a Will;
- (7) A statement whether the Decedent had any unpaid debts or taxes;
- (8) A description of Decedent's ownership in real property;
- (9) The names of the Decedent's heirs; and
- (10) A statement that the witnesses are not going to benefit financially from the estate.

An Affidavit of Heirship is also utilized when more than four years have elapsed since the Decedent passed away.

### **Judicial Declaration of Heirship**

When someone dies without leaving a Will, the most commonly used estate settlement proceeding is a judicial declaration identifying the heirs of the Decedent. In a judicial declaration of heirship, the Court makes a formal declaration as to the identity of the Decedent's heirs, and the percentage each heir owns in the estate. The judgement allows the Decedent's property to be divided and distributed among the heirs. The Court's formal declaration is final.

The judicial declaration of heirship can avoid the probate process, but it also is used in conjunction with dependent administration, when someone passes away intestate (without a Will). A judicial declaration of heirship is also utilized when the Decedent died with a Will but failed to dispose of all the estate assets. Thus, the Decedent technically died partially testate and partially intestate, and an heirship proceeding may be required to determine the legal owners of any remaining estate assets.

An heirship proceeding may be utilized when more than four years have elapsed since the Decedent's death. Even if a Decedent had a Will, if the applicant does not probate the Will within four years from the Decedent's death, then an heirship proceeding may be required if the Court will not admit the Will to probate as a Muniment of Title.

It is important to note that a judicial declaration of heirship is time-consuming and often costly alternative to probate. The Court is required to appoint attorney ad litem to represent the unknown heirs, and that attorney will report his

or her findings to the Court at the determination of heirship hearing. The Court also requires two disinterested witnesses to testify as to the Decedent's family history at the time of the hearing.

Additional discussion of heirship determinations can be found in Texas Estates Code chapter 202.

### **Informal Family Settlements**

Informal family settlements are common and can be utilized when the estate is small and consists only of personal property, such as personal effects and household furnishings. If a motor vehicle is involved, a new certificate of title may be obtained by filing an affidavit of heirship with the county tax assessor's office.

### **Revocable Living Trust**

A Revocable Living Trust is an alternative to probate, but this option requires advanced planning prior to death. The Revocable Living Trust is a written Trust agreement between the Trustee (the manager of the Trust property) and the settlor (the person who creates the Trust arrangement). Because the Trust is created during the settlor's life, the Living Trust is a twofold plan – one plan directs the administration of assets during the settlor's lifetime and the other directs the disposition of his or her estate at death. Note: A Living Trust must be in effect before the Decedent passes away.

It is possible, but unlikely, that a Living Trust will allow one to avoid the probate process. Probate can be avoided if all a person's assets are in the Trust. However, people seldom transfer all their assets to the Living Trust. Assets outside the Trust may still be subject to probate. For a Living Trust to be effective, one must transfer all property to the Trust by changing the title of the property to the name of the Trust. Failure to do this will result in the non-transferred property remaining subject to probate and possibly being subject to an estate plan different than the one set out in the Trust. A Living Trust, just like a Will, is subject to a contest by the Decedent's heirs based on lack of mental capacity, undue influence, and fraud.

A Living Trust will not reduce a person's taxes. Because a Living Trust is usually revocable and amendable during a person's lifetime, all the income realized by the Trust is recognized and reported on his or her individual income tax return. Likewise, at the person's death, the assets of the Trust are subject to the federal estate tax. Note that tax planning can be accomplished with Wills and Living Trusts. However, a Living Trust, compared to a Will, does not provide a tax advantage.

It is also important to note that the assets put in a Living Trust are not protected from creditors. Texas law does not permit one to transfer assets into a Revocable Living Trust and protect the property from known creditor's claims. These are considered "grantor trusts."

### **Conclusion**

Depending on each estate's specific circumstances, probate might not be the best alternative. One should consult with an attorney to discuss the different options available to them.

NO. \_\_\_\_\_

ESTATE OF

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IN THE \_\_\_\_\_ COURT

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\_\_\_\_\_ COUNTY, TEXAS

**SMALL ESTATE AFFIDAVIT AND ORDER**

\_\_\_\_\_ (“Distributee”) furnish the following information to the Court pursuant to Section 205.002 of the Texas Estates Code:

1. \_\_\_\_\_ (“Decedent”) died \_\_\_\_\_, 20\_ , in \_\_\_\_\_, \_\_\_\_\_ County, Texas, at the age of \_\_\_\_\_ years.
2. Decedent’s fixed place of residence and domicile was in \_\_\_\_\_ County, Texas. [*Or: The principal part of Decedent’s property at the time of death was situated in \_\_\_\_\_, Texas.*]
3. No petition for the appointment of a personal representative is pending, nor has any petition for appointment of a personal representative been granted for Decedent’s estate.
4. More than thirty (30) days have elapsed since the death of Decedent.
5. The value of the entire assets of Decedent as of the date of death, exclusive of homestead and exempt property, does not exceed \$75,000.00, and those non-exempt assets exceed the known liabilities of the estate.
6. The only real estate owned by Decedent is the residence homestead described below.
7. Decedent was not married at the date of his death. Decedent left no Will. Decedent had only two children, \_\_\_\_\_ and \_\_\_\_\_, and both children survived Decedent. [*Note: Relevant family history facts concerning heirship must be stated here.*]
8. The names and addresses of all the distributees, heirs, devisees, or assigns of the money or property of the estate of Decedent, and their right to receive the same are as follows:

<u>Name and Address</u>	<u>Relationship to Decedent</u>	<u>Share of Estate</u>
_____ _____ _____	Daughter and Heir [ <i>Relationship</i> ]	One-half (½) of estate (real and personal)
_____ _____ _____	Son and Heir [ <i>Relationship</i> ]	One-half (½) of estate (real and personal)

9. The known assets of Decedent’s estate are as follows:

<u>Description</u>	<u>Estimated Value</u>
1. The residence homestead of Decedent, which property is described as follows: [ <i>property description</i> ]	\$ _____
2. Checking Account No. _____ at [ <i>name of financial institution</i> ]	_____
3. Automobile [ <i>type of automobile</i> ], Year: _____, Make: _____, Model: _____, Vehicle Identification Number: _____	_____
4. Tangible personal property (furniture, furnishings, clothing, etc.)	_____
<b>Total</b>	\$ _____

10. The only known liability of Decedent's estate is a mortgage debt to \_\_\_\_\_, whose address is \_\_\_\_\_ This debt is secured by a deed of trust lien and vendor's lien on the residence homestead property described above, and the remaining principal balance of the debt as of \_\_\_\_\_, 20\_\_, was \$\_\_\_\_\_.
11. The Distributees pray that this Affidavit and Application be filed in the Small Estate Records; that the same be approved by the Court; and that the Clerk issue certified copies thereof in order to allow the Distributees to record the same in the real property records of \_\_\_\_\_ County, Texas, as required by Tex. Est. Code § 205.006, and to present the same to persons owing money to the estate, having custody or possession of property of the estate, or acting as registrar, fiduciary, or transfer agent of anyone having evidences of interest, indebtedness, property, or other right belonging to said estate.

Respectfully submitted,

\_\_\_\_\_  
 State Bar No. \_\_\_\_\_  
 [Firm Name/Address/Telephone/Fax]

ATTORNEYS FOR DISTRIBUTEES

THE STATE OF TEXAS           §  
    §  
 COUNTY OF \_\_\_\_\_ §

The undersigned Distributee states that she has personal knowledge of the facts stated in the foregoing Affidavit and that, to the best of her knowledge, the facts contained in the Affidavit are true.

\_\_\_\_\_  
 SUBSCRIBED AND SWORN TO BEFORE ME by the said \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, to certify which witness by hand and seal of office.

[SEAL]

Notary Public, State of Texas

STATE OF \_\_\_\_\_ §  
    §  
 COUNTY OF \_\_\_\_\_ §

The undersigned Distributee states that she has personal knowledge of the facts stated in the foregoing Affidavit and that, to the best of her knowledge, the facts contained in the Affidavit are true.

\_\_\_\_\_  
 SUBSCRIBED AND SWORN TO BEFORE ME by the said \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, to certify which witness by hand and seal of office.



[SEAL]

Notary Public, State of \_\_\_\_\_

Notary's Printed Name: \_\_\_\_\_

Notary's Commission Expires: \_\_\_\_\_

THE STATE OF TEXAS       §  
  §  
COUNTY OF \_\_\_\_\_ §

I have no interest in the estate of Decedent and am not related to Decedent under the laws of descent and distribution of the State of Texas. I have personal knowledge of the facts stated in the foregoing Affidavit. To the best of my knowledge, the facts contained in the Affidavit are true.

\_\_\_\_\_  
[Address]

SUBSCRIBED AND SWORN TO BEFORE ME by the said \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_,  
to certify which witness by hand and seal of office.

[SEAL]

Notary Public, State of Texas

THE STATE OF TEXAS       §  
  §  
COUNTY OF \_\_\_\_\_ §

I have no interest in the estate of Decedent and am not related to Decedent under the laws of descent and distribution of the State of Texas. I have personal knowledge of the facts stated in the foregoing Affidavit. To the best of my knowledge, the facts contained in the Affidavit are true.

\_\_\_\_\_  
[Address]

SUBSCRIBED AND SWORN TO BEFORE ME by the said \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_,  
to certify which witness by hand and seal of office.

[SEAL]

Notary Public, State of Texas

NO. \_\_\_\_\_

ESTATE OF

§

IN THE \_\_\_\_\_ COURT

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DECEASED

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\_\_\_\_\_ COUNTY, TEXAS

**ORDER**

On this day the Court considered the Affidavit of the Distributees of this estate and the Court finds that the above Affidavit complies with the terms and provisions of the Texas Estates Code, that this Court has jurisdiction and venue, that this estate qualifies under the provisions of the Estates Code as a Small Estate, and that the Affidavit should be approved.

It is ORDERED and DECREED by the Court that the foregoing Affidavit be and the same is hereby APPROVED, and shall forthwith be recorded in the Small Estates Records of \_\_\_\_\_ County, Texas, that the Clerk of the Court shall issue certified copies thereof to all persons entitled thereto, and that a certified copy of this Affidavit and Order shall be filed in the official real property records of \_\_\_\_\_ County, Texas.

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_.

\_\_\_\_\_  
Judge Presiding

## **SECTION 4 – Questions**

### **Can I probate an estate without a Will?**

Yes, but the process becomes more cumbersome. For example, the Court will have to determine the Decedent's heirs before designating an independent Administrator. You should review all your administration options with your attorney, because an alternative to probate may be a better option in your situation.

### **What if I cannot find the original Will, but only a copy?**

The Texas Estates Code does allow for a copy of the original Will to be probated in the case of a lost Will. Texas Estates Code §§ 256.054 and 256.156. But this is a difficult and expensive process. There is a presumption that the Testator (person who wrote the Will) revoked it. Thus, a judge may not always admit a lost Will to probate.

### **Do I have to have an attorney represent me?**

Yes, in nearly every Court. Most Courts will not let you serve as an Independent Executor without an attorney because many creditors and beneficiaries are affected by the probate process. The Executor position is fiduciary, meaning the person has a duty to act for the benefit of others (*i.e.*, the beneficiaries). Therefore, most Courts require attorneys to represent Executors. Check with the Court that has jurisdiction over your case to verify their specific rule.

### **How long do I have to probate an estate?**

Ordinarily, an application to probate a Will must be filed within four (4) years of the date of death of the Decedent. Letters Testamentary or Letters of Administration cannot be issued more than four (4) years after the date of death of the Decedent.

### **Does probate mean I have to go to Court?**

Yes, if you are named the Executor of an estate. However, your trip to the courthouse will likely be brief and painless. While most of the probate process can be handled by your attorney, an Executor should: (1) attend a hearing before the judge in order to admit the Will to probate and (2) take the Oath of Executor before the Court or the Court clerk. Both of these tasks can be accomplished in a single trip to the courthouse.

### **I was told that probate is expensive and to avoid it, is that true?**

Generally, probate is not expensive in Texas. Legal fees for probate are typically based on an hourly charge as opposed to a percentage of an estate or a flat rate. Texas permits "independent administration" of estates which avoids costly Probate Court procedures. Generally, Texas is considered a "probate friendly" state. Other states mandate "dependent administrations" which could create high legal fees. A good rule of thumb is to discuss costs in your initial meeting with your attorney.

### **If the Decedent had a Living Trust, that means that the estate does not have to go through probate, right?**

It is possible, but unlikely, that a Living Trust allows one to avoid the probate process. Probate can be avoided if all of the estate's assets are in the Trust. However, people seldom transfer all of their assets to the Living Trust. Assets outside the Trust may still be subject to probate.

## **What is the difference between a Living Will and a regular Will?**

A “Living Will,” also referred to as a “Directive to Physician”, becomes effective (if medically necessary) while an individual is still alive. The document instructs medical personnel to either withhold or continue life-sustaining procedures in the event the individual reaches a terminal or irreversible medical condition.

A “regular,” or traditional, Will does not become effective until after the individual’s death. The Will is the legal declaration of an individual’s intention for the disposition of their estate following their death.

## **If I want my child who is not a resident of Texas to be my Executor, will that be a problem?**

The Estates Code specifically excludes a non-resident of the State of Texas from qualifying to serve as estate Executor. However, if the non-resident appoints a resident agent to accept service of process in all actions or proceedings with respect to the estate, and such appointment is on file with the Court, then a non-resident can serve as an Executor.

## **What are Letters Testamentary?**

Letters Testamentary are official documents issued by the Court authorizing the Executor to act for the estate. They are the proof to others that the Executor has been qualified by the Court.

## **If I do not have a Will, does the State of Texas get all of my assets?**

When a person dies without a Will, Probate Courts in Texas distribute estate assets according to Texas’ laws of intestacy. Your property will be distributed to your heirs according to a formula that the Court applies based on specific rules of distribution to your surviving family members. If no heirs are available to inherit your assets, then your property may escheat (be transferred) to the State of Texas. The state must file a petition for escheat and successfully show that there are no heirs to the estate before it can properly claim the property for the state.

## **SECTION 5 – Resources**

### ***Finding Legal Assistance***

You may contact the State Bar of Texas toll free at 1-800-204-2222 and request a lawyer referral. You can also fill out an online attorney referral request at [www.texasbar.com](http://www.texasbar.com). The following counties also offer local lawyer referral services.

#### **Bexar County**

San Antonio Bar Association:  
(210) 227-1853  
[www.sanantoniobar.org](http://www.sanantoniobar.org)

#### **Brazoria County**

Houston Bar Association:  
(713) 237-9429  
[hlrs.org](http://hlrs.org)

#### **Collin County**

Plano Bar Association:  
(972) 424-6113

#### **Dallas County**

Dallas Bar Association:  
(214) 220-7400  
[www.dallasbar.org](http://www.dallasbar.org)

North Dallas Bar Association:  
(972) 980-0472

**El Paso County**

El Paso Bar Association:  
(915) 532-7052  
elpasobar.com

**Fort Bend County**

Houston Bar Association:  
(713) 237-9429  
hlrs.org

**Galveston County**

Houston Bar Association:  
(713) 237-9429  
hlrs.org

**Harris County**

Houston Bar Association:  
(713) 237-9429  
hlrs.org

**Jefferson County**

Jefferson County Bar Association:  
(409) 835-8438  
www.jcba.org

**Montgomery County**

Houston Bar Association:  
(713) 237-9429  
hlrs.org

**Nueces County**

Corpus Christi Bar Association:  
(361) 883-3971  
ccbar.com

**Tarrant County**

Tarrant County Bar Association:  
(817) 336-4101  
Email: [Iris@tarrantbar.org](mailto:Iris@tarrantbar.org)

**Travis County**

Austin Bar Association:  
(512) 472-8303  
Toll-free: (866) 303-8303

***Whom Can I Contact for Free Legal Advice?*****City Square, Legal Action Works**

(214) 827-1000  
[www.citysq.org](http://www.citysq.org)

**Dallas Bar Association Legal Advice  
Telephone Line**

2nd & 3rd Wednesday of each month  
5:30 pm – 8:00 pm  
(214) 220-7476  
[www.dallasbar.org](http://www.dallasbar.org)

**Denton County Alternative Dispute  
Resolution Program**

(940) 320-1500  
[www.dentonadr.com](http://www.dentonadr.com)

**Houston Volunteer Lawyers Program**

(713) 228-0732  
[www.hvlp.org](http://www.hvlp.org)

**Legal Aid of NorthWest Texas**

Legal Aid Hotline:  
Mon – Fri 9:00 am – Noon  
1:00 pm – 4:00 pm  
Toll-free: (888) 529-5277  
[www.lanwt.org](http://www.lanwt.org)

**Lone Star Legal Aid**

Toll-free: (800) 733-8394  
[www.lonestarlegal.org](http://www.lonestarlegal.org)

**NAACP Houston Branch**

(713) 526-3389  
[naacphouston.org](http://naacphouston.org)

**South Texas College of Law – Legal Clinics**

(713) 646-1743  
[www.stcl.edu/clinics/index.html](http://www.stcl.edu/clinics/index.html)

**Texas Legal Services Center**

Legal hotline for Senior Citizens and Texas Veterans  
Toll-free: (800) 622-2520  
[www.tlsc.org](http://www.tlsc.org)

**TexasRio Grande Legal Aid**

Toll-free: (888) 988-9996

[www.trla.org](http://www.trla.org)***Community Resources*****Area Agency on Aging**

Toll-free: (800) 252-9240

[www.dads.state.tx.us](http://www.dads.state.tx.us)**Area Agency on Aging of the Alamo Area**

(210) 362-5200

[www.aacog.com](http://www.aacog.com)**Area Agency on Aging of the Capital Area**

Toll-free: (888) 622-9111

[www.aaacap.org](http://www.aaacap.org)**Area Agency on Aging of Central Texas**

Toll-free: (800) 447-7169

[www.centexaaa.com](http://www.centexaaa.com)**Area Agency on Aging of the Heart of Texas**

(254) 292-1800

[www.aaahot.org](http://www.aaahot.org)**Area Agency on Aging of North Central Texas**

Toll-free: (800) 272-3921

[www.nctcog.org/cs/aging](http://www.nctcog.org/cs/aging)**American Bar Association**

Toll-free: (800) 285-2221

[www.americanbar.org](http://www.americanbar.org)**American Society on Aging**

Toll-free: (800) 537-9728

[www.asaging.org](http://www.asaging.org)**National Council on Aging**

Toll-free: (800) 677-1116

[www.ncoa.org](http://www.ncoa.org)**Social Security Administration**

Toll-free: (800) 772-1213

[www.ssa.gov](http://www.ssa.gov)**State Bar of Texas**

Toll-free: (800) 204-2222

[www.texasbar.com](http://www.texasbar.com)**Texas Health and Human Services Commission**

Toll-free: (877) 541-7905

[www.hhsc.state.tx.us](http://www.hhsc.state.tx.us)**Texas Young Lawyers Association**

(800) 204-2222 ext. 1529

[www.tyla.org](http://www.tyla.org)

## **Estate Planning Checklist**

One of the first steps in preparing a will and disability planning documents is to gather documentation and information. This is true whether you intend to draft the will and disability planning documents yourself, or if you plan to hire an attorney. You should be aware that making a mistake in drafting or executing a will might result in your estate not being distributed as you intend. Accordingly, it is recommended that you consult an attorney. The attorney may provide you with a list of items to bring to your meeting.

<b>Items to Locate</b>		<b>Located</b>	<b>Location/Information</b>	<b>Given to Attorney</b>
1.	Any Prior Wills, Trusts and Codicils	<input type="checkbox"/>		<input type="checkbox"/>
2.	Spouse's Will and Codicils	<input type="checkbox"/>		<input type="checkbox"/>
3.	Full name, birthdate, social security number	<input type="checkbox"/>		<input type="checkbox"/>
4.	Information regarding children – names, ages, contact information, born or adopted, etc.	<input type="checkbox"/>		<input type="checkbox"/>
5.	Documentation regarding citizenship (if applicable)	<input type="checkbox"/>		<input type="checkbox"/>
6.	Marriage license	<input type="checkbox"/>		<input type="checkbox"/>
7.	Prenuptial agreement	<input type="checkbox"/>		<input type="checkbox"/>
8.	Marital or partition agreements	<input type="checkbox"/>		<input type="checkbox"/>
9.	Divorce decrees	<input type="checkbox"/>		<input type="checkbox"/>
10.	Information regarding funeral arrangements	<input type="checkbox"/>		<input type="checkbox"/>
11.	Contact information for your chosen executor (the person who will carry out the terms of your will)	<input type="checkbox"/>		<input type="checkbox"/>
12.	Names and contact information for your chosen beneficiaries (this can be an individual, organization, or charity)			
13.	Specific Bequests/Gifts that you want made in your Will (for example, my wedding ring to my daughter)			
14.	Contact information for your chosen Trustee (the person who will carry out the terms of your Trust)			

15.	Contact information for your chosen Guardian (the person who will care for any minor children)			
16.	Information regarding safety deposit box	<input type="checkbox"/>		<input type="checkbox"/>



Items to Locate		Located	Location/Information	Given to Attorney
17.	Assets and Debts	<input type="checkbox"/>		<input type="checkbox"/>
	a) Real Property (need legal description)	<input type="checkbox"/>		<input type="checkbox"/>
	b) Mineral Interests	<input type="checkbox"/>		<input type="checkbox"/>
	c) Rental and Lease Contracts	<input type="checkbox"/>		<input type="checkbox"/>
	d) Bank Accounts (need name of bank) and account numbers, owners of account, and what type of an account	<input type="checkbox"/>		<input type="checkbox"/>
	e) Savings Accounts (need name of bank and account numbers, numbers, owners of account, and what type of an account)	<input type="checkbox"/>		<input type="checkbox"/>
	f) ) Savings & Loan Accounts (need name of bank and account owners of account, and what type of an account)	<input type="checkbox"/>		<input type="checkbox"/>
	g) Credit Unions (need name of bank and account numbers, owners of account, and what type of an account)	<input type="checkbox"/>		<input type="checkbox"/>
	h) Securities and Investments – stocks, bonds, brokerage accounts, mutual funds, annuities, stock options, etc. (need names, account numbers, and ownership interest)	<input type="checkbox"/>		<input type="checkbox"/>
	i) Security Interest (have you been granted a security interest in any property?)	<input type="checkbox"/>		<input type="checkbox"/>
	j) Tax Deferred Accounts/Plans – i.e. 401(K) plans, individual retirement accounts (IRA), pension plans, benefit plans, employee stock ownership plans, any other retirement plans – (need names, account numbers, named beneficiaries)	<input type="checkbox"/>		<input type="checkbox"/>
	k) Non-Qualified Benefit Plans	<input type="checkbox"/>		<input type="checkbox"/>
	l) Company Benefits (employment trusts, accrued, unpaid bonuses, stock purchase plans, employment contracts)	<input type="checkbox"/>		<input type="checkbox"/>

Items to Locate		Located	Location/Information	Given to Attorney
	m) Life Insurance (need names, account numbers, named beneficiaries)	<input type="checkbox"/>		<input type="checkbox"/>
	n) Military Retirement Benefits	<input type="checkbox"/>		<input type="checkbox"/>
	o) Motor Vehicles (title, make, model, year, vin numbers)	<input type="checkbox"/>		<input type="checkbox"/>
	p) Equipment and Machinery (need description, make, model, vin numbers)	<input type="checkbox"/>		<input type="checkbox"/>
	q) Valuable Collections (need specific description of items in collection)	<input type="checkbox"/>		<input type="checkbox"/>
	r) Receivables (Does anyone owe you money?)	<input type="checkbox"/>		<input type="checkbox"/>
	s) Tax Refunds	<input type="checkbox"/>		<input type="checkbox"/>
	t) Tax Prepayments	<input type="checkbox"/>		<input type="checkbox"/>
	u) Lawsuits (Are you involved in a lawsuit?)	<input type="checkbox"/>		<input type="checkbox"/>
	v) Pending Claims against you	<input type="checkbox"/>		<input type="checkbox"/>
	w) Copyrights and Patents (Did you copyright or patent anything, or are any copyrights or patents pending?)	<input type="checkbox"/>		<input type="checkbox"/>
	x) Business Associations	<input type="checkbox"/>		<input type="checkbox"/>
18.	List of your heirs with full names and contact information	<input type="checkbox"/>		<input type="checkbox"/>
19.	Name of your Accountant	<input type="checkbox"/>		<input type="checkbox"/>
20.	Name of your Financial Advisor	<input type="checkbox"/>		<input type="checkbox"/>
21.	Financial Power of Attorney – Contact information for agent (the person who will make financial decisions on your behalf) and successor agent	<input type="checkbox"/>		<input type="checkbox"/>
22.	Medical Power of Attorney – Contact information for agent (the person who will make medical decisions on your behalf) and successor agent	<input type="checkbox"/>		<input type="checkbox"/>
23.	HIPAA Authorization – Contact information for those individuals you want to have access to your medical information	<input type="checkbox"/>		<input type="checkbox"/>

## **Probate Preparation Checklist**

Starting the probate process is often difficult. It is recommended that you initially contact an attorney. The attorney may provide you with a list of items to bring to your meeting. However, if not, the checklist below sets forth several items that may or may not be applicable to the Decedent's estate. Locating some or all of these documents prior to an attorney meeting can assist the attorney in identifying the best way to proceed forward with the estate. Also, providing as much information to the attorney earlier on can help make the probate process move more efficiently.

Items to Locate		Located	Location/Information	Given to Attorney
1.	Decedent's Last Will and Testament	<input type="checkbox"/>		<input type="checkbox"/>
2.	Codicils to the Decedent's Last Will and Testament	<input type="checkbox"/>		<input type="checkbox"/>
3.	Decedent's Trust	<input type="checkbox"/>		<input type="checkbox"/>
4.	Decedent's Funeral Arrangements	<input type="checkbox"/>		<input type="checkbox"/>
5.	Decedent's full name, birthdate, social security number	<input type="checkbox"/>		<input type="checkbox"/>
6.	Documentation regarding Decedent's citizenship (if applicable)	<input type="checkbox"/>		<input type="checkbox"/>
7.	Decedent's safety deposit box	<input type="checkbox"/>		<input type="checkbox"/>
8.	Decedent's marriage license	<input type="checkbox"/>		<input type="checkbox"/>
9.	Decedent's divorce decrees	<input type="checkbox"/>		<input type="checkbox"/>
10.	Decedent's prenuptial agreement	<input type="checkbox"/>		<input type="checkbox"/>
11.	Decedent's marital or partition agreements	<input type="checkbox"/>		<input type="checkbox"/>
12.	Decedent's children – names, ages, contact information, born or adopted, etc.	<input type="checkbox"/>		<input type="checkbox"/>
13.	Death Certificates (order 5 – 10 certified copies)	<input type="checkbox"/>		<input type="checkbox"/>
14.	Secure the Decedent's home	<input type="checkbox"/>		<input type="checkbox"/>
15.	Decedent's Assets and Debts			
	a) Real Property (need legal description)	<input type="checkbox"/>		<input type="checkbox"/>
	b) Mineral Interests	<input type="checkbox"/>		<input type="checkbox"/>
	c) Rental and Lease Contracts	<input type="checkbox"/>		<input type="checkbox"/>

Items to Locate		Located	Location/Information	Given to Attorney
	d) Bank Accounts (need name of bank and account numbers, owners of account, and what type of an account)	<input type="checkbox"/>		<input type="checkbox"/>
	e) Savings Accounts (need name of bank and account numbers, owners of account, and what type of an account)	<input type="checkbox"/>		<input type="checkbox"/>
	f) ) Savings & Loan Accounts (need name of bank and account numbers, owners of account, and what type of an account)	<input type="checkbox"/>		<input type="checkbox"/>
	g) Credit Unions (need name of bank and account numbers, owners of account, and what type of an account)	<input type="checkbox"/>		<input type="checkbox"/>
	h) Securities and Investments – stocks, bonds, brokerage accounts, mutual funds, annuities, stock options, etc. (need names, account numbers, and ownership interest)	<input type="checkbox"/>		<input type="checkbox"/>
	i) Security Interest (had the Decedent been granted a security interest in any property?)	<input type="checkbox"/>		<input type="checkbox"/>
	j) Tax Deferred Accounts/Plans – <i>i.e.</i> , 401(K) plans, individual retirement accounts (IRA), pension plans, benefit plans, employee stock ownership plans, any other retirement plans – (need names, account numbers, named beneficiaries)	<input type="checkbox"/>		<input type="checkbox"/>
	k) Non-Qualified Benefit Plans	<input type="checkbox"/>		<input type="checkbox"/>
	l) Decedent’s Company Benefits (employment trusts, accrued, unpaid bonuses, stock purchase plans, employment contracts)	<input type="checkbox"/>		<input type="checkbox"/>
	m) Life Insurance (need names, account numbers, named beneficiaries)	<input type="checkbox"/>		<input type="checkbox"/>

Items to Locate		Located	Location/Information	Given to Attorney
	n) Military Retirement Benefits	<input type="checkbox"/>		<input type="checkbox"/>
	o) Motor Vehicles (title, make, model, year, Vehicle Identification Number)	<input type="checkbox"/>		<input type="checkbox"/>
	p) Equipment and Machinery (need description, make, model, vin numbers)	<input type="checkbox"/>		<input type="checkbox"/>
	q) Valuable Collections (need specific description of items in collection)	<input type="checkbox"/>		<input type="checkbox"/>
	r) Receivables (Did anyone owe the Decedent money?)	<input type="checkbox"/>		<input type="checkbox"/>
	s) Tax Refunds	<input type="checkbox"/>		<input type="checkbox"/>
	t) Tax Prepayments	<input type="checkbox"/>		<input type="checkbox"/>
	u) Lawsuits (Was the Decedent involved in a pending lawsuit at death?)	<input type="checkbox"/>		<input type="checkbox"/>
	v) Pending Claims against the Decedent	<input type="checkbox"/>		<input type="checkbox"/>
	w) Copyrights and Patents (Did the Decedent copyright or patent anything, or was a copyright or patent pending?)	<input type="checkbox"/>		<input type="checkbox"/>
	x) Decedent's Business Associations	<input type="checkbox"/>		<input type="checkbox"/>
	y) Decedent's cash on hand	<input type="checkbox"/>		<input type="checkbox"/>
16.	Create List of Decedent's Heirs with full names and contact information	<input type="checkbox"/>		<input type="checkbox"/>
17.	Name of Decedent's CPA	<input type="checkbox"/>		<input type="checkbox"/>

Generally, an attorney will be retained to represent the Executor throughout the probate process. Most Texas Probate Courts will not let a person serve as an Independent Executor and represent him/herself pro-se. The Executor position is a fiduciary, meaning the person has a duty to act for the benefit of others (*i.e.*, the beneficiaries). Therefore, most Courts require that an attorney represent the Executor. It is a good idea to check with the Court that has jurisdiction over the case to verify its specific rule with respect to representation. Some alternatives to probate do not require that an Executor be appointed, and therefore, an individual could successfully represent him/herself. Below is a template of a Small Estate Affidavit and Order. It is not required, but strongly encouraged, that an individual filing a Small Estate Affidavit and Order consult an attorney.

