Frequently Asked Questions About Settling a Estate

Does the Will have to be Probated? The Will does not have to be probated unless there is probate property because the Will only controls probate property.

What is Probate Property? Accounts that are only in the deceased person's name, ownership of real property unless the property is in a trust or a special deed is involved such as a life estate deed or a lady bird deed. Examples of probate property: The decedent has a bank account, CD, or stock certificate that is only in the decedent's name. If the decedent owns a home with his wife, the Decedent's Will will most likely have to be probated to give full ownership to the surviving spouse. (An Affidavit of Heirship can sometimes be used, depending on the situation.)

Different Kinds of Property that a Decedent Owns? People frequently have three different kinds of property: (1) joint accounts with right of survivorship like joint checking accounts, (2) beneficiary designation items like life insurance, IRAs, 401(k)s, and annuities, and (3) probate property described above.

Joint Accounts? Joint accounts *with right of survivorship* are not probate property. The decedent's interest passes to the surviving co-tenant because that was decided when they signed the signature card or account application. A Will does not have to be probated to take charge of this kind of property; however, it is possible to set up a joint account that is **not** *with right of survivorship*. If the account is **not** *with right of survivorship*, it is probate property.

Beneficiary Designation Items? If a person is named as beneficiary on IRA, for example, that beneficiary will be able to coordinate directly with the financial institution to take ownership of his or her portion of that account. The Will does not have to be probated for this to happen.

What if there is no Will? If there is no Will and the estate includes probate property, then the family will still have to go to probate court, establish an Administration, and have an Administrator appointed by the Court. This is usually much more complicated and expensive than probating a Will.

What is Probate and Do you have to go to court? Probate means that the named Executor or other interested party appears before a judge and gives testimony under oath, beneficiaries are notified, and the judge provides a letter authorizing the executor to take control of the decedent's property. The letters are called Letters Testamentary or Letters of Administration.

The Will Names Me as Executor, Why Do I have to go to Court? Because anyone could forge a Will and steal the decedent's property, so no bank, financial instituion, or title company is going to act without the letter from a judge.

How long does it take to get approved by the Court? Normally, it takes five or six weeks from the time you sign the Application for Probate and deliver the original of the Will to your attorney. If there was a good reason, the process could be shortened to three weeks. (By good

reason, we mean something the judge would consider a good reason, not the mere convenience of the applicant. (Example: You are trying to close on your mother's house in three weeks. Not a good reason. Postpone the closing.)

What if there is an Emergency Requiring a Administrator? The quickest way is to establish a Temporary Administration in addition to the regular probate action. This can be done in a week or so, but requires additional cost in attorney's fees, filing fees, and court time. (Example: The family must file a lawsuit on behalf of the decedent before a certain date that is less than three weeks in the future.)

What about real estate like homes, mineral interests, and investment property? After the Will is probated and the Executor has Letters Testamentary, he can sell the property or transfer it to the beneficiaries by deed. The family or named executor could list the home for sale before obtaining Letters Testamentary. (If the property is in a trust, it is not probate property, and the trustee can sell it or transfer it to the beneficiaries without court action. If the decedent prepared a life estate deed or lady bird deed, the grantees (beneficiaries) have control once they file an Affidavit of Death in the deed records to show that the decedent has died.)

What about business interests? After the Will is probated and executor has Letters Testamentary, he can act for the decedent to prepare new corporate, LLC, or partnership documents to transfer ownership or sell the business.

What about personal property like furniture, clothing, guns, and jewelry? This property is probate property unless it is assigned to a trust. However, if the family members or beneficiaries are on good terms, they could divide the property based on the Will without going to probate court.

What about cars and boats? Cars and boats that are **not** in a trust and **not** owned as joint tenants with right of survivorship are probate property. However, these items do not require a probate. The Texas Department of Motor Vehicles and the Texas Department of Parks and Wildlife (boats) have alternate procedures which allow the surviving spouse or children to transfer this property without necessarily opening a probate. If the Will is going to be probated for some other reason, the Executor with Letters Testamentary will be able to sell or transfer the car or boat.

Does the Executor or Trustee Have to pay estate taxes on **the property value** of the estate? Not unless the decedent's property exceeds $5,340,000 in fair market value. (The exemption amount for 2014. The exemption is due to rise by an inflation factor each year.)

Does the Executor of Trustee Have to pay **income taxes** on the Decedent's income? Yes, if the decedent earned enough money to meet the filing threshold, then the executor, trustee, or beneficiary needs to file the return by April 15 to the year following the death of the person.

Does the Estate Need a Tax Id Number? Yes, in many cases. The period of the estate runs from the person's date of death until all of the property is distributed to the beneficiaries. Once banks, insurance companies, and title companies find out that an account holder has died, they frequently require a federal tax identification number for the estate. Checks are frequently made out to the "Estate of the Decedent" which requires the Executor or Administrator to open a new bank account in the name of the estate with a new tax identification number in order to cash the check.

Do Beneficiaries Owe Tax on the Property They Receive? No, unless we are talking about IRAs, 401(k)s, retirement plans, and annuities. Since these assets consist wholly or partly of untaxed money, any distribution that a beneficiary takes out of an inherited IRA, for instance, will be taxed to the beneficiary in the year received. On the other hand, non-IRA, non-annuity assets pass to the beneficiary without any tax being due. However, once the beneficiary puts the inheritance in his or her accounts and begins earning interest, dividends, or capital gains on their inheritance, the IRS wants its share of the earnings each year. Once the beneficiary has control of the asset, it is just like any other asset the person owns for income tax purposes.

What if you are named as a beneficiary of an IRA or Retirement Plan? The beneficiary will have a choice to make. First, he can take a distribution of the whole amount, but he will owe income tax on it for the year it is received. However, he will not owe a 10% penalty if the beneficiary is under 59½ as he would if he took the money out of his own IRA. Second, he can take the IRA as an inherited IRA, in which case he can take minimum required distributions over his life expectancy. This would allow the IRA to continue to grow tax deferred on the amount still inside of the IRA. This would limit the person's tax liability to only the amount he takes out each year. Further, he is not limited to the minimum required distribution, he could take more but not less as he decides as time goes bye. There is no 10% penalty for withdrawals prior to age 59½ on the inherited IRA

What should the Executor or Trustee Be Worried About? Being Executor or Trustee means you are in charge, and it gives you control over the assets in the estate or in the trust. It sounds like a good and necessary thing. However, the Executor or Trustee is legally responsible for correctly, carefully, and prudently handling his role. He is personally liable to the beneficiaries for discharging his duties, and he must account for his handling of the estate or trust. If the family is at war or if there are creditors, he is in the hot seat, not the cock bird seat. There can be demands for accountings and threats of lawsuits against him for all kinds of reasons. The Executor or Trustee should go into this job with his eyes wide open. He needs to carefully account for everything and keep meticulous records. He needs to make sure he gets help or advice from professionals like appraisers, CPAs, and attorneys as necessary.