

ALLEN TEXAS ATTORNEYS

NORTHCUTT • DEAN • BALIUS • SCHULMEISTER

80 E. McDermott Drive, Allen, Texas 75002
Telephone: (972) 390-1608; Fax: (972) 390-1685
Email: Office@allentxattorney.com
Website: www.AllenTexasAttorneys.com

From the Desk of:
Elizabeth Morrison Dean,
Managing Member
Edean@AllenTxAttorney.com

Texas Probate Process—Explained

By: Elizabeth Morrison Dean

Probate. When a person dies and leaves property that has not been transferred to another person by way of a trust, joint ownership with a right of survivorship, or a properly designated payable on death to a beneficiary (which could include a life insurance policy, bank account, or retirement account), titled property will be distributed through a judicial process called probate.

Transfer Title. Probate is the process in which a court legally recognizes a person's death and oversees the payment of a deceased person's debts and the distribution of his or her assets to beneficiaries (through a Will) or heirs (without a Will). The court's role is to facilitate this process and protect, when necessary, the interests of all creditors and beneficiaries or heirs of the decedent's estate. The role of the Texas probate court, and all persons hired by the court to facilitate this process, is known as probate administration.

Where to File. If the deceased person, known as the decedent, dies with a validly executed Will, the executor (if one is named in the Will) or a personal representative (if no one is named, then any interested person can probate the Will), will file the Will for probate in a Texas court in the county where the Decedent was domiciled (permanent address, not a hospital or temporary arrangement) when they died.

When to File. The Texas Estates Code governs the various time periods that the executor or administrator must follow in probating a Will. The general rule in Texas is that the executor has four years from the date of death of the testator (person who drafted the Will) to file the Will for probate. If the executor does not file the Will within that prescribed time period, the laws of intestacy (when there is no Will) may govern how the estate's assets are distributed unless the applicant is not at fault for failing to present the Will within the four-year time period. Courts are typically lenient in determining what constitutes "at fault."

Length of Probate. Depending on the type of probate, it can take a few months to over a year for the entire probate process to be completed. It depends on the facts and circumstances of the case, the type of probate, the availability of the Court for a hearing, and other factors, including uncooperative beneficiaries or claims filed against the estate. Texas has a few types of probate that could be used to probate a Will, depending on the facts and circumstances of the estate. An attorney can explain which type of probate process is appropriate.

Non-Probate Assets. It should be noted that although it can take several months or years to probate an estate, Beneficiaries may be able to obtain funds of the estate sooner if they are listed as a payable-on-death beneficiary. These assets are called, "non-probate assets." These can include bank accounts, life

insurance policies, as well as IRAs, KEOGHs, pensions, profit sharing, and 401(k) plans. These assets can be transferred directly from the company or bank holding them to the beneficiary who is named in the policy or account documents by submitting a copy of the death certificate to the institution. Since these assets pass outside of probate, it is not necessary to wait until the probate process is complete to obtain these funds. If you are unsure whether an asset is a probate asset or a non-probate asset, and you need clarification, please discuss this with an attorney.

Probate Terms:

As you go through the probate process, there are many legal terms that might be unfamiliar or unclear to you. Here are a few of the main terms:

- **Administrator:** When the decedent left a Will, but the Will does not name an executor or the decedent passed away without leaving a valid Will, Texas law requires that an administrator be appointed to carry on the duties of the executor. The court will often appoint one of the primary heirs to act in this capacity.
- **Beneficiaries:** These are the persons or organizations named in a Will by the testator to receive the testator's property upon the testator's death.
- **Creditor:** Any company that has an unpaid balance in the name of the person who died. A creditor can include credit card companies, medical facilities, mortgage company, etc. There are special rules a creditor must follow to properly submit a claim against an estate. If those rules are not followed, the creditor's claim may be barred. **TIP:** Do not make any payments to creditors without speaking to an attorney.
- **Decedent:** When probating a will in Texas, you will likely encounter the term "decedent" often. This is the legal term for the person who has died and whose estate is in the probate process.
- **Executor:** When a person dies with a valid Will in place, the document typically names a person to serve as executor of the estate. The executor is tasked to follow the instructions of the Will. There are several administrative tasks Texas requires of an executor. The chief duties of the executor are (1) collect and secure the assets of the estate; (2) inventory and catalogue the decedent's assets; (3) pay valid debts of the estate; (4) and distribute assets from the estate to the beneficiaries as named in the decedent's Will.
- **Heirs:** If there is no valid Will, Texas law controls how a decedent's property will be distributed among the decedent's living relatives, who are called heirs. A court must determine there is no Will, identify the living relatives of the decedent, and designates which heirs will receive the decedent's property and how much. These recipients are called, "Heirs".
- **Intestacy:** When the decedent dies without a Will.
- **Probate Estate:** In the state of Texas, a probate estate consists of the decedent's probate assets. These include any assets that do not have a beneficiary designated or that are not in a valid trust. This can include cash, bank accounts, real estate (homes, land), Investments accounts, life insurance policies, retirement accounts, vehicles, and personal belongings.

- **Testator:** A person that executes a Will. “**Testate,**” means a person died with a Will.
- **Will:** This is the legal document in which a decedent has outlined how he or she would like assets distributed among their loved ones.

7 Types of Probate:

1. Affidavit of Heirship
2. Small Estate Affidavit
3. Muniment of Title
4. Determination of Heirship
5. Determination of Heirship with Administration
6. Letters Testamentary
7. Letters of Administration

If your probate case requires administration:

There are two types of administration: “dependent administration” and “independent administration.”

The easier probate process falls under independent administration procedures. In this situation, the court appoints an Administrator who submits an inventory of all assets and a list of people who owe money to the estate. After the inventory is filed, the administration of the estate continues without the probate judge’s approval. More than 80 percent of the estates probated in Texas are independently administered. Texas law allows the person writing a Will to include a provision in the Will for independent administration of the estate upon his or her death. The language for this provision is found in the Texas Estates Code. This law also tells how to ask for an independent administration in different kinds of cases.

A dependent administration procedure refers to the court being much more involved and appointing a dependent administrator who must get the probate judge’s approval in every step of the probate process. This usually happens when beneficiaries fight over the Will or the estate assets of the person who died. The purpose of dependent administration is to protect the rights of the beneficiaries, the people who will receive the assets. However, the necessity of a dependent administrator writing reports and seeking constant judicial approval drives the costs of probate administration up – a lot. Depending on the size of the estate, it can cost thousands of dollars more to go through dependent administration, money that would have gone to the beneficiaries under independent administration procedures.

The 8 Steps of Texas Probate

Step 1: Filing. An application for probate must be filed with the proper Texas probate court in the county where the decedent resided.

Step 2: Posting. After the probate application is filed, there will be approximately a two week waiting period before a hearing is held for the application. During this time, the county clerk will post a notice at the courthouse stating that a probate application was filed to serve as notice to anyone who may contest the Will or administration of the estate. If no contests are received, the probate court proceeds in opening the administration.

Step 3: Will Validation. After the waiting period, a Texas probate judge will preside over a hearing and will legally recognize the decedent's death. You can also expect the probate judge to verify that the decedent had a valid Will or that there was no Will, and finally appoint an administrator or verify the person named as executor.

Step 4: Cataloguing Assets. After an executor or administrator is named to the estate, that person must catalogue and report to the county clerk all the assets held by the estate within 90 days after appointment. The executor must prepare an Inventory, Appraisal, and List of Claims, which is sworn to be accurate to the best of their knowledge.

The Inventory is essentially a catalog of estate properties which must be carefully prepared. It must include proper and complete descriptions of the various estate assets together with reasonably accurate valuations of such assets as of the date of death.

There is an exception to the filing rule for independent executors. If there are no unpaid debts owed by the estate, except for secured debts, taxes, and administration expenses, and if the decedent's Will does not require the Inventory to be filed, then the executor may file an Affidavit in lieu of Inventory with the county clerk before the deadline, swearing that there are no unpaid debts (except secured debt, etc.) and that all estate beneficiaries have received a copy of the Inventory. The purpose of this exception is to protect the decedent's privacy and to keep his/her assets from appearing in a public record.

Step 5: Beneficiaries Identified. If the decedent had a valid Will, the executor will notify beneficiaries of the estate. If no Will was filed, the probate court must determine heirship. This can be a challenging predicament. With the legal representation of a Texas probate attorney, parties interested in the estate of the decedent may file a proceeding to determine heirship before the court in the county where the real property is situated.

All heirs must sign the application or must be personally served with the application. If there are potentially unknown heirs of the decedent, the court requires that notices be posted in newspapers as well as at the courthouse. In addition, an attorney-ad-litem is appointed by the court to represent the interests of the unknown heirs and to confirm the identity of the heirs.

All applicants must be able to prove the truth of the details in the application. Written as well as oral testimony may be necessary.

Besides the heirs themselves, a secured creditor or a qualified representative of the deceased can also initiate these proceedings as parties interested in the estate.

Step 6: Notifying Creditors. Decedents usually leave behind debts. These must be resolved out of their estate. Typical debts include medical bills, mortgages and credit card companies. Creditors are notified of the decedent's death by the estate's executor and given the opportunity to file claims against the estate. This notice to creditors can be legally accomplished in Texas with a notice published in the local newspaper and permissive notice can be sent to known creditors.

Step 7: Resolving Disputes. The estate cannot be finalized if family members or other potential beneficiaries are contesting a Will or if they file related grievances. These disputes must be heard by a probate court judge.

Probating a Last Will and Testament is often an emotional situation that has the potential to cause problems in the family. In the state of Texas, contesting a Will must be done within two years after the

original probate. A legal representative is necessary to direct and guide you through the dispute process whether or not you are the complainant.

The person contesting a Will must prove that the Will is invalid or that there is something wrong with it. There are several ways that a Will can be determined to be invalid, including:

- Proving the Will was a forgery;
- The Will was forced due to excessive influence by a third party;
- The Will was improperly executed;
- There was more than one Will executed;
- The testator lacked the ability to understand what he or she was doing when they signed the Will.

Many people contesting a Will in Texas never get to court because mediation is the suggested course of action for resolving conflict with Texas probate. Sometimes the dispute never even makes it to a mediator because the problems are settled out of court between the family and their attorneys.

Step 8: Distributing Assets. After the debts are resolved and disputes cleared up, the remaining probate assets are then distributed to the beneficiaries or heirs.

Conclusion:

There are additional housekeeping matters, based on the unique facts of each case, that may need attention that we will assist you with in closing the estate, such as reconciling the estate, preparing an accounting, and obtaining receipts from the beneficiaries.

If you have any questions about the probate process, give our experienced probate attorneys a call.