

# ESTATES OF DECEDENTS IN TEXAS

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July 10, 2020

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## Part I

# INTRODUCTION

## 1 WHAT'S AN ESTATE?<sup>2</sup>

### 1.1 Overview

When a person dies, he becomes a “decendent.” His “estate” is the chaos he leaves behind. The survivors are thrown into a strange world, overgrown with its own jargon, that confuses even the experts. This presentation gives you an overview of estates of decedents in Texas. It should help you understand the jargon and the procedures available for you to deal with an estate.

### 1.2 Basic Elements

In every estate the survivors are concerned with:

- ▷ The property the decedent had at death.
- ▷ The debts the decedent had at death.
- ▷ Who gets what?
- ▷ Who's in charge (if anyone)?

### 1.3 Property

Property means everything the decedent owned (not just real estate). Sometimes it's easy to count the assets. But people own an astonishing variety of property these days. These properties fall into two different kingdoms: the probate and non-probate assets. If the decedent was married, the survivors may be faced with sophisticated concepts of marital property rights. If the decedent shared interests in property with others (joint bank accounts come to mind), it may be tricky to figure out what belongs in the decedent's estate. Sometimes the survivors have to search for assets because the decedent was secretive or had poor records. The decedent may have assets that are hard to detect (such as rights under a stock options plan). If you don't have the passwords to accounts the decedent managed via the Internet, you may get very frustrated getting the the bottom of things. A wealthy decedent may, for federal tax purposes, be deemed the owner of property he gave away before death or never actually owned. Sometimes you learn that your decedent was the beneficiary of yet another estate that was not correctly handled — two estates to clear! Finally, if the decedent died as the result of a tragic event like an accident, the death itself may itself result in new property rights for the estate or certain survivors.

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## **1.4 Debts**

The law attempts to require that the decedent's debts be discharged before the survivors can enjoy the inheritance. Of course, debts includes ordinary bills and the expenses of final illness and the funeral. But there can also be business debts that are hard to pin down quickly like obligations under contracts, child support, personal guaranties, and litigation under way. And the debt that can really surprise you is unpaid back taxes! Finally, if the decedent died in an accident, there could be litigation leading to new obligations for the estate.

### **1.4.1 Who bears the burden?**

In most estates, the debts are paid without problems. But if the decedent had a lot of debts, this can quickly become problem numero uno. What creditors should you pay, and who bears the burden of paying them? Some of the decedent's properties are liable for debts — and some are exempt. Debts tend to fall on the kingdom of probate assets first and on the kingdom of non-probate assets only if the probate assets are exhausted. If the decedent had different beneficiaries for different properties, some of the beneficiaries may get wiped out by debts and some may get off Scot-free.

### **1.4.2 Buyer beware**

The survivors who inherit are sometimes not the only persons concerned about debts. If you are buying something from an estate, you want to be sure you get clean title with no lien for the debts of the decedent. For an (extreme) example, if the decedent's estate did not pay federal estate taxes, there can be a lien on real property of the estate for as long as 10 years. If you buy land that went through the estate, the IRS can sell the land out from under you to collect the taxes even though you were an innocent purchaser who paid fair value.

## **1.5 Who Inherits?**

In addition to being richer than any other people in history, many of us marry and divorce a lot, have children with different spouses, and have half-blood relatives and step-children. And then there's an increasing number of children born outside marriage, adoptions, test-tube babies, and the like. There can be a colorful crowd at the funeral. At the other end of the curve, more people outlive their close relatives and friends and die alone. So the question who inherits comes up more often than ever before.

It can get pretty wild. For example, after X dies, it appears that his children born to wife 1 inherit through a will he wrote three years before his death. Soon the estate appears to be settled. But almost two years after X's death, wife 2 finds a will X wrote a week before he died. That will leaves everything to wife 2. If the later will is admitted to probate, which is quite possible, the children will be "unheired" and wife 2 will inherit. And what about an innocent buyer who bought property from the children in the meantime? Does he have good title?

## 1.6 Who is in Charge?

Many estates are concluded by just falling off the log. Maybe all you have to do is to pay the bills and collect a bank account left to you, say, through a right of survivorship. You just present the bank with a death certificate for the decedent, and you are done. But if there is any substantial work to be done, somebody may have to be put officially in charge. The most general term for that person (or corporate trustee) is the “personal representative.” In Texas, however, you will never be appointed with the title “personal representative.” More specific designations are used in Texas for different situations. The most common titles are:

- ▷ Independent executor — used when there is a will and the executor will basically operate free of court control.
- ▷ Dependent executor — there is a will, but the court will supervise the executor closely.
- ▷ Independent administrator — there is no will, but the heirs convince the court to appoint the administrator to operate free of court control.
- ▷ Dependent administrator — there is no will and the estate will be supervised closely by the court.

In the rest of this presentation, I will frequently refer to the personal representative as the “PR.” Whatever specific title the PR has will be spelled out in a document the PR gets from the clerk of court called “Letters.”

## 1.7 Most Common Estate

So now you are ready for an example: The most typical PR in Texas is a widow who is named as independent executor in her husband’s will. If the widow determines she will need “Letters Testamentary” to handle the estate, she will then offer the will for probate. She will be appointed independent executor and get her Letters Testamentary. (If you have much Latin, you will know that the female is “executrix.” This presentation is unisex.)

# 2 STATE LAWS AND FEDERAL LAWS

## 2.1 State Laws

States (Texas, Oklahoma, New York, etc.) provide most of the laws about ownership of property, marriage rights to property, and inheritance. All the states have similar goals in these fields, but the particular laws and the jargon of each state can be quite different. So if you picked up some knowledge about estates in another state, that’s great; but be careful to focus on the Texas way of doing things. (Matters can really get confusing if you have property in several states (or other countries), each with its own peculiar rules.)

## **2.2 Federal Laws**

The federal government also has laws that apply to property matters and estates. This includes, for example, laws about individual retirement accounts (IRAs), pension plan laws (under ERISA or the Employee Retirement Income Security Act), and the like. Many federal tax laws get involved with estates. Even the smaller estates can have income tax issues. The Big Bopper is the federal estate tax that applies to larger estates. The word “estate” then means what the IRS will tax and may have little correlation to the word “estate” at the level of local law. For example, Mr. Riche put all his very valuable assets into a living trust successfully designed to “avoid probate,” and no will was filed after his death. There may be no estate for Mr. Riche on file at the court house. But the trustee of the living trust may have to file a whopper federal estate tax return and pay a lot of tax.

## **3 WHAT’S PROBATE?**

The word “probate” has several meanings depending on the context. The narrow meaning is the legal process of filing a will or otherwise dealing with an estate in a probate court. The broadest meaning is the whole process of dealing with the estate, much of which may have nothing to do with a court case. And somewhere between is the concept of probate assets, which I discuss in the next section.

## **4 PROBATE AND NON-PROBATE ASSETS**

I already mentioned the two kingdoms of properties: the probate and non-probate assets. At this point we should discuss the differences between the kingdoms:

### **4.1 Probate Assets**

These are the mostly old-fashion things that people have always owned. Good examples would include land and mineral interests in the name of the decedent, stock certificates or accounts at financial institutions in the name of the decedent alone, cars with titles in the name of the decedent alone, furniture and household goods, art works, tools, and clothing. On the death of the owner, the will says who inherits these items. Or if the decedent had no will, the law of intestacy says who inherits. So the hallmark of a probate asset is that there is no contract or form associated with the asset designating who gets it when the owner dies. You have to go further to figure out and prove who will get the property. Well, the Latin word for prove is “probare,” and that is why we say we go through probate to determine the new owners of the property.



## **4.2 Non-probate Assets**

### **4.2.1 Definition**

For a great many estates, the non-probate assets are more important than the probate items. The hallmark of a non-probate asset is that it passes at death according to a contract the owner made, or form he filled out, with the entity from whom he acquired the asset. You can establish immediately who gets it, often by reading a beneficiary designation form. The beneficiary usually collects the asset by identifying himself and presenting his claim together with a death certificate for the decedent.

Non-probate assets tend to be newfangled products of modern commerce. Because these assets go directly to the new owners, they usually have no contact with the probate process. They are not in the “probate estate” of the decedent.

### **4.2.2 Examples**

Here are some of the most common non-probate assets:

- ▷ Life insurance
- ▷ Retirement plans
- ▷ Special bank accounts (“multi-party accounts”)
  - Survivorship accounts
  - Pay on death accounts
- ▷ Annuities purchased from an insurance company
- ▷ Government bonds
- ▷ A funded revocable living trust for property management

### **4.2.3 Switch hitter**

You can convert a non-probate asset into a probate item by directing through a beneficiary form that the asset go at death to the estate of the decedent. For example, the beneficiary designation form of an insurance policy might read: “Pay on death to my wife; or if she does not survive me, to my estate.” Then if the wife survived, the insurance would pass as a non-probate asset. If the wife did not survive, the insurance would be a probate asset payable to the PR of the estate.

#### 4.2.4 The gorilla — the funded living trust

This is not the place for a detailed discussion of all the non-probate assets. But perhaps we should dwell a bit more on the 1000 lb gorilla in this group, the funded revocable living trust for property management. If you set up such a trust and put all your property in it, you technically don't own any thing any more. Your stuff belongs to a trustee. At your death, the trust keeps right on chugging (if things are done right) and you may completely avoid the probate court. But there may still be plenty of probate work to do (in the broad meaning of the word) such as filing insurance claims, dealing with creditors, paying taxes, running businesses, selling assets, funding new trusts, and distributing assets. The rules in the Texas Estates Code, Texas Trust Code, and related statutes were pretty much written when no one had even heard of a funded revocable living trust for property management. Also, the Internal Revenue Code and the IRS rules were written with the idea in mind that there will usually be a probate estate with an executor. So if you are involved with an estate based on a funded revocable living trust and there are complications, you may find yourself in *terra incognita*.

## 5 WITH OR WITHOUT WILL

Probate assets pass either by a will or by intestacy. If a person dies with a will that is admitted to probate, we say the decedent dies “testate.” If there isn't a will, the decedent is said to have died “intestate.”

### 5.1 Testate

#### 5.1.1 What is a will?

Normally a will is a document signed by the person making it, called the “testator,” which shows the intent to dispose of property at death while reserving the right to revoke. Wills may appear in several forms.

**5.1.1.1 Lawyer will** The typical will is a formal document prepared by a lawyer. To prevent forgery, a typewritten will must be signed before two witnesses who also sign it. The will should be signed before a notary public. We now have two different ways to do this: the new way and the old-fashioned way:

- ▷ New way (since 2014). The person making the will and the two witnesses sign one time each and the notary signs as well.
- ▷ Old-fashioned way. This is for lawyers who haven't gotten the word about the new way and are still using the old forms. The person making the will and the witnesses sign twice. The first time they sign is on the will itself. Then they also sign a separate page called the “Self-Proving Affidavit.” There are, of course, millions of wills in file cabinets all over Texas that were signed this old way. They are still just as valid as before.

If the will is signed correctly, the witnesses don't have to come to court when the the will is "proved up." This can save everybody a lot of trouble.

**5.1.1.2 Handwritten will** A handwritten (or "holographic") will is legal. It may not be as good as the will a lawyer would write, but if sure can beat dying without a will. To be legal, it should be entirely in the handwriting of the decedent and signed by the decedent. No witness or notary is needed. (It's easy to forge someone's signature, but it's hard to forge a whole paragraph of a handwritten will.)

One reason the law allows the handwritten will is to let people make a will in an emergency. Handwritten wills have turned up on hotel stationary, the backs of envelopes, on menus, and other odd places. Sometimes a valid handwritten will is found in what appears to be a deed, contract, or lease. So if you find anything the decedent wrote speaking of disposition at death, it may be a will.

**5.1.1.3 Codicil** A "codicil" is an amendment to a will. It can be done with the formalities of a lawyer will or be handwritten. If you have more than one testamentary document, you first see if the later document revokes the earlier one. If not, you try to read all the valid documents together. The biggest mess I've seen along these lines was a will with nine codicils.

## **5.1.2 What do you do with the will?**

**5.1.2.1 No probate required** There are times when you hold a perfectly valid will of a decedent, but you see no need to use it. Perhaps the decedent did the will first and later made arrangements to dispose of all his property by non-probate means. If you can handle all the business of the estate without having Letters Testamentary, there may be no point in going to the trouble of probating the will. There is no law requiring you to file a will for probate just because it exists.

**5.1.2.2 Four-year deadline** You normally have 4 years from the death of the decedent to decide if there is a need to file the will for probate. But caution, once four years pass, the will is late, and you may not be able to get it probated thereafter. Way too many people sit too long on a will that they need to probate and then get frustrated by the four-year rule.

**5.1.2.3 Delivery of will to clerk is different from offering for probate** There is a statute that says you are supposed to "deliver" the will of a decedent to the clerk of the court. This law by custom doesn't mean what it appears to say. It is really a "hot potato law." If you have what may be the will of a decedent and you feel uncomfortable about it, the will is a hot potato. You can get rid of the hot potato by turning over possession of the document to the clerk. The clerk then keeps it for anyone to inspect and possibly file for probate. Your delivery of the hot potato is entirely different from offering the will. Offering the will is done by someone with an interest in the estate who files a court case asserting that the document is the true will.

### **5.1.3 Why do you have to take the will to court?**

You may know for sure that a document is the true will of the decedent, but nobody else does. A will has no legal force until the court accepts it. Sometimes a decedent will make a series of wills over a period of time, and the court must decide which documents are valid.

- ▷ There was a deranged old lady in Dallas a few years ago who wrote and delivered wills to many of her friends and relatives. She gave a will to her yardman and another to a plumber who came to her house once (so the story goes). After her death, some 37 wills came to light. The court appointed a special master to collect all the wills and arrange a settlement out of court to deal with most of them.
- ▷ Sometimes the person named in the will as executor goes around with the will (that has not been offered for probate) and claims to be the executor. This is, of course, improper because you do not become the executor until the will is admitted, the judge approves your appointment, and you take the oath of office. Still, sometimes it works! But well-informed people will not deal with you until you get those famous Letters Testamentary.

## **5.2 Intestate**

If there is no will, the decedent died “intestate.” You then figure out who inherited the property by identifying the survivors and applying the law of intestacy.

### **5.2.1 Decedent not married**

If the decedent was not married, the property goes to children (and their descendants). If there are no descendants, the property goes to the parents in equal shares. If one parent is deceased, half goes to brothers and sisters of the decedent (or their descendants). If there be no such brothers and sisters of the decedent (or their descendants), all goes to the surviving parent. If there is no surviving parent, it can really be fun to search for and find the “laughing heirs.”

### **5.2.2 Decedent married**

If the decedent was married, the first step is to figure out what property the decedent had and whether each item was community or separate property.

**5.2.2.1 Community property** The surviving spouse first gets his half of the community by virtue of being the surviving spouse. If the decedent had no descendants, his half of the community also goes to the surviving spouse. If the decedent had descendants who are also the descendants of the surviving spouse, the surviving spouse gets the decedent’s part of the community. But here’s the rule that surprises people: if the decedent had a child or other descendant who is not a descendant of the surviving spouse, the decedent’s half of the community property goes to the child (or other descendant) and not to the surviving spouse.

This step-child situation can be a real killer. The step-child gets half of the community property saved by the decedent and also half of the community property saved by the surviving spouse! (A lot of people these days have step-children. If you have a step-child, be sure your spouse has a will!)

**5.2.2.2 Separate property** If the decedent has descendants, two-thirds of the decedent's personal property goes to them and the balance goes to the surviving spouse. And oh, joy! The surviving spouse also gets a life estate in one-third of the decedent's separate real property. If the decedent has no descendants, the surviving spouse gets all the decedent's separate personal property and at least one-half of his separate real estate (outright).

### **5.2.3 Bad Parents**

In some situations involving abandonment or crimes, a probate court can disinherit a "bad parent."

## **6 RIGHTS OF THE SURVIVING SPOUSE**

If the decedent was married, the surviving spouse may have certain rights (that apply whether the decedent had a will or not.) The most important right is the Texas homestead. For example, suppose the decedent left (in a valid will) his separate property home to his children, the step-kids of the surviving wife. If the wife was living in that home when the decedent died, she will (under the Texas Constitution) have the right to live there for the rest of her life (even though it belongs to the step-children). The surviving spouse may also have valuable rights to support from the decedent's estate for a year. The surviving spouse should take steps to collect this support *as soon as possible*.

## **7 FRONTIER LAW**

The basic policy of Texas probate law is to get the property to the new owners as fast as possible with a minimum of fuss. It's rough-and-ready frontier law.

### **7.1 Title Passes at Moment of Death**

Texas law says that title to the decedent's property passes instantly at the moment of death to the new owners in one manner or another. (You may not know for quite some time how this happens and who all the new owners are.)

#### **7.1.1 Probate assets**

The title to probate assets passes at death to the new owners under a statute. This statute does this whether there is a will or the decedent died without a will and was intestate.

### **7.1.2 Non-probate assets**

The statute I mentioned above was written at a time when non-probate assets didn't exist. But non-probate assets pass at the moment of death by contract, so the result is the same.

## **7.2 Lien for Creditors**

There is a "lien" on the property passing at death in favor of creditors of the decedent. The creditors can sue the heirs directly to enforce their lien.

### **7.2.1 Probate assets**

The lien works the same on probate assets whether there is a will or the decedent died intestate. But the lien applies only to probate assets.

### **7.2.2 Non-probate assets**

There is no lien on non-probate assets because they pass outside probate and there's no way for the lien to attach. In addition, several of the most important non-probate assets — life insurance and retirement plans — are exempt from creditors. This is a problem in the Texas law of estates. The original system of running all the assets through the probate estate subject to the lien was fair to creditors and beneficiaries. But the original system has been substantially undermined by the creation of non-probate assets that get around the lien. A few statutes have been passed to try to put some of the burden of debts on non-probate assets.

**7.2.2.1 Multi-party accounts** For example, there is a Texas statute that gives creditors a shot at certain non-probate accounts at banks and other financial houses. Let's try an example. Suppose the decedent left all his probate property to his good son and left a bank account by right of survivorship to his bad daughter. The decedent thought the son would get most of his estate and the daughter only a specific amount. But, alas, there were lots of bills and costs of final illness that wiped out the probate estate. The son got nothing and the creditors were still not paid in full. Meanwhile the daughter collected her bank account. The statute says that the creditors can try to collect from the daughter. So maybe she settles for 10 cents on the dollar and still has an inheritance. The statute gives no relief to the son who did all the work of the estate and got nothing.

**7.2.2.2 How to identify non-probate assets** So you see how it may well be necessary to get as much information as possible about the decedent's assets – both probate and non-probate. This process was in the past often frustrated when holders of assets passing non-probate would "stonewall" the administrator and refuse to give out information about those assets. Well, the Legislature in 2019 passed a new law that requires account managers to give information about the decedent's non-probate assets to the executor (or other personal representative). This is an important step toward the goal of handling the probate and non-probate assets in a transparent and coordinated

way. But the administrator is not required to actually pursue non-probate assets unless a demand for this to be done is made by the spouse of the decedent, a creditor, or a minor child represented by a next friend or guardian.

**7.2.2.3 Federal estate taxes** There is a Texas statute and there are provisions of the Internal Revenue Code that attempt to cause the burden of federal estate tax to fall fairly on the probate and non-probate beneficiaries. But these statutes can easily fail if the will is poorly written. Here's an example. Suppose a wealthy man left his probate estate through a simple will to his son from his second happy marriage. He left his stocks in an IRA stock brokerage account with a pay-on-death provision to his daughter from his earlier unhappy marriage. The stocks got white-hot just about the time the decedent died. The simple will says for the executor to pay the death taxes out of the probate estate. The stocks are in the estate for estate tax purposes and the tax wipes out the probate estate. Because the simple will said to pay taxes from the estate, there is no help from the Texas statute on this nor does a federal statute cover this situation.

**7.2.2.4 Transfer-on-death deeds** A peculiar non-probate asset in Texas would be real estate that passes from the decedent by a "transfer-on-death deed" or "TOD deed" to someone named in the deed to receive the property. For historical reasons, such deeds were rarely used in Texas in the past. But a recent Texas statute recognized their validity and even provided statutory forms. Various problems arose in writing and using these deeds. The Texas Legislature in 2019 repealed the statutory forms, but directed the Texas Supreme Court to come up with new forms. This was, it appears, a rather weird law for the Legislature to enact, since every school child is taught that the courts decide controversies and the legislature passes laws. Don't be the first client to eat the oyster. If you want to try a transfer-on-death deed, you should confer with a title insurance company for advice in this somewhat bizarre niche of the law. Finally, you may have heard something about a "lady-bird deed." This would be a special TOD deed used by lawyer in the elderlaw field as part of what is called "Medicaid planning." This entire subject is over my pay-scale: be sure not to try something like this unless you are guided by an expert.

## **7.3 PR has Only Possession**

As we saw earlier, a PR may be appointed. How does the PR function if title to the assets has already passed to the heirs? Well, by statute, the PR is given temporary right of "possession" of the probate assets. Then the creditors can't sue the heirs directly; instead they must work with the PR. The PR will have various techniques available to provide benefits to some of the survivors ahead of the creditors. He will then deal with the creditors. Finally, he will release what's left to the owners (who got title at the moment of death).

Passage of title at death to the owner is a concept from the Civil law tradition of Europe (as is the Texas system of community property for married persons). This Texas law is different from the law in most places in our country. In most of the states, the theory is that title passes from the deceased to the PR. Only after the PR finishes with the estate does the property go to the heirs, and then by formal transfer from the PR.

The Texas theory has several ramifications:

- ▷ Nobody in Texas seems to know for sure how to correctly sell property from an estate with a PR:
  - For real property, the issue is who signs the deed. Well, the law on this is whatever the title company closing the sale declares the law to be. Often the heirs are asked to sign the deed and the PR is asked to sign too. If you can't get the heirs to sign, the task then will be bolster the authority of the personal representative to sign alone. This works better in practice than you might think. The title companies have an incentive (the premium earned on the sale of the title insurance policy) to make the sale. They are flexible and practical and take on a fair amount of risk in estate situations to close sales.
  - When selling personal property, the emphasis seems to be on getting the signature of the PR. Often you are dealing with lawyers in other states and they are used to the idea that the PR has title to the property that he can transfer with his signature.
- ▷ The estate is not a legal entity in Texas (as is an individual or corporation). You can't sue an estate. You must either sue the heirs directly or the PR if one has been appointed.

## **8 NEED FOR ADMINISTRATION**

Now we are down to the last subject we must cover in our introduction to the Texas law of decedents' estates — the concept of the need for administration. When you approach any estate, there are two over-arching themes that will concern you:

- ▷ How can you pin down who inherits?
- ▷ Will there be a need for administration, and if yes, what's the cheapest way to do that?

Let's briefly consider each of these themes.

### **8.1 Here's to the Heirs**

Texas frontier law encourages heirs, who received title at the moment of death, to collect the assets themselves (rather than impose a layer of formality on the process by appointing a PR to conduct an administration). Various procedures have been devised to allow this in proper cases by clearly identifying the heirs.



## **8.2 Role of the Probate Court in Administration**

On the other hand, the law recognizes there will be situations where a PR should be appointed to administer the estate. The PR is appointed by invoking the jurisdiction of the probate court. When the probate court takes jurisdiction of an estate, the question arises as to what responsibility the probate judge has in the matter. Now you may know that a judge of a court of general jurisdiction can't be sued if he makes a bad decision. He has judicial immunity. The purpose of judicial immunity is to allow the judge to make honest decisions without fear of retribution from lawsuits. But a probate judge does *not* have judicial immunity when he supervises an estate. The judge can wind up being personally liable if he does something that is grossly negligent and causes loss to the estate. The purpose of this rule is to make sure the judge will be careful in supervising the administration of estates. A corollary of this rule of judicial liability for estates is the rule that estate administrations will not be lightly opened — you have to show a need.

### **8.2.1 No need required for independent administration**

Right away we hit a big exception. If the will appoints an *independent* executor, it is not necessary to show a need for administration. As soon as the judge appoints the independent executor, the judge gets rid of the case for most purposes and no longer has personal responsibility. So the court cheerfully approves independent administration requested in the will without an examination of need.

### **8.2.2 All other administrations require a need**

To get any other administration going, you have to convince the court that it's needed. If there are two or more debts, the court must grant the administration. The purpose of this rule is to insure to all estates a forum to deal with the claims of creditors. If you can show it's necessary to have an administration to collect on assets of the estate, the court must grant administration. There may be other good reasons why a PR with Letters should be appointed. But Texas would prefer for you to handle the estate without an administration.

## **Part II**

# **TEXAS PROCEDURES FOR ESTATES**

## **9 SIX WAYS TO CLEAR AN ESTATE WITHOUT ADMINISTRATION**

### **9.1 Affidavits of Heirship**

Let's say your mother dies, and you are the only heir. Your mother wrote a nice will leaving everything to you, and you are named the independent executor. You are able to collect most of the assets by non-probate means discussed earlier in this presentation. Then you pay the bills. Finally you are left with your mother's homestead and a stock certificate in her name only. You want to sell the house and stock. Do you have to go to court and probate the will? Well, maybe not.

All you have to do now is sell the homestead and the stock, and under Texas law title has already passed to you by intestacy (the same as provided in the will). How do you convince somebody that you are now the true owner without using the will? In Texas, the practical custom has arisen to allow you to prove you are the true owner just by getting some other folks to swear that you are! What you need is two upstanding persons who have known your family for a long time and who will sign a paper, under oath, setting out the facts that establish you as the only heir. The paper they sign is called an "Affidavit of Heirship." The affidavits of heirship have to be carefully written by someone who knows enough about the law to make it complete and convincing. The affidavits don't make anyone do anything. They are only as good as they seem to be to the person to whom you present them.

#### **9.1.1 Selling the homestead**

You have a buyer for the house and it's time to close. The title company will probably be quite happy with your affidavits of heirship, especially since you told them early of your intentions and they reviewed the affidavits then. Based on the affidavits and your promise to protect them if there is trouble, they will likely close the sale and issue a policy of title insurance for which they charge a tidy premium.

#### **9.1.2 Selling the stock**

Now for the hard part. The stock certificate is for a famous company. You want to get the title changed to your name so you can sell the shares. The company has appointed an out-of-state bank to keep track of the owners of record of its shares. This bank is called the "transfer agent." You call the transfer agent, and they send you a package of documents and a letter asking for the your "Letters Testamentary." Clearly, the transfer agent wants you to probate the will. The transfer agent is not being unreasonable. If the transfer agent issues stock to the wrong person and the true

owner later appears, the transfer agent must issue the stock again and is responsible for the loss. The transfer agent has seen every trick in the book and has learned to be careful. And unlike the title company handling the real estate sale, the transfer agent has no incentive to take on a risk to help you. They are only paid a few dollars for handling the change of title.

Your next step is to call again and try to explain the situation. You can appeal to a supervisor and eventually work your way up to a lawyer in the legal department. Will they eventually accept your affidavits of heirship and put the shares in your name? Probably yes, if you don't blow your cool and frighten or anger someone.

So you see the problem. Whether you can clear the estate without asking for an administration depends on the circumstances of the estate and your ability to cope. If you have several stock certificates, it may be more practical to use the will and become executor rather than to clear the estate informally.

## **9.2 Small Estates Affidavit**

If the value of the probate estate (not counting the homestead and certain other exempt property) exceeds all known liabilities and certain other conditions are met (such as the value of the estate not exceeding \$75,000), you may qualify for a "small estates" procedure. This is just a fancier version of the affidavits of heirship mentioned earlier. All the heirs as well as two disinterested witnesses sign sworn statements about the family tree. The small estates affidavit is filed with the clerk of court and is examined by a probate judge who will approve it or ask for improvements. When completed, the affidavit remains on the public record.

A copy of the approved small estates affidavit is supposed to encourage persons holding assets of the estate to turn them over to the heirs. In practice, I have used this only in situations where a bank or stock brokerage firm insisted on something signed by a judge and agreed in advance to honor the small estates affidavit.

Use of the small estates affidavit still requires heirs to pay the liabilities of the estate, such as medical bills and credit card debt. Heirs must send copies of the approved affidavits to creditors in order for the affidavit to have effect. Because the homestead and other exempt property are protected, they are not included in deciding whether a small estate procedure is appropriate or in determining what debts the heirs must repay.

## **9.3 Determination of Heirship**

Now we come to the "gold standard" for establishing the identity of the heirs: the determination of heirship case. Let's suppose the decedent died intestate with two heirs and an estate with several stock brokerage accounts worth \$500,000. All the bills are paid and there is nothing left to do except collect the accounts. Well, brokerage houses will generally not accept mere affidavits of heirship with so much at stake. The estate is too big to handle with a small estates affidavit. There are no creditors, so there is no sure-fire need for an administration. After mulling things over, the legal department at the brokerage house may request a determination of heirship case in the probate court. They want the comfort of a court order.

Now even though this is a court case, no on-going administration will be created. The court will only make a finding of the identity of the heirs. The heart of the case will be the same thing we saw used in the affidavits of heirship and the small estates procedure: the sworn statements of two witnesses who knew the family. But for the court case there will be additional safeguards to make the process more reliable and reduce the chances of missing an heir. These safeguards likely would include the following:

- ▷ A notice of the case will be published in a newspaper (perhaps in the future there will also be a special website where you must register your heirship case).
- ▷ Two witnesses must testify in court in person under oath.
- ▷ The court will appoint an independent lawyer, called the attorney ad litem, to investigate the facts of the case and try to find heirs that have been overlooked. The ad litem will make a report at the hearing.
- ▷ At least one of person claiming to be an heir will testify in court under oath.

If the proof of heirship is convincing, the judge then decides who inherits what and the conclusions are put in an order signed by the judge. Anybody who relies on this order determining the heirs is discharged from further liability when he turns property over to the heirs. Of course, no matter how careful you are, a mistake can be made and an missing heir can show up later. But his only recourse would be to ask the other heirs to share the inheritance with him.

The determination of heirship case is not cheap and can seem like overkill. But sometimes unknown heirs are found. I was appointed ad litem in a case where the decedent had no descendants or other close relatives. Nine heirs through the mother's side of the family claimed the estate. I found 93 more heirs on the father's side.

## 9.4 Muniment of Title

Sometimes a will is available that may name an executor, but there is no need to do anything except to identify the beneficiaries in the will who inherit. If all the debts have been paid (other than mortgages on the homestead), you may want to offer the will "as a muniment of title." The word "muniment" means badge or proof of ownership.

For example, suppose the only thing left to do is to take care of the title to the decedent's home. The will leaves the home to one of three children. In this situation, the inheritance by intestacy is different from the terms of the will, so you can't use the heirship procedures described earlier in this presentation. So you start a court case on the will that has the sole goal of establishing the will as proof that the home passed to the one child. Thereafter the will operates like a deed. No PR will be appointed and there will be no administration.

This procedure only saves a little money when compared to an independent administration by an executor. If you see any possibility you might need Letters Testamentary later, it's safer to be appointed executor. But if you make a mistake in using the muniment procedure and later discover that you need an administration to deal with a creditor or to claim a later-discovered asset, there's a way to do that also.

## 9.5 Community Administration

I know, the title of this subsection uses the word “administration.” But the procedure I describe here is misnamed and is not a court administration.

Say your spouse died, you had community property with him, and his part of the community passed to his children from a prior marriage. There are bills to pay. Your husband left a will, but every penny counts. You may be able to handle this situation without the expense of going to court. A special statute says you can on your own as the survivor of the marital partnership do the following:

- ▷ Collect (based on a special affidavit you make) the decedent’s final paycheck (including unpaid sick pay and vacation days).
- ▷ Take possession of community property owned by the decedent.
- ▷ Sell, lease, or borrow money on community property to pay the debts.
- ▷ Collect claims due to the community.
- ▷ Take other steps to protect the community property until it is divided among the heirs.

In the past, this was called an “unqualified community administration.” Now it is just called “community administration.” Alas, it is not used much because of the practical problems of convincing the people you must deal with that it is safe for them. They tend to feel better if you can give them a copy of “Letters.”

## 9.6 Order of No Administration

Let’s suppose a young widow is faced with debts run up by her husband. The law gives a family allowance of one year’s sustenance to the surviving widow and minor children. If the family allowance will be more than the assets of the estate, there will be nothing left for anybody else including creditors, persons named in a will, or other heirs. In this situation, the surviving spouse can shake off everybody by filing an Application for Order of No Administration with the court. The judge should award a family allowance. If it proves to be more than the assets, then the judge should assign all the assets to the widow. The widow should then be able to collect the assets without regard to the claims that others might have if the estate were larger.

## **10 WHAT'S INDEPENDENT ADMINISTRATION?**

If you can't avoid an administration, at least you can try to keep it as simple as possible. Texas frontier law has a real winner for you — independent administration. You do go to court one time. But after that, the judge turns the estate over to you to handle independent of court control. It's one of the most consumer-friendly methods of handling estates that is available in the United States.

### **10.1 Usually in the Will**

Most Texas wills denote the executor as “independent,” and that is probably enough by itself. In addition, Texas wills normally have something like the following language: “I direct that no action shall be had in the county court or other probate court in relation to the settlement of my estate other than the probate and recording of this will and the return of an inventory, appraisement and list of claims of my estate; provided that, if the independent executor files an affidavit in lieu of inventory under Texas law, the independent executor is not required to file the inventory, appraisement and list of claims with the court.” This is, of course, a quote from the statutes creating independent administration.

### **10.2 Or Just Ask**

Sometimes the will doesn't have the classic Texas language about independent administration. Maybe the will was written in another state or the decedent wrote the will himself using a printed form from a bookstore. Well, don't despair, you can ask the judge to appoint an independent executor anyway. If the decedent died intestate (with no will), you can even ask the judge to appoint an independent administrator of the estate.

Of course, there is a special procedure for asking the judge for this kind of break. All the beneficiaries of the estate must be notified and must join you in asking for the independent administration. Sometimes this is expensive or politically inconvenient. And if there is no will, the judge may require you to complete a determination of heirship case before independent administration will be considered.

In the next section of this presentation, I will focus on the norm — the independent executor appointed by a will.

# 11 THE NORMAL COURSE OF AN INDEPENDENT ADMINISTRATION

Here are the steps in a typical independent administration called for in a will admitted to probate in Texas. Because this is by far the most common type of administration, I will cover the elements of the court case in considerable detail. I will only briefly discuss the work of the executor done independent of the court. I will call the independent executor simply the “executor.”

## 11.1 Offer the Will.

You offer the will for probate by starting a court case in the name of the decedent. To do this, you must have “standing”, i.e., be someone who will benefit from the successful probate of the will. When you offer the will, you become its champion and are vouching for its authenticity to the best of your knowledge.

- ▷ You start the case by having your attorney work up a pleading called the “Application for Probate of Will and for Issuance of Letters Testamentary.” In this Application you are called the “Applicant.” Only the attorney needs to sign the application.
- ▷ The application is filed electronically with the clerk of court over the Internet. (All civil court matters in Texas are now done via “e-filing.”) There is a fee to the clerk for starting the court case that is usually about \$250.
- ▷ Within 3 days after the e-filing of the application, you must deliver the original will to the clerk of court. This is the only situation I know of now in Texas where the clerk of court typically will hold a paper document in connection with a court case. (The will usually will be the only document in a special paper file that sits on a shelf at the clerk’s office just like in the good old days). The reason for this is that the original will must be available for persons interested in the estate to physically inspect. This inspection may be necessary to determine if the alleged will was in fact signed by the decedent and has not been tampered with, etc.
- ▷ Most often the applicant is also the person named as executor in the will. But this is not always the case. For example, the executor may be out of town and the applicant might be some other interested party.
- ▷ Sometimes an executor is named who doesn’t personally benefit from the will (like a bank trust department). A statute gives the named executor named standing to offer the will.
- ▷ The law expects you to file the original will. But sometimes it may be lost. Then it’s possible, but a lot of trouble, to offer a copy of the will to probate. You use the copy, you will have to prove to the judge that the decedent did not destroy the original will with the intent to revoke it.

## 11.2 Post Notice

When the application is filled, the clerk will give your case a number. In Dallas County, the case will be assigned to one of the three probate courts. Then a notice of the application will be “posted” by the clerk at the customary place. In a small county, there may be only a handful of posted notices at any time. In an urban county, the postings can be a huge and unusable mess.

- ▷ If you want to see if a case has been filed for a particular decedent, you can consult the county data base over the Internet. Or you can call the clerk’s office and ask for help (good luck).
- ▷ If the posting process is done correctly, you can return to the court for a hearing on the will beginning on Monday next after ten days has passed from the posting of the notice. This Monday is called the “return date.” Figuring backward, you can now see that there typically is a deadline each week on Thursday for the Monday two weeks later. I try to get all my filing done by the end of business Wednesday. If you file on Thursday, you increase the risk that something will go wrong, the notice might not get posted until Friday, and you will have to wait another week.
- ▷ The postings are done in-house by county employees with no help from the attorney. If there is a typo or other problem with the posted notice, this will likely be eventually noticed and you will have to start over. It’s rare to have a posting problem (once a decade in my experience). But if there is a problem, the attorney always gets the blame. So the attorney should read the copy of the posted notice after it’s filed to be sure all is well (and especially if a witness is flying in from out-of-town to testify at the probate hearing).
- ▷ The purpose of the posted notice is to let the world know what you are up to. You may know how a lawsuit is started in other courts. A non-probate case typically starts with a plaintiff who sues a defendant. The case goes nowhere until the plaintiff lets the defendant know about the suit by “serving” papers on the defendant. Then the defendant in Texas has until Monday next after 20 days have passed to file his answer in the suit. Well, when you start a typical Texas probate case, you don’t have to give notice to anybody in particular. You just let the whole world know by posting the notice.
- ▷ The posted notice speaks to the world — at least in theory. In the real world, nobody will learn anything as a result of the posting unless they are savvy enough to know what to do. Sometimes the will gets through probate before the person who might oppose it learns about the application. Stated differently, if you have an interest in the estate of a decedent and someone else may have possession of the decedent’s will, you may have to protect your position by actively checking on what is happening.
- ▷ Caution: in some counties, an applicant will be required to give actual notice to the folks who would usually have the greatest interest in the case.



### **11.3 Set a Hearing**

As soon as you know the return date, you can set a hearing on that date or later. Each court has its own docket and policies for setting the probate hearings. You have to call to see how the game is played in your court.

- ▷ Many hearings are before the judge. Other hearings wind up before an assistant judge or an administrative assistant trained to do routine hearings — then you may never see the judge although he or she will sign the order you seek.
- ▷ Probate judges try hard to have routine probate hearings on time. But emergencies come up in every court, and your hearing in probate can be delayed.
- ▷ Often you can get a hearing on your return day or soon thereafter. But in the urban counties, it usually seems now to take longer. You have to check with the staff of your court to fine out how busy your judge is. If you are good at sweet talking, the judge's secretary may call you about a spot on the docket caused by a cancellation. I try to schedule hearings on Tuesday or Wednesday. There is too often a land rush atmosphere on Monday.

### **11.4 Wait Out the Time Before the Hearing**

The purpose of the minimum 10-day waiting period is to give others the opportunity to oppose what you are up to. If someone wants to contest your offer of the will, his best opportunity is to oppose the will before you have your hearing. He can, without a great effort, stop the music by filing an opposition to the will. This opposition will instantly move the case off the uncontested docket (that moves fast) to the contested docket (that moves slow). By filing the contest before you get the will admitted, the opponent keeps the burden on you to prove that the will you offered is valid. If the opponent waits until after the will has been admitted to probate and then contests the will, the burden will then be on the opponent to prove the will is invalid. This shift in the burden of proof is probably the most important factor in determining the fate of most will contests.

### **11.5 Attend the Hearing.**

Like Woody Allen said, 90% of success at the probate hearing is in showing up on time.

- ▷ You usually don't have to bring anything to the hearing. Your lawyer should bring all the papers needed. You do not need to bring a death certificate unless the court has a special rule demanding production of the certificate. (When the Texas probate laws were written, there was no such thing as a death certificate.)
- ▷ Usually, all the judge wants is to hear is testimony from you under oath. Normally you will answer a few questions to show the judge that the decedent is dead and that you are in the right court. In other words, your main task at the hearing is to keep the judge from going to sleep.

- ▷ Of course, there can be special problems. There may be mistakes in the documents — “minor technical defects” — and your lawyer will try to convince the judge to overlook them. If more than 4 years have passed since the decedent died, the will is late and you must preform well indeed to get the will admitted. If the will was not signed with the usual formalities, the lawyer will have to give proof that the decedent was of sound mind, that the witnesses were in the presence of the decedent when he signed the will, etc. This likely will require testimony from one of the witnesses to the will.
- ▷ After the judge has heard your testimony and is happy with the will, he will sign an order accepting the will as the true will of the decedent and appointing the executor. If in a good mood, the judge may express condolences and/or wish you luck.

## **11.6 Take the Oath of Office**

Next the executor must take the oath that he will do a good job. Normally the applicant is the executor and takes the oath immediately. But it is not necessary for the executor to attend the hearing. In that case, the executor can take the oath before a notary public. By taking the oath, the executor “qualifies.” When the executor qualifies, the judge has passed most of the responsibility for the estate on to the executor. By qualifying as executor, you are taking on serious responsibility. And you can’t resign as executor like you can write a letter of resignation to the garden club. You do not want to become the PR of an estate unless you know what you are getting into.

## **11.7 Get Letters Testamentary**

Letters Testamentary (“LT”) is a document furnished by the clerk that says you are the duly appointed executor. It’s your badge of office now that you are riding into Dodge. Everybody you will deal with knows about the LT, and they want a copy for their file.

## **11.8 Notice Beneficiaries**

Once the executor is appointed, he must give actual notice to every beneficiary named in the will.

- ▷ The executor has 60 days to do this.
  - Most beneficiaries will be able to speed the notice process along by signing a paper called a waiver.
  - Beneficiaries who don’t sign waivers must be mailed notice by certified or registered mail, return receipt requested.
- ▷ 90 days after the will is admitted, the executor must file a report on the notice process with the court. If you fail to handle this correctly, the court can remove you as executor and appoint someone else.

## 11.9 Publish the Notice to Creditors

One of the jobs of the executor is to deal correctly with creditors. There are several provisions in the Estates Code about giving notice to different kinds of creditors. I'll discuss here only one of these — which is required of every estate — and is called the “Notice to Creditors” (“NTC”).

The Estates Code tells the executor to publish the NTC within 30 days after getting LT. The notice is published once in a newspaper of general circulation in the county where the will is offered. It tells creditors who is in charge and where to send claims. There is at least one newspaper geared up to publish these notices for each county. In the big counties, this often will be an obscure paper that focuses on the “legals.” In Dallas it is the *Daily Commercial Record* (not the *Dallas Morning News*).

- ▷ So what is the penalty if the executor doesn't file the NTC? Well, if there was a creditor who didn't know about the death of the decedent and who didn't get paid, he can collect from the executor personally.
- ▷ The typical executor is a widow who inherits the whole estate. She knows all the creditors, has the ability to pay them promptly, and does so. In this situation, there seems to be no benefit to paying for a NTC. Some widows worry that publishing the NTC may tip off criminals and increase the risk of a burglary or other unpleasantness. So many executors just ignore the NTC.
- ▷ On the other hand, there are situations where the executor should not take on any risk from dealing with creditors. A professional executor will always file the NTC. If you are serving as executor for other family members or for a deceased friend, you should file the NTC. If the decedent has a lot of debts or was involved in business deals, the executor must be defensive and careful. Then the standard NTC will likely be only one of a number of measures to be used by the executor in dealing with the creditors.

## 11.10 File the Inventory

The Probate Code calls for every executor to file either (1) an inventory or (2) an affidavit in lieu of the inventory. In some places, this law may be ignored, but in all the courts I know about near the Dallas-Fort Worth Metroplex, you will have to do this. Let's discuss the regular inventory first and then discuss the affidavit in lieu of the inventory.

### 11.10.1 Inventory

The inventory is not a balance sheet or a statement of net worth. The purpose of the inventory seems to be to give the judge a list of properties that pass through probate and that are potentially available to the claims of creditors.

- ▷ Let's discuss first what is *not* put on the inventory. Here's a list of items that usually are omitted:
  - Real estate outside of Texas
  - Non probate assets:
    - \* Life insurance (unless payable to the estate)
    - \* Retirement accounts like pension, 401(k), or IRAs (unless payable to the estate)
    - \* Multi-party accounts like accounts passing by survivorship
    - \* Property in a living trust that continues after death
  - Homestead and other property exempt from the claims of creditors (this is a bit controversial)
  - Debts owed by estate to others
- ▷ Here are items that are included:
  - Real estate and minerals in Texas
  - Personal property everywhere that passes through the will (this sweeps up many kinds of assets)
  - Debts owed to the estate
- ▷ The inventory is a court document of public record that anyone can read.
  - In Dallas County, the fact of the filing of the inventories are on the public docket, but the actual inventory documents are not displayed on the Internet. To see the inventory details, you have to go to the office of the Probate Division of the County Clerk and use their computers, which have permission to view the inventory. We are not sure what authority the Dallas County Clerk to do this or how the rest of the 254 counties in Texas are handling this.
  - But it is clear that the inventory rarely gives an accurate idea about the true financial condition of the estate (because the non-probate assets are not included). For this reason, people seldom examine the inventories just out of curiosity.
  - Still, some folks don't want strangers to learn anything about their financial matters from the inventory. The affidavit in lieu of inventory (see below) will give relief for this in many estates. For more complicated situations, a revocable living trust for property may be a best way to avoid filing an inventory. Also, in exceptional cases, the lawyer may be able to convince courts to seal inventories.

- ▷ The inventory is usually due 90 days after the executor qualifies by taking the oath of office. If you need more time or you want to file the inventory when you file the estate tax return (usually nine months after the date of death), the judge will usually give you an extension. But don't wait until the last minute to apply for an extension.

### **11.10.2 Affidavit in Lieu of Inventory**

Now let's move on to the new affidavit in lieu. This is a sworn statement which says that you have given an inventory to beneficiaries and will therefore not file an inventory with the court.

- ▷ If you have serious creditor problems, you probably will not qualify to file an affidavit-in-lieu.
- ▷ You still have to prepare the inventory in all its glory, sign it before a notary, and give a copy to each beneficiary. So this doesn't save you any work - it only avoids public display.
- ▷ What if you are the executor and also the only beneficiary? Possibly some courts will waive the actual preparation of the inventory for the executor to present to himself. But this remains an unsatisfactory part of our Estates Code. Probably many widows and widowers are signing statements under oath that they have prepared inventories when they have not. The law needs to be changed to waive the inventory when the only beneficiary is the executor.

## **11.11 Conduct the Business of the Estate**

This includes all the leg work and possible legal actions that can be required to locate and protect assets, deal with creditors, conduct and dispose of the decedent's businesses, pay the decedent's taxes and taxes of the estate, and get the assets eventually to the folks who inherited them at the moment of death under the will. Sometimes this takes only a few days. On the other end of the rainbow, some estates thrash around for a decade or longer before they are concluded. This presentation is an overview designed to help start you off in the right direction — I can't cover routine administration here in detail. But still, here are a few observations about the conduct of a typical independent administration.

### **11.11.1 Secure the assets fast**

It may take weeks to become executor. So if security is a problem, pick up the cars and change the locks immediately. Usually you don't have actual authority to do these things. But when you are appointed executor, your authority will relate back to the moment of death. If you are dealing with valuable assets and you are nervous about taking charge on your own, you can ask the court for a temporary administration (discussed later in this presentation) to allow you to protect estate property.

### **11.11.2 Collect non-probate assets**

This is done by providing a copy of the death certificate. For example, if insurance is payable to you personally, you send a death certificate and a claim form to the insurance company. They will send you a check in a few days.

### **11.11.3 Estate bank account**

Sometimes you can keep using an old account of the decedent as the estate account. But most people find it wise or necessary to open a special account just for the estate. To do this you will need Letters Testamentary and a taxpayer identification number.

### **11.11.4 Accounting**

Most estates don't require much or any accounting. On the other hand, a complicated estate may demand thorough accounting from the start to finish. For example, a married decedent owned separate and community property and had separate and community debts. He left property to children from his first marriage and the rest of his estate was put into trusts. Death taxes were due. The trusts made provisions for his second wife. On her death, the property remaining in one of the trusts goes to the children from the first marriage and the property remaining in the second trust goes to a charity. The widow and the step-children don't get along very well. This is a large and complicated estate. There must be accounting for everything:

- ▷ First you have to determine what is in the decedent's estate and what the interest of the widow is in the decedent's community property.
- ▷ Next you account for debts to be paid by the estate and by the widow.
- ▷ Because this estate will take some time to settle, there will be ongoing expenses. These costs will fall on someone (depending on the terms of the will and decisions of the executor) and must be accounted for.
- ▷ The death taxes come out of someone's hide, and you have to account for that.
- ▷ Finally, you reach the point where you are ready to make distributions to the children and put money in the trusts ("fund" the trusts). There be likely be an extensive agreement drawn up that shows to the penny who winds up with what and everybody will be asked to sign off.
- ▷ Of course, the story isn't over when the trusts are funded. The widow wants as much income from the trusts as possible, regardless of the risk to the trust corpus scheduled to go eventually to the children and the charity. The children and the charity want the trustee to invest in risk-free assets, but these don't provide much income. The trustee will have to manage this situation for a long time and will need accountings to back up his work. When the widow dies and the remaindermen come into their glory, there will be a final accounting of some sort and the remaindermen and executor of the widow's estate may be asked to sign off.

- ▷ There are few Texas rules about the form of an accounting for an independent administration of an estate or for a trust. The most authoritative resource for accounting for estates and trusts is the *Fiduciary Accounting and Trust Administration Guide* written by R. Whitman and D. English and published by ALI/ABA (2008). You can buy specialized software that follows the principles set out in the *Guide*.

#### **11.11.5 Taxes**

The executor is *personally* responsible for taxes due. Let's say you don't correctly pay the taxes and then distribute the estate to the beneficiaries. When the tax man gets around to sending the bill, he can try to collect from the beneficiaries. But he will probably find it easier just to come to you. Generally, the law says you must pay the taxes out of your own money and then you can collect from the beneficiaries. There are various ways for the executor to protect himself from tax hassles, but I have seen some executors get pretty peeved when they find out they are stuck with this responsibility. Here are the most common taxes you may encounter as executor:

- ▷ Decedent's unpaid back income taxes (Oh, no!)
- ▷ Sales taxes for decedent's business
- ▷ Real estate taxes
- ▷ Income tax on the income of the estate (Form 1041)
- ▷ Gift tax for the decedent (Form 709)
- ▷ Estate tax (Form 706)
- ▷ Tax on generation-skipping transfers
- ▷ Death taxes to Texas and other states with which the decedent had sufficient contact

#### **11.11.6 Deal with creditors**

The first step is to find out what debts the decedent appears to have and who else besides the decedent may share liability for them. There are procedures available to require the creditors to authenticate the debts so you can weed out those that should not be paid. Sometimes a creditor fails to play by the rules and may lose his right to collect. If there are a lot of debts, remember that the homestead is exempt. You can also set aside a family allowance to provide for the widow and dependent children for a year, and that property will be off limits to creditors. If the probate estate still appears to have more debts than assets, certain financial accounts passing by non-probate means may be liable for debts.

## 11.12 Close the Estate

Now we come to the best part. To close the estate in Texas you normally do absolutely nothing. True, if you are dealing with a larger estate, there may be a ceremony at the lawyer's office, called a closing, where everybody signs papers saying they were treated right. You may have to pay death taxes and eventually get a "Closing Letter" from the IRS. But you will likely do nothing in the probate court to officially close the case opened on the estate. All this comes from the fact that we are dealing with an independent administration of an estate.

- ▷ An independent administration in Texas is like General MacArthur — it never dies, but only fades away. Remember when you filed the inventory of the estate and the judge approved it? From that time on, the judge had no jurisdiction over the independent administration. He has nothing to do with it unless a special problem should come up with a specific provision in the law to give the judge authority to act.
- ▷ Since you are operating independently of the court, there is no need to close anything. One benefit of this is that you can get fresh Letters Testamentary into the indefinite future in the event you need them. The down side to the lack of closure is the fact that you are never officially and completely let "off the hook."
- ▷ Actually, there are a couple of exceptions to what I have just said, but they are rarely invoked in the real world:
  - There is a procedure whereby you can file a paper in the probate case saying that the administration is closed. But the statute doesn't give the executor any release from responsibility for things done or things left undone. It isn't worth a toot to the independent executor except he can later honestly write a letter saying, "I closed the estate, and I'm not executor anymore." Sometimes even this small factor may make formal closing worthwhile, especially to a professional executor with an unhappy estate.
  - There is also a new procedure which lets an independent executor go back to to probate court and try to close the estate *with* judicial discharge. To do this, you start an independent lawsuit (under the declaratory judgments statute), give personal notice to the beneficiaries, cook up an accounting for the court, and ask for an audit and discharge as to matters fully revealed.

I don't think this is going to be popular with the judges. After maybe years of complicated administration with no court supervision and no formal annual accountings, you suddenly dump the mess in court and ask the judge to kiss it. Good luck. But the declaratory judgment case might give you a way to bring difficult beneficiaries to settlement of disputed issues.



## **11.13 Cost of Independent Administration**

Independent administration in Texas reduces contact with the probate court, and the court fee itself is usually about \$250. Most executors in Texas don't charge anything. The fees of professional executors are usually based on published and competitive schedules. Finally, estates lawyers in Texas usually charge by the hour. (Maybe estates lawyers in rural counties still can sometimes get a fee based on a percentage of the estate.) So the vast majority of estates in Texas are handled at low cost to the survivors.

But if you are in an troubled situation where the estate is threatened with dangers from creditors, bitter tensions between beneficiaries, poorly written will provisions, and the like, you may not want an independent administration. Perhaps you should seek a safe harbor in a dependent administration under full court control – which happens to be my next topic.

## **12 WHAT'S DEPENDENT ADMINISTRATION?**

You have heard about a fearful monster called “Probate” that is attacked and slain in books with titles like “How to Avoid Probate.” Well the probate process in other parts of the country has acquired a bad reputation for being too complicated and expensive, especially for modest or simple estates, because everything is done under close supervision of the probate court. And in some places, the probate process is infected with high fees for the courts (which are really taxes) or lawyers (which then becomes a source of patronage for the lawyers from the judges supported by the lawyers in elections). Often these probate fees are based on percentages prescribed in the law, which can result in huge windfalls when the estates are large.

### **12.1 Dependent Administration Needed in Special Cases**

So you may be surprised to learn that the basic form of probate in Texas is the same as elsewhere — “full blown” dependent administration under close supervision of the court. Technically, dependent administration is the default procedure in Texas. Independent administration is the exception that has all but completely gobbled up the rule. So when do you have a dependent administration?

#### **12.1.1 Intestacy where all beneficiaries don't agree on an independent administration**

The most common dependent administration arises from the situation where the decedent did not have a will. There may be doubts about who the heirs are. Sometimes you can't find a known heir. Or you know the heirs, but they can't agree on what to do. In these difficult situations any heir can get the ball rolling by starting a dependent administration with an appropriate person named as administrator.

### **12.1.2 Creditor problems**

Another fairly common situation where a dependent administration is used is the estate with too many creditors. If it appears the estate doesn't have enough money to pay all the bills and creditors, the estate is said to be insolvent. An estate can't go to bankruptcy court. So if the estate is insolvent, a dependent administration may be the ticket. This give the personal representative a set of rules to provide care to the widow and needy children while collecting claims of the creditors. Creditors who make their claims correctly then share on a fair basis in estate property that is left over. In other words, when the decedent leaves lots of debts, a dependent administration can function like a bankruptcy court.

### **12.1.3 Waring beneficiaries**

Say you are in line to be executor of a large estate. But before you can even offer the will for probate, you start getting lots of letters by Certified Mail, RRR from the lawyers of different beneficiaries making all kinds of conflicting demands. Maybe its best for you to switch from the independent status given to you in the will to the dependent mode. Then you can get instructions from the judge when needed. Also, the beneficiaries may feel a lot better about you once you have exposed yourself to all the formality and checks and balances involved in a dependent estate. If you can calm everybody down this way, the dependent administration may turn out to be cheaper than a turbulent independent effort.

### **12.1.4 Interconnected estates**

Sometimes an estate may be closely connected to other litigation or another estate in a way that suggest a dependent approach. For example, a business man and his wife died together in a tragic plane crash. There were several complicated businesses, business and personal debts, and other financial issues. Both spouses had separate property and community property together, and both had children from earlier marriages. Federal estate taxes appeared likely be due on one or both estates. One of the spouses died without a will. The other had a will written in foreign language, lodged with a Notary Public in another country, which disinherited a child. There were issues where the two estates were at loggerheads. Children of both spouses took the normal steps to open two independent administrations to be operated in parallel. Both cases came to the attention of the same judge, who ruled that independent administration would not be appropriate for either estate. Both were handled dependently, and the lawyers for each estate were required to cooperate in many ways. This was a costly way to go, but it was probably better than the chaos that would have resulted from these two estates at war in independent administrations.

## 12.2 When Are You Going to Tell Me What it Is?

OK, in a dependent administration, you have all the steps I discussed earlier in this presentation when describing an independent administration. But superimposed over those steps the following: In dependent administration, the judge is in charge of the estate and personally responsible for it from the beginning to the bitter end. The judge can't do the work himself — he just doesn't have time. So he appoints a PR called the "administrator" to do the work. To protect the estate, the judge requires the PR to buy a bond from an insurance company. The PR can do a few things (like pay insurance and taxes) without permission of the judge. But the PR must have a hearing and get an order from the judge to do anything much fancier than that. All the property of the estate must be locked up tight. There are mandatory provisions for dealing with creditors which operate like a bankruptcy case inside the probate case. Each year the PR makes an exhaustive accounting to the court that rhymes to the penny with the bank accounts. At the end, there is a final account and the PR distributes property as ordered by the court. The court requires releases from the beneficiaries before they get anything from the estate. The court then discharges the PR from further responsibility, and it thereafter becomes very difficult for anyone to question the actions of the PR while the PR was in office.

## 12.3 How the Bond Works

I mentioned earlier in this presentation the personal liability of the judge for estates under his control. Let's work through an example of the chain of personal responsibility in a dependent estate. Suppose the judge appointed X as dependent PR of an estate. Even though the estate was worth more than \$1,000,000, the judge required a bond of only \$300,000. The judge did not require proper annual accountings for several years. X steals money from the estate and turns up dead in Las Vegas. A successor executor is appointed, who can't find most of the estate. The heirs are out \$800,000. What will happen?

- ▷ Well, the successor executor will sue the estate of the former executor and the bonding company who provided the bond covering the "former." The estate of the former is broke, so the bonding company pays the \$300,000 loss to the successor (after a tremendous battle).
- ▷ Now the bonding company is short. The successor executor and the heirs are still out \$500,000. Next everybody will sue the judge and the judge's bonding company.
- ▷ Because the judge did not require an adequate bond and good accountings, he may be found grossly negligent. The judge's bonding company will pay the \$300,000 and the additional \$500,000 (after a tremendous battle). The judge's bonding company will then sue the judge.

Now you can understand why probate judges get real persnickety about dependent administrations.

## **12.4 Cost of Dependent Administration**

Court costs for starting a dependent administration are about the same as for an independent administration. Thereafter the court will charge filing fees, but these are usually minor compared to the value of the estate. The cost of annual accountings and the bond premiums are more significant but not exorbitant. The PR may charge a fee, but that would normally be line with what an independent executor might charge. The real cost will likely be legal fees. There will be fees for taking routine matters to the judge for approval, and these fees can be avoided in an independent administration. Finally, most dependent estates have big legal problems that must be solved no matter what the mode of administration. These fees will be large, but might be even larger without the structure provided by court control.

## **13 TEMPORARY ADMINISTRATION**

### **13.1 For Emergency**

It usually takes two to three weeks to get a PR appointed. Sometimes there is estate business that can't wait that long. For example, the decedent died owning an 18-wheeler full of ripe watermelons. Or the decedent's mansion is full of valuable antiques and art and lots of people have keys. You may need a temporary administration ("TA"). You can ask the court to create a TA on the spot. This can even be done orally by the judge. But usually there will be an emergency hearing with the judge in court, maybe during lunch hour. The idea is to ask the court for the minimum powers needed to take care of the emergency. The judge will likely be pretty stingy on granting emergency authority, and he may well turn down a TA if he thinks the problem can wait.

### **13.2 During Will Contest**

If a will contest breaks out, you have an emergency plus the possibility that there may not be a regular PR for quite some time. In this situation, the judge may, if requested, appoint a TA with whatever list of powers is needed to take care of the estate until the the contest is over. The TA will have to get a substantial bond and eventually account for everything he does. I don't cover the subject of will contests in this presentation. But I will point out that will contestants frequently ask immediately for a TA. This is designed to embarrass and perturb the proponent of the will and thereby increase leverage for a settlement.