

THE LEGAL ASSISTANCE OFFICES OF
III CORPS, 1ST CAVALRY DIVISION, 4TH INFANTRY DIVISION (MECHANIZED)
FORT HOOD, TEXAS 76544

PROBATE

I. INTRODUCTION - Probate is the legal process that insures the legitimate and orderly transfer of property at a person's death. This involves the proving of someone's passing, a determination of whether a document is a valid will or, in its absence, who the lawful heirs are, and the updating of transferable title while protecting the rights of legitimate creditors.

In Texas there are many types of Probate, but these can be sorted into a few basic categories. In simple cases where there is "no necessity of administration," Probate can be quick and inexpensive. In such cases where there is a will, a *Muniment of Title* may be available, and where there is no will being offered for Probate, a *Small Estate Affidavit* or *Affidavit of Heirship* should be considered. However, when there is a "necessity for administration" such as when there are debts that must be handled, or there is property which must be managed or sold, an *Independent or Dependent Administration* is usually used. These will be discussed in greater detail below.

II. REASONS FOR PROBATE - One of the main reasons Probate is necessary is to update the title to property so that at some point down the road it may be sold. Title, or written documentation of ownership, is often required with real estate, vehicles, investments, and bank accounts. In some instances this can occur without Probate by the mere presentation of a death certificate and/or Affidavit of Heirship. However, in most cases, property will require some form of Probate in order to verify and update who the rightful owners are. In Texas, the statute of limitations for most forms of Probate is four years.

III. SUMMARY FORMS OF PROBATE WHEN NO ADMINISTRATION NECESSARY

A. *Small Estate Affidavit* - One of the quickest and cheapest forms of Probate is by *Small Estate Affidavit*. To qualify, the beneficiaries must be willing to abide by the state laws of succession where there is no will (either because there is no will or they are not going to offer any document as a will for Probate) the estate must be solvent, and the assets must exceed the debts of the Probate estate by less than \$50,000, exclusive of the homestead and other exempt property. See the fact sheet entitled "Small Estate Affidavits" for more detail.

B. *Muniment of Title* - When there is a valid will, a *Muniment of Title* should be considered for its speed and low cost. To qualify for this type of probate, there must be no outstanding debts in the decedent's name other than those secured by real estate (i.e., a mortgage). This type of Probate still requires an attorney and court appearance, but can normally be completed in less than a month.

IV. WHEN ADMINISTRATION IS NECESSARY OR *LETTERS* ARE REQUIRED

A. *Letters* - Often you will hear that you need "Letters," either Letters Testamentary or Letters of Administration (although this is not always true and therefore you should not fail to consider a *Muniment of Title or Small Estate Affidavit*). "Letters" are actually not as we think of it, but rather a certificate of authority issued by the courts to a personal representative of the estate. This will be required when there is a need for administration.

B. *Independent vs. Dependent Administration* - Many reports will have to be filed with the Probate court, including an inventory, appraisal, and list of claims, proof of notice to creditors, as well as reports of any sales of property. In an Independent Administration, many of these requirements do not require advance court approval, court hearings, or other cumbersome and expensive forms of supervision and therefore can be significantly cheaper than a Dependent Administration. In the latter, virtually everything is supervised and controlled. This expensive and slow form of Probate can usually be avoided when a will expressly provides for an Independent Administration or when all the heirs consent to this form.

V. WHERE TO START

First relax, and realize that the Probate process is usually a very straightforward and, in many cases, quick and relatively inexpensive process. Next, gather together the decedent's will and any codicils or amendments to the will, and the death certificate. You can expedite the process by making a list of the decedent's major property holdings, including real estate, vehicles, investments, and bank accounts along with their approximate values. Also, make a list of the full names and addresses of all the people mentioned in the will. Note that the discussion below highlights many of the issues you would face in a dependent administration, which is the most onerous form of estate administration.

A. *Duties as Executor* - The duties of the Executor or Administrator include the obligations to:

- (1) Safeguard the estate's property;
- (2) Inventory the property;
- (3) Submit accounts and inventories to the court as needed or required;
- (4) Pay the debts and expenses of the deceased (including funeral and burial expenses as well as costs of last illness or outstanding medical bills);

- (5) Pay any federal or state death taxes; and
- (6) Distribute the estate to those named in the will or, if no will exists, to the next-of-kin.

B. *Paying Debts, Bills, Expenses* - In general, an estate is responsible for all of the decedent's debts, bills and expenses. These must be paid before any remaining assets in your estate can be given to the heirs under the will. The Executor or Administrator has no duty to pay these costs out of his or her own pocket and is not normally personally liable for the estate's debts. The Executor or Administrator has the duty to release enough of the estate's assets to allow the payment of expenses such as taxes, credit card balances and hospital bills.

C. *Notifying Creditors* - An Executor/Administrator must place a legal notice in the newspaper for the estate's creditor's within 30 days of the granting of Letters. Once this is done, the publisher prepares an Affidavit of Publication and this is put in the court file. Any claims not presented to the Executor or Administrator within six months need not be paid under most state laws. Claims by unsecured creditors not presented within 4 months of receipt of notice are barred under Texas law. Within 4 months of Letters, the estate's representative must also notify each secured creditor or claimant with a recorded lien.

Those claims which are valid and which are presented within the six-month period, including debts and expenses known to the Executor or Administrator, must be paid out of the available funds in the estate.

D. *Inventory, Appraisal and list of Claims* - Normally, the Executor or Administrator must also, within 90 days of qualifying, file a detailed inventory of the property of the estate, the fair market value of each item on the date of death, and a list of claims due to the estate. There is a continuing duty to update this information.

E. *Estate Account* - The Executor or Administrator should immediately set up an "estate account" at a local bank. There is a small charge for printing the checks showing name, title (Executor/Administrator), the name of the deceased and other information. Having a separate account is a step toward preventing the mixing of personal funds and those that belong to the estate.

F. *Life Insurance Proceeds* - For tax purposes, life insurance proceeds are counted as part of the taxable estate if the policy was owned by the deceased. The Executor or Administrator must account for the proceeds of such a policy on the tax returns of the estate. On the other hand, only life insurance proceeds payable to the estate are listed on the inventory filed with the Clerk. Those policies and proceeds made payable to individual beneficiaries pass by contract, outside of the estate, directly to the named beneficiary.

G. *Homestead, Exempt Property and Family Allowance* - In Texas, the homestead and certain items of exempt personal property are not subject to attachment, execution or forced sale for the payment of debts. To ensure the surviving spouse and children are financially provided for during probate, the court will normally set aside the homestead and exempt property (up to \$60,000 for a family) when it approves the inventory, appraisal and list of claims. If the decedent did not own a homestead or any exempt personal property, the court will set aside a reasonable amount of the estate as an allowance in lieu of the exempt property. In addition, the surviving spouse and children are entitled, based on need, to a family allowance payable out of the estate sufficient to maintain them for 1 year after the decedent's death.

G. *Closing the Estate*

(1) Other duties that may fall to the executor/administrator during the pendency of probate include the payment of claims, sale or other transfer of real or personal property and the filing of federal and state income and estate tax returns. Twelve months after the receipt of letters, the executor is required to file an accounting with the clerk of court, and thereafter, annually until the estate is closed.

(2) *Distribution of Assets* - Any time after twelve months have elapsed since the granting of letters, the executor/administrator may file an application for partition and distribution of the estate. The next step is to distribute the estate among the heirs-at-law (if there is no will) or the designated beneficiaries (if a will has been admitted to probate). The estate's representative should obtain a receipt from all heirs or beneficiaries stating that they have received their entire share of the estate of the deceased (signed, dated and witnessed).

(3) *Final Settlement* - After paying the debts and distributing or dividing the property, the executor/administrator may file an account for final settlement, accompanied by proper vouchers and receipts for all items not previously accounted for.

FOR ADDITIONAL INFORMATION CONTACT THE LEGAL ASSISTANCE OFFICES ON FORT HOOD: III Corps, Building 1001, Room C224, 287-7901/3199; 1st Cavalry Division, Building 28000, Room 1155, 287-6060; 4th Infantry Division (Mech), Building 410, Room 175, 287-1850.