

# PROBATE BASICS

## Introduction

The legal process of transferring of property upon a person's death is known as "probate." Although probate customs and laws have changed over time, the purpose has remained much the same: people formalize their intentions as to the transfer of their property at the time of their death (typically in a will), their property is collected, certain debts are paid from the estate, and the property is distributed.

## Probate Administration

Today the probate process is a court-supervised process that is designed to sort out the transfer of a person's property at death. Many states (Texas included) have provisions for an "informal probate" or "simplified probate" which greatly reduces the time cost of the probate process along with the requirements of interaction with the court, but doesn't eliminate the court entirely. Property subject to the probate process is that owned by a person at death, which does not pass to others by designation or ownership (i.e. life insurance policies and "payable on death" bank accounts). A common expression you may have heard is "probating a will." This describes the process by which a person shows the court that the decedent (the person who died) followed all legal formalities in drafting his or her will. What is often taught about the probate process is how to avoid it. The movement to avoid probate is primarily motivated by the desire to avoid probate fees. It is, in fact, quite possible to avoid the probate process completely. There are three primary ways to avoid probate and its protections: joint ownership with the right of survivorship, gifts, and revocable trusts. The probate system, however, exists for the protection of all the parties involved and the focus of this article is what occurs in probate.

## What Happens in Probate?

The probate process may be contested or uncontested. Most contested issues generally arise in the probate process because a disgruntled heir is seeking a larger share of the decedent's property than that he or she actually received. Arguments often raised include: the decedent may have been improperly influenced in making gifts, the decedent did not know what they were doing (insufficient mental capacity) at the time the will was executed, and the decedent did not follow the necessary legal formalities in drafting his or her will. The majority of probated estates, however, are uncontested. The basic process of probating an estate includes:

- Collecting all probate property of the decedent;
- Paying all debts, claims and taxes owed by the estate;
- Collecting all rights to income, dividends, etc.;
- Settling any disputes; and
- Distributing or transferring the remaining property to the heirs.

Usually, the decedent names a person (executor) to take over the management of his or her affairs upon death. If the decedent fails to name an executor, the court will appoint a personal representative, or administrator, to settle the estate. The administrator will fulfill many of the same duties listed above.

Typically, people may leave property to any person they wish, and may make such designations in their will. However, in certain situations, depending on the relationship to the decedent and the laws of the state, the decedent's wishes may have to be overridden by the court. For example, in most states, a spouse is entitled to a certain amount of property. Furthermore, creditors may have a claim on the property of the estate. Each jurisdiction usually prescribes how long an estate must be open to give creditors an adequate time frame in which to present claims to the estate. The more complex and sizable the estate, the longer and more time-consuming this process can be.

The probate process itself also carries with it a number of costs that are usually paid out of estate assets. These costs include:

- Fees of the personal representative;
- Attorneys' fees; and
- Court costs.

### **Why Do I Need a Will?**

A will is simply a formal way of setting forth your wishes regarding how you would like your property distributed upon your death. You should consider a will whether you are single, married, have minor children, or own even a small amount of personal assets or property. In fact, every adult should have a will or other means to control the disposition of their assets. If you have not formalized your intentions, your estate may meet with unnecessary and costly litigation, adding to the grief experienced by your survivors. Avoiding the financial and emotional turmoil of will contests and other legal wrangling starts with choosing an experienced estate planning attorney.