

Asset Titling and the Transfer of Estate Property



Last Will and Testament (hereinafter "Will")

In its simplest form, a Will is a written and legally executed document under State Law by an individual (testator/testatrix) giving directions as to how his or her estate is to be settled after they die. This process is called the estate settlement. Until the testator or testatrix dies and the will is probated in the local probate court, a Will has no power or authority. Prior to one's death the Will can be changed an unlimited amount of times by the testator/testatrix. If one leaves various Wills on file, the latest dated (and properly executed) Will is the instrument that normally becomes activated on death.

The Personal Representative

"Personal Representative" is the generic term for an Independent Executor or Court appointed Administrator. One of the rights of the testatrix/testator in their Will is to appoint and name an adult person or entity as the Personal Representative to settle the estate. The Personal Representative can be a person or bank trust department (or a combination) appointed in the Will to carry out the instructions of the deceased and to do what is necessary to properly settle the deceased's probate estate. It is common to have a primary Personal Representative and a secondary Personal Representative (to serve as a backup) if the primary cannot or elects not to serve. There also can be more than one Personal Representatives named to share in the duties. In some states, the Personal Representative must also be a resident of the decedent's state (non-related) or be a relative of the testator. If no one qualifies under the Will the court may appoint an Administrator to protect the estate assets until a Personal Representative is appointed.

Death without a Will

If the deceased has not left a valid Will, they are declared to have died intestate and State Laws governing descent and distribution (addressed elsewhere in this website) govern which family members receive the estate assets. In this circumstance, the probate court in the county where the decedent lived (or where the bulk of the real property estate assets are located) appoints an Administrator.

Probate

Probate is the legal procedure for settling a decedent's estate. Probate laws are state specific and are implemented by county probate courts or statutory probate courts in larger Texas counties. Some property or assets may not be subject to the procedures of probate and these are discussed below under types of property ownership. Basically, a decedent can have "probate" assets which are controlled by a Will or Statutory descent and distribution rules, or "non-probate" assets which are controlled by titling restrictions or beneficiary designation forms. Both probate and non-probate assets are subject to federal estate taxes if the combined values are in excess of \$5,250,000 in the year 2013. Probate in Texas is a relatively simple process when compared to other states in the U.S. For example, the term "Independent" Executor is unique to Texas and means that with the exception of minimum requirements, the Executor operates independent from the Court in the day to day administration and settlement activities for the Estate.

To probate an estate in Texas, one must take the following actions: (1) file an original copy of the Will, along with a certified death certificate and an Application to Probate the Will, with the local probate court; then (2) schedule a hearing to "prove up" the Will as the valid Last Will and Testament of the Decedent under State Law, at which time Letters Testamentary or Letters of Administration (if there is no Will) are issued to the Personal Representative by the Court. After this, the Personal Representative has the authority to act on behalf of the Estate. Within 90 days, an Inventory must be filed with the Court and during the same time a Notice to Creditors must be published in a local newspaper giving potential creditors an opportunity to file a claim against the estate. Proof of this publication is then filed with the Court. After this, there are normally no more filings with the Court until the Estate is completely settled (i.e., all bills paid, all assets distributed and accountings are provided to the heirs). Once the estate closing is filed with the Court, the Independent Executor or Administrator is released from their duties and obligations by the Court.

Types of Ownership of Property

Tenants by Entireties

Only a husband and wife can own property in tenants by entireties. When real property is owned by husband and wife, it is assumed that the title is held as tenants in entireties. When one spouse dies the other spouse gets the entire property and does not go through probate. If the decedent owned property in their sole name at the time of death probate is required.

Joint Tenants with Rights of Survivorship

The titling of property Joint Tenants with Rights of Survivorship is a form of ownership between two or more persons. When a tenant (person) dies the surviving person(s) owns the property and the property does not pass through probate. If one has the potential for a taxable estate, or if one is leaving assets to various parties, this is often not the best choice for asset titling.

Tenants in Common

Jointly held owned property (excluding the spouse) which is not titled, joint tenants with rights of survivorship will be legally presumed to be held in tenants in common. Under the tenants and common ownership, each share of the property of the deceased goes to the heirs or beneficiaries as determined by the Will or state statute and will be passed through the probate procedure.

Community Property

Texas is one of ten community property states in the U.S. Along with this, know that each community property state has its own unique rules and statutes so for example, what is the rule in Texas may not be the rule in California. In Texas, any asset that one brings to a marriage, receives as a gift during a marriage, or inherits during a marriage is separate property unless it is titled jointly with their spouse. Any income earned (excluding capital gains) on the separate property asset during the marriage is community property. Community property is jointly owned property where each spouse owns an undivided one-half interest in the community property asset. A couple can alter the treatment of community and separate property by mutual agreement by use of a pre or post marital agreement where both have the right to be represented by counsel and there is complete disclosure by both parties as to assets owned.

Transferring non Probate Property

In some circumstances, property titled tenants by the entireties and joint tenants with right of survivorship can be transferred to the surviving tenant by filing a certified copy of the death certificate with the proper county clerk. A certified copy of the death certificate may also be required documentation with the Department of Motor Vehicles for the transferring of the title and registration of an automobile. Accounts with banks or financial institutions will also need a certified copy of the death certificate to remove a decedent's name from a joint account.

Trust and Trustees

A **"Living" Trust** is a trust established by a grantor during their life which provides for the disposition of the trust assets during the grantor's life and following their death. These assets will be handled by the stated trustee in the governing document of the trust. The trustee on the trust may be a different entity and have different duties as the Personal Representative named in the grantor's Will.

"Pour-over" Will

A common estate planning strategy is to have one's Will pour-over into a living trust which may offer greater flexibility than what is available under a Will. The terms of the trust may articulate a special need of beneficiaries and stipulate a method to meet these needs. When assets are distributed to beneficiaries under a trust the Estate Settlement is done by the trustee of the trust.

If you have any questions about your estate planning, Will or Trust documents, please contact us for a no cost review and discussion of your plan and your planning needs.

IMPORTANT: This brief summary of planning ideas is for discussion purposes only. It does not contain legal, tax, investment, or insurance advice and cannot be relied upon for implementation and/or protection from penalties. Always consult with your independent attorney, tax advisor, investment manager, and insurance agent for final recommendations and before changing or implementing any financial, tax, or estate planning strategy.

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