

WHAT A BENEFICIARY NEEDS TO KNOW ABOUT THE PROBATE PROCESS

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1. INTRODUCTION.

Many Decedents make gifts to persons that take effect upon their deaths. These gifts may take the form of a designation of the person as a beneficiary under a will, trust, life insurance policy, annuity, bank account, IRA or pension plan. This article provides a basic outline of the probate process in Texas and is intended to serve as a guide for beneficiaries to help them monitor a gift under a will from the date of death to the distribution of the gift to the beneficiary.

2. INITIATION OF PROBATE.

Upon the death of a Decedent, his or her will may be filed for probate with the county clerk of the county of the Decedent's residence. The law does not require any person to offer a will for probate. However, a person's will does not become effective until it is admitted to probate by the county (or probate) court. Thus, it is important that if a person believes that they may be a beneficiary of an estate, they should monitor the county clerk's records to determine if an application to probate a Decedent's will has been filed. This information is public record and one may obtain a copy of the will and the application to probate from the county clerk. The application will include the name and contact information of the attorney representing the executor, a copy of the will, and the name of the person seeking appointment as executor. Generally, the person who files the will is the executor named in the will. However, a beneficiary may also offer the will for probate. The person who offers the will for probate is called the "Applicant". If a person is in possession of a will but does not offer the will for probate, a beneficiary may file a motion with the court to obtain an order compelling the person in possession of the will to deliver it to the court. The beneficiary may then offer the will for probate.

3. NOTICE OF APPLICATION TO PROBATE WILL.

Upon filing the will for probate, the county clerk will issue notice of the filing which will be posted at the county courthouse. The notice will include the date of the filing, the nature of the proceeding, the style and number of the proceeding and shall direct the persons notified to appear by filing a written contest or answer or to perform other acts required of him or them and state when and where such appearance or performance is required. Once a will is offered for probate, the earliest that the court may hear the application to probate is the Monday following the expiration of ten (10) days from the date the application is filed.

4. HEARING TO PROBATE WILL AND ISSUANCE OF LETTERS TESTAMENTARY.

The attorney for the applicant will contact the court and make an appointment for a hearing to probate the will. At the hearing, the applicant will be asked to verify the authenticity of the will and that the Decedent has died. Upon hearing the testimony, the court will sign an order admitting the will to probate and directing the clerk to issue Letters Testamentary to the executor. The executor will file an oath and sometimes a bond (the will may waive bond). At this stage, the probate process has begun and the executor is now officially able to administer the estate.

5. NOTICE TO CHARITIES AND BENEFICIARIES.

The Texas Probate Code requires the executor to send a copy of the will and the order admitting the will to probate to any person that is named as a beneficiary under the will within sixty (60) days of the date that the executor qualifies to serve. The notice must include the name and address of the beneficiary, the name of the personal representative of the estate, and his or her contact information. The notice must state that the will has been admitted to probate and the name of the Decedent. The notice must be sent by certified mail, return receipt requested. Within ninety (90) days of appointment, the executor must file an affidavit stating that the notice to the beneficiaries was given. It is customary to ask beneficiaries to waive receipt of notice.

6. ESTATE CHECKING ACCOUNT.

As soon as an executor is appointed, he or she should obtain an estate identification number from the IRS. Upon receipt of the EIN, the executor should open an estate account, which should be styled, "Estate of (Decedent's Name), (Executor's name)". The executor should transfer any monies belonging to the Decedent into the estate account in order to provide accurate accountings to beneficiaries or to taxing authorities as required.

7. NOTICE TO CREDITORS.

Texas law requires that the executor give the following notices:

a. Notice by publication. Publish notice of appointment as executor in a newspaper.

b. Certified mail notice to secured and unsecured creditors. Notice sent by mail to any secured creditor of the estate within two months after the issuance of Letters Testamentary. The law also gives an executor an option to notify unsecured creditors of the estate of their appointment. The notice to the secured and unsecured creditors of appointment as executor will provide that a

creditor must file their claim with the executor within four months after the date of receipt of notice of appointment, or else the claim will be forever barred.

8. INVENTORY.

An executor is required to file an Inventory, Appraisal and List of Claims with the county (or probate) court within ninety (90) days of issuance of Letters Testamentary. The due date may be extended upon request of the executor. The inventory will list all of the assets of the Decedent's estate. It will not list non-probate assets such as life insurance, annuities, IRA's, or pension benefits, unless the estate is the named beneficiary of those benefits.

9. FEDERAL ESTATE TAX RETURN.

The federal estate tax return, Form 706, is due nine (9) months after the Decedent's date of death. It is common for an executor to request an extension of time to file the estate's Inventory to coincide with the due date of Form 706. The estate tax return will list all assets of the Decedent, debts of the Decedent, administration expenses, names of beneficiaries and the value of their gifts, and other very useful information. For the years 2011 and 2012, no return is required to be filed for estates worth less than \$5,000,000.00. Once the return is filed, the IRS will audit the return and issue a closing letter. This usually takes at least nine (9) months.

10. OTHER TAX RETURNS.

A U.S. Individual Tax Return, Form 1040, should be filed for the Decedent through his or her date of death. A Fiduciary Income Tax Return, Form 1041, is due each year that the estate is open. All income and expenses of the estate are reported on this return. The initial Form 1041 return will cover the period from the date of death through December 31st or the executor may elect to file the return on a fiscal year coinciding with the last day of the month prior to the Decedent's date of death. An annual return will need to be filed until the estate is closed.

11. DUTIES OF EXECUTOR TO BENEFICIARY.

An executor is a fiduciary and, as such, has the same duties to the beneficiaries as a trustee under a trust. The executor has a duty to comply with Texas probate law and to abide by the Decedent's will. The executor must keep accurate financial records of all estate transactions and has a duty to report those transactions to the beneficiaries. If the executor does not provide the beneficiaries with an annual accounting, a beneficiary may compel an executor to provide an accounting at any time after the expiration of fifteen (15) months from the date Letters Testamentary are issued. If a beneficiary files suit to obtain an accounting, they can recover their attorney's fees and costs.

12. MANAGEMENT OF ESTATE ASSETS

An executor has the duty to manage the estate's assets prudently. This includes keeping property maintained and insured. Investments should be monitored and sold if it is prudent to do so.

13. PAYMENT OF DEBTS.

The executor may pay debts of the estate if he or she determines that the debts are due and owing and there are sufficient funds to pay the same.

14. EXECUTOR'S FEES AND ATTORNEY'S FEES.

Unless the will provides otherwise, an executor is entitled to reasonable compensation. If the executor is a bank or trust company, they will charge in accordance with a published fee schedule. An individual may charge a reasonable fee. Unless there are extraordinary circumstances, the probate code limits the fee of an executor to no more than 5% of the value of the estate. The probate code provides a formula for calculating commissions which is 5% of the cash receipts and disbursements of the estate. A beneficiary should be consulted if the executor determines to charge an extraordinary fee. The executor is entitled to employ attorneys, agents, financial advisors, accountants and other persons necessary to carry out their duties. These charges should be reasonable. A beneficiary is entitled to see the invoices and may question any that they believe to be unreasonable.

15. CLOSING THE ESTATE.

Once the executor has paid all debts, taxes and expenses of administration, the estate should be closed and the assets distributed to the beneficiaries. If two years have passed from the date that Letters Testamentary were issued and the executor has failed to distribute the estate, a beneficiary may file suit to obtain an accounting and distribution of the estate. Unless the court determines that there is a continued necessity for administration, the court will order the estate distributed. The court may also order a partial distribution.

16. RECEIPTS

Upon distribution, an executor will request that a beneficiary sign a receipt. The executor may also request a release. If the executor requests a release, it is recommended that the beneficiary review any accounting and information concerning the administration of the estate to satisfy themselves that the executor has properly administered the estate.

17. ATTORNEY GENERAL.

The Attorney General of the State of Texas has authority to represent all charities in any estate proceeding. If a charity has a concern about the way that

an estate is being administered, they may contact the Attorney General's Charitable Organizations division for advice. The contact information is:

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

512-475-4233 phone
512-322-0578 fax

18. CHARITABLE BENEFICIARIES.

A charity holds a public trust to carry out its mission for the benefit of the public in accordance with its charitable purpose. In order to carry out its trust, a charity should act prudently to monitor gifts made to the charity under donor's wills. This includes making prudent efforts to confirm that the will is admitted to probate, that the estate is properly administered and that the gift is delivered to the charity.

19. CONCLUSION.

When a person dies, the beneficiary should determine if the will is filed for probate. Once the will is filed, the beneficiary should obtain a copy of the will and contact information of the executor and the executor's attorney. The beneficiary should request and receive a copy of the estate's inventory and, if an estate tax return is filed, ask for a copy of the return. The beneficiary should know the date that Letters Testamentary are issued and monitor the estate so that if the gift is not received within two years, further inquiry is prudent. If anything appears wrong or suspicious, one should seek advice from legal counsel.