

WILLS, PROBATE AND POWERS OF ATTORNEY SIMPLIFIED

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Scope of Article: This paper will outline briefly two main areas of law. The first will be to explain the probate process of a valid Will in Texas. The second will be to outline what is a valid Will and what are some of the other documents an attorney could prepare for a client to handle certain situations which may arise during a person's life. This article will not cover the area of estate and tax planning, as that area of the law is very fact-specific to each client's situation and requires the advice and guidance of a tax law specialist.

It is my hope after you read this article, you will see that having your Will and other documents prepared for you by an attorney is not only a smart plan which lets you make crucial decisions now about your well-being and your estate, but also that the probate process is not like falling into a deep, dark hole out of which there is no escape. On the contrary, with the assistance of a skilled, experienced attorney, the probate process can go very smoothly.

The Probate Process in Texas: This discussion assumes there will not be a Will contest filed, a valid (under Texas law), self-proved written Will is being submitted for probate by one spouse after the death of the other spouse, no bond is required, and there is a need for administration of the estate. Under Texas law, there is "a need for the administration of the estate" if there are at least two debts that need to be paid, or Letters Testamentary are needed in order to obtain or to transfer assets. Also, I am assuming that the surviving spouse has been designated as the **Independent Executor(rix)** of the deceased spouse's estate and that all of the decedent's estate has been left to the surviving spouse.

The steps involved for probate of this Will are typically as follows:

Step One: Obtain the original Will and take it to an attorney's office. (Denton County Local Rules require an attorney must represent the applicant in most probate cases.)

Step Two: Your attorney will prepare an **An Application For Letters Testamentary** and file it in the Probate Court in the county of last residence of the decedent. This document must be filed within four years of the date of death. At the time of filing, your attorney will set the **Application** for a "prove-up" hearing. You will be notified of the date and time of the hearing. Local Rules may require you to give Notice of this hearing to additional persons. Your attorney will assist you with the options for accomplishing this step.

Step Three: You and your attorney will meet at the Courthouse in the Probate Court for the “**prove-up**” hearing. At this hearing, your attorney will offer the original Will into evidence and ask you certain questions in order to “**prove up**” the facts necessary to persuade the Judge to admit the Will to probate and name you as the **Independent Executor(rix)** of the estate and grant you **Letters Testamentary**. This hearing usually takes about five minutes. After the evidence is heard, the Judge will sign an **Order Admitting Will To Probate and Granting Letters Testamentary**, naming you as the **Independent Executor(rix)** of the estate and directing the Clerk to issue to you the **Letters Testamentary**. You and your attorney then go to the Clerk who will administer the **Oath of Executor(rix)** (in Denton County, the Judge gives the Oath) and issue to you your **Letters Testamentary**. This is usually the only time you’ll need to visit the Judge on this matter.

Letters Testamentary represent to others your authority granted to act in the stead of the deceased person in carrying out your duties under the Will and the Texas Probate Code. In the capacity of the **Independent Executor(rix)**, you are the **Personal Representative** of the decedent.

Step Four: The signing of the **Order Admitting Will To Probate and Granting Letters Testamentary** at the “**prove-up**” hearing triggers several deadlines which will need to be met by the Personal Representative. Your attorney will assist you with instructions on how to meet these deadlines:

- a. **Within 30 days:** A **Notice To Creditors** will need to be published in a newspaper of county-wide distribution. If there are any creditors of the estate, this Notice tells them where to send their claims and to whom to send them. Your attorney will assist you with how to deal with any claims that are sent in.

File with the Clerk proof of the Notice and a **Publisher’s Affidavit**.

- b. **Within 60 days:** Within this timeframe, you must send to all secured creditors (like the mortgage company and car finance company) a Notice via certified mail that a probate case has been opened.

File with the Clerk proof of your compliance with this requirement.

- c. **Within 90 days:** Within this timeframe, you will need to prepare and file a “**Sworn Inventory and Appraisalment**”. This is a document listing all of the assets of the estate which were in existence on the date of death, as well as all debts *owed to* the estate as of the date of death. Your attorney will assist you with the preparation of this document. When approved, the Judge will sign an **Order Approving Inventory and Appraisalment**.

Step Five: Your attorney will assist you with the preparation of **Closing Documents**, such as Deeds, Motor Vehicle and Boat title transfer documents, and stock transfers. You

should also consult a CPA or other tax expert about filing any needed tax returns on behalf of the decedent.

Step Six: Your attorney will prepare an **Affidavit of Compliance and Closing Report** for the Personal Representative to sign after the terms of the Will have been fulfilled and the debts of the estate have been paid. When this is filed with the Clerk, it has the effect of terminating the authority of the Personal Representative. The filing of this report may be waived by the Court in the **Order Admitting Will To Probate and Granting Letters Testamentary**. Sometimes, it is advisable not to close the estate, in which event, this step should be skipped.

Probate of a Will as a Muniment of Title Only: In Texas, we have a procedure for probating a Will that eliminates some of the Steps set out above, but only if on the date of the prove-up hearing, there is testimony that there are no outstanding debts owed by the estate, except those which are secured by liens on real estate. In that case, the Judge would admit the Will to probate as a Muniment of Title Only and sign an Order to that effect. Even if the conditions are present which meet these requirements, the situation may not be appropriate for this type of application. Your attorney will assist you with making this decision.

If this is the appropriate relief to seek in your case, you would not have to file an Inventory and Appraisal or publish the Notice To Creditors in the newspaper. Also, no **Letters Testamentary** will be issued under this procedure.

Wills, Powers of Attorney (POA's), Declarations of Guardian, etc.: A valid written Will under Texas Law typically does and contains the following things: (1) names a Personal Representative (an **Executor or Executrix**) and an Alternate; (2) identifies the Testator(rix)'s family members; (3) sets out the distribution of the decedent's estate; (4) gives instructions to the Personal Representative on what is to be done in the probate process; (5) gives instructions to the Personal Representative on the handling of debts; (6) gives certain powers and authority to the Personal Representative; (7) may establish a **Trust** and direct which assets go into the **Trust** and name a **Trustee** and Alternate Trustee; (8) may establish a **Guardianship for Minors** (or a disabled person) and name the **Guardian** and Alternate Guardian; (9) must be signed by the Testator(rix) in the presence of at least two witnesses who are at least 14 years of age, and a Notary; (10) must be signed by the Testator(rix) at a time when he/she is at least 18 years of age, of sound mind, is not suffering from any undue influence by any person, is acting freely and voluntarily, and while fully realizing the extent of his/her estate and the effect of executing the Will; (11) contains a "**Self-Proving Affidavit**" as defined in the Texas Probate Code.

The **Executor or Executrix** (or **Successor Executor(rix)**) stands in your stead to make sure your wishes as set forth in your Will are carried out.

The **Trust** (officially called a *Testamentary Trust*) set out in your Will puts someone (called a *Trustee* and *Alternate Trustee*) in charge of the money and assets you will leave for your minor children (or a disabled person), directs what purposes the Trustee can use the money for, and sets out at what age (or under what conditions) your children get the remainder of the Trust assets. Without this provision, your children would get the Trust proceeds when they turn age 18.

The **Guardianship for Minors** states your wishes for who should take over the daily care, control and custody of your minor children (a **Guardian** or **Alternate Guardian**) when there are no biological parents alive. The Judge must appoint the person you have named as Guardian, unless that person is dead, disqualified (such as, received certain types of criminal convictions), does not want to serve or would not serve the best interests of the children. Without this provision, the Probate Court Judge decides who their Guardian will be.

Without a Will (called being *Intestate*), the Texas Probate Code sets out what will happen to your estate (called *Intestate Succession*), which is most likely not the way you would prefer your estate to be divided. Also, the Probate Court Judge will decide who will be put in charge of distributing your estate (a type of Personal Representative called a *Dependent Administrator*, in most cases, who has far less authority than does an *Independent Executor*). The process of administering an *Intestate* estate is much more expensive than when a valid, written Will is admitted to probate. A *Dependent Administrator* usually must post a bond, must ask the Judge for permission to sell any property, and may ask the Judge to be paid for his or her services (usually 10% of all monies going into the estate and 10% of all monies going out of the estate). Attorney's fees, consequently, are much higher also because of the increased work that must be done to administer the estate.

Donate Your Body: If you wish to donate your body to a medical school, hospital, bank or storage facility, or the Anatomical Board of the State of Texas, you may execute a document which will accomplish that desire. You must know the full name and physical address of the donee organization, and give instructions as to who is to receive your ashes once the donee organization is finished with your body. You should let each family member know your wishes in this regard. You may also make this donation in your Will.

Donate Your Organs or Tissue: If you wish to become an Organ or Tissue Donor, you may make your wishes known by executing a document setting out which organs or tissues you wish to donate and sending the document to one of the organ donation registries. You may carry a card with your Driver's License that lets anyone know you have sent a designation to an organ donation registry. Your attorney can assist you with information on where to obtain the card and registration form. All donations of organs, tissues or of one's own body are governed by the *Texas Anatomical Gifts Act*, which is part of the **Texas Health & Safety Code**. You may also make this donation in your Will.

Directive On Disposal of Your Remains: Texas Law allows you to designate a person to be in charge of what happens to your body upon your death. This is a separate

document from your Will and is usually more accessible than your Will. If you wish to be buried or cremated, you may state your preference in this document, thus eliminating arguments about this topic among the family members.

The above documents apply to circumstances after your death. The documents discussed below deal with issues which may arise during your lifetime. Each one's authority expires at the time of your death.

Statutory Durable Power of Attorney: This document has the backing of Texas Law as provided in the *Durable Power of Attorney Act* (Chapter XII of the Texas Probate Code). By executing this document, you (called the *Principal*) give a person (called your *Attorney-in-Fact* or *Agent*) broad authority to act for you. The purpose for executing this document is to give authority to act to your Agent prior to your becoming mentally or physically disabled, so that a *Guardianship of the Person or Estate* or both, will not need to be opened on your behalf, or at least delayed for as long as possible, in the event you do become unable to care for your personal needs or take care of your financial and legal affairs. Guardianships are expensive and ongoing. If you can avoid having to open a Guardianship, you and your family will be way ahead financially and emotionally. This document must be filed in the County Clerk's Office in the county of your residence.

Medical Power of Attorney: This document's authority arises under the **Texas Civil Practice and Remedies Code**. It allows you (called the *Principal*) to designate a person or persons (in order of preference, called *Agents*) who have authority to make health care decisions for you, in the event your attending physician certifies in writing in your medical chart that, based on the attending physician's reasonable medical judgment, you lack the capacity to make health care decisions for yourself. That certification triggers the authority of your agent to make any health care decision on your behalf that you could make but for your incapacity. The authority may be revoked at any time, even orally. It is a good practice to include with this document a release of medical information acceptable under the *Health Insurance Portability and Accountability Act (HIPPA)*, so that your *Agent* can review all relevant medical records with your doctor.

Directive To Physicians: This document is provided for under the *Texas Natural Death Act*, which is a part of the **Texas Civil Practice and Remedies Code**. That law provides that a competent adult (called a *Declarant*) may at any time execute a written *Directive*, in the presence of two witnesses who must also sign the *Directive*, which makes known the person's desire that his/her life not be artificially prolonged in the event the person has an incurable or irreversible condition caused by injury, disease, or illness, certified to be a terminal condition by two physicians, and if the application of life-sustaining procedures would serve only to artificially postpone the moment of the person's death, and if the person's attending physician determines that the person's death is imminent or will result within a relatively short time without the application of life-sustaining procedures, the person may direct that those procedures be withheld or withdrawn, and that the person be allowed to die naturally. The *Declarant* may also include in the *Directive* a designation of a person to make a treatment decision for the *Declarant* in the event the *Declarant* becomes comatose, incompetent, or otherwise mentally or physically

incapable of communication. You may also specify which life-sustaining measures you want taken. This document may be revoked at any time, even orally.

Declaration of Guardian for Minor Children While Parent Is Alive: This document (arising under the *Texas Probate Code*) allows a parent to name a *Guardian* and as many *Alternate Guardians* (in order of preference) for the person's minor children (called *Wards*), to serve in the event the parent becomes incapacitated and unable to take care of the children, and there is no other biological parent with rights to the children to assume those duties, thus necessitating the opening of a *Guardianship of the Person or Estate* or both for the minor children. The law requires the Judge to appoint the person you have chosen (or the Alternates) unless that person is dead, refuses to serve, is legally disqualified, or would not serve the best interests of the minor children. This designation may be revoked by any approved method for revoking a Will, including the execution of a new *Declaration*.

This document may also be executed in a form to serve the same purpose after your death, but that would not be necessary if you provided for the same situation in your Will.

Declaration of Guardian Before Need Arises: This document (arising under the *Texas Probate Code*) allows a person, other than an incapacitated person, by written *Declaration* to designate a person or persons (in order of preference) to serve as the person's *Guardian of the Person or Estate* or both, in the event the need for same later arises. A *Declarant* may also *disqualify* any named persons from ever serving as their *Guardian*. The law requires the Judge to appoint the person you have chosen as your Guardian, unless that person is dead, refuses to serve, is legally disqualified or would not serve the best interest of the Ward.

As you can see from the above outline, these documents allow you to have the final say in these important matters concerning your well-being. Planning ahead of time for these possible events is not only good insurance, but will save your family members time, expense and the emotional toll of having to go to court to get the authority to handle these issues and make these decisions for you.

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