This handbook presents only a basic outline; no attempt has been made to address many of the legal issues that may arise during the administration of an estate in Texas. Persons entrusted with the responsibility of administering an estate should work closely with the estate’s lawyer and not attempt to administer an estate on their own. We believe that once you read this guide, you will understand the process and of what your Texas Probate Lawyer is doing.

A Texas Probate Administration is the process in which a decedent’s assets are distributed to their heirs or beneficiaries. Probate is a court-supervised process for identifying and gathering the decedent’s assets; paying taxes, claims, and expenses of administration; and distributing assets to the beneficiaries. The Texas Probate Code is found in the Texas Statutes. [http://www.statutes.legis.state.tx.us/](http://www.statutes.legis.state.tx.us/)

Texas has some unique rights and protections that are afforded to a homestead property. The Texas Constitution protects one’s homestead from creditors and is among the strongest homestead protections in the country. If the homestead is not dealt with properly, it can lose these protections and become subject to the claims of creditors. Texas courts require that an attorney be involved with a probate administration to help with proper filings and smooth administration of the decedent’s assets.

Because the court cannot give legal advice, it’s important to understand that in most cases in Texas the personal representative must be represented by an attorney to administer the estate in the probate court.

**When is Probate Required?**

If a person dies owning anything in his or her name individually a probate is necessary. Some examples of these assets include a checking account, insurance payable to the insured’s estate, a home or other real estate, stocks, or bonds. Just because a will names an asset and a beneficiary, does not mean that the asset will be distributed per the will. If such asset is jointly owned, for example, it will generally pass to the surviving joint owner (with few exceptions). To carry out the instructions in the will, you must first open a probate.

**When is Probate Not Required?**

If an asset has a payable-on-death beneficiary or a joint owner it is not subject to probate. Property that is generally not included in the probate estate includes life insurance proceeds that are not payable to the decedent’s estate, jointly owned property, and property held in an inter vivos trust (a trust created during the life of the decedent). Trust property may be used to
satisfy the expenses of estate administration and claims of creditors if the probate property is not sufficient.

**What is a Will?**

A will is a written instrument, signed by the decedent and at least two witnesses in each other’s presence that fulfills the requirements of Texas law. A will names the beneficiaries for the testator’s probate assets. The testator can also designate guardians for minor children and a personal representative to administer the estate. If a will was validly executed in another state, Texas courts will recognize the document as a will except in the case of a holographic will.

Holographic wills are wills written entirely in the testators own handwriting and in most states they do not require a witness.

**What if there is not a Will?**

In Texas if someone dies without a valid will they are said to have died ‘intestate’. If they have a will when they die, they die ‘testate’. If a person dies without a will, Texas statutes direct how their assets will be distributed based on whether the decedent had a spouse, children, children from outside the marriage, parents, siblings and so on. If a person dies without a will or any living relatives then his or her property will escheat to the state (become the property of the state).

**What happens if I cannot find the Will?**

A Will that cannot be found that was last seen in the hands of the testator is presumed to have been destroyed by the decedent. If a will has been destroyed by the decedent it is presumed that the decedent intended to revoke the will. It is possible to admit a copy when the original cannot be found and people can testify to its validity. This process is not guaranteed because you have to overcome the presumption that the testator destroyed the will intentionally.

**Do I need the original Will?**

In Texas only an original will can be admitted to the court unless there are extenuating circumstances.

**Is a Will valid?**

In order for a will to be admitted to court, it must be a validly executed will under the statutes governing Wills. For a will to be valid, it must be signed at the end by the testator and two witnesses, who each in the presence of the other witness the testator’s signature. It is not
necessary that the testator sign their name, an X is sufficient. If the will was validly created in another state, Texas Courts will generally recognize the will.

**Admitting a Will**

To have the probate court recognize a Will it must have a self-proving affidavit or it will require the oath of a witness to the Will, the personal representative or another disinterested witness who have a belief that the Will is genuine.

**Contesting a Will**

In Texas, after a will has been admitted to probate, any interested person may contest the probate by filing a suit in the proper court within two years after the will was admitted to probate, and not afterward, except in the case of forgery or other fraud. You cannot contest a will before someone dies. Contesting a will is a very complex procedure in Texas and you should speak with a Texas Estate Planning Lawyer to help you determine if you have grounds for a contest. These claims involved undue influence, testamentary capacity, improper execution, and issues such as forgery, murder, or pretermitted spouse or child.

**What if the will is filed with a court in another county or State?**

In order to open a probate case in Texas you will need an authenticated or exemplified copy of the will to proceed with the Texas Probate case.

**Who is involved in the probate process?**

Depending on the facts and issues involved with your probate, any of the following people may be involved in your probate case:

a) The Clerk of the Court in the county in which the decedent was domiciled at the time of the decedent’s death and the Court Judge;

b) The personal representative;

c) The personal representative’s attorney;

d) The creditors;

e) Additional attorneys involved in litigation with or on behalf of the estate;

f) Beneficiaries and/or their representatives; and

g) The IRS.
Steps in opening a probate

The steps in opening a Texas probate involve gathering information, determining what assets are subject to probate, determining who the creditors and beneficiaries are and filing the probate with the court. Your attorney will guide you through the process from beginning to end.

Gathering information

Generally the information that will need to be gathered includes the death certificate, will, list of assets, contact information for family members and beneficiaries listed in the will, and creditor information.

If you need a death certificate you can order one from the Bureau of Vital Statistics.

Will probate be required in another state?

If the decedent owned real property in another state, it may be necessary to have a separate (ancillary) probate administration in the state where the property is located.

What is a Texas Homestead?

The Texas constitution protects a decedent’s homestead in Texas from the claims of creditors. A family can only have one homestead in the United States. It is important to have the court determine the property to be a homestead and do so with proper notice to maintain the Texas Homestead protection. People often confuse the constitutional protection from creditors, with another Texas homestead that provides a property tax break.

Who is responsible for the remaining loans on the property?

If property is devised any encumbrance will only be paid at the expense of the residuary of the estate when the will shows the intent to pay the encumbrance.

Where should the probate be filed?

The decedent’s will, death certificate, and other required documents are filed with the Clerk of the Court, usually in the county that the decedent last lived or maintained his or her homestead.
What type of probate should be filed?

There are many different types of administration. The proper method of administration depends on the type of property to be administered, the debts involved, the beneficiaries involved, and the documentation requirements of the institutions that hold the property. For example, a “small estate” administration may be perfectly appropriate for Texas purposes, but if you need to transfer a stock that is held in an account with a broker in New York they probably do not understand what a “small estate” administration in Texas is and occasionally require the more traditional, full probate documentation.

How are attorneys’ fees calculated?

Attorneys for the personal representative are entitled to reasonable compensation that is payable from the estate. The Shea Law Firm charges the following fees to represent an Executor or Administrator of a Texas Probate Estate:

1) One thousand five hundred dollars for estates having a value of $40,000 or less.
2) An additional $750 for estates having a value of more than 40,000 and not exceeding $70,000.
3) An additional $750 for estates having a value of more than $70,000 and not exceeding $100,000.
4) For estates having a value in excess of $100,000, at the rate of 3 percent on the next $900,000.
5) At the rate of 2.5 percent for all above $1 million and not exceeding $3 million.
6) At the rate of 2 percent for all above $3 million and not exceeding $5 million.
7) At the rate of 1.5 percent for all above $5 million and not exceeding $10 million.
8) At the rate of 1 percent for all above $10 million.

In addition to the fees for ordinary services, the attorney for the personal representative shall be allowed reasonable compensation for extraordinary services. Extraordinary services may include:

a) Involvement in a will contest, will construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceeding, apportionment of estate taxes, or any adversarial proceeding or litigation by or against the estate.

b) Representation of the personal representative in audit or any proceeding for adjustment, determination, or collection of any taxes.

c) Tax advice on postmortem tax planning, including, but not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative
expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 6166 and 303 privileges, deduction of last illness expenses, fiscal year planning, distribution planning, asset basis considerations, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation, handling employee benefit or retirement proceeds, prompt assessment request, or request for release of personal liability for payment of tax.

d) Review of estate tax return and preparation or review of other tax returns required to be filed by the personal representative.

e) Preparation of the estate's federal estate tax return. If this return is prepared by the attorney, a fee of one-half of 1 percent up to a value of $10 million and one-fourth of 1 percent on the value in excess of $10 million of the gross estate as finally determined for federal estate tax purposes is presumed to be reasonable compensation for the attorney for this service. These fees shall include services for routine audit of the return, not beyond the examining agent level, if required.

f) Purchase, sale, lease, or encumbrance of real property by the personal representative or involvement in zoning, land use, environmental, or other similar matters.

g) Legal advice regarding carrying on of the decedent's business or conducting other commercial activity by the personal representative.

h) Legal advice regarding claims for damage to the environment or related procedures.

i) Legal advice regarding homestead status of real property or proceedings involving that status and services related to protected homestead.

j) Involvement in fiduciary, employee, or attorney compensation disputes.

k) Proceedings involving ancillary administration of assets not subject to administration in this state.

**Who supervises a probate administration?**

In Texas a Judge presides over all probate proceedings. The Judge will rule on the validity of the will, appoint a personal representative (if necessary), rule on the homestead status, hear objections from creditors or beneficiaries, and issue Letters of Administration and other Court Orders.
What are some of the additional things that may be required in a Texas Probate?

- Deal with Medicaid,
- Verify ownership of property and obtain title insurance,
- Locate missing heirs or their descendants,
- Administer trusts,
- Obtain consent forms and/or waivers,
- Attend court hearings regarding disputed items or other issues.

Letters of Administration

The ‘Letters of Administration’ are a formal document that is issued by the Court. The ‘Letters of Administration’ appoint a manager of the assets of the deceased (called a personal representative in Texas). Often banks, insurance companies, and other financial institutions state that they require Letters of Administration to disburse assets. In a summary administration, there are generally no Letters appointing a Personal Representative and the Order of Summary Administration serves in place of the Letters of Administration.

Letters Testamentary

Letters Testamentary are very similar to Letters of Administration. The primary difference is that Letters Testamentary is the term used when the deceased left a Will appointing an Executor to administer the Estate. As with Letters of Administration, only a Probate Court with jurisdiction over the Estate can issue valid Letters Testamentary.

Who can be a personal representative in Texas?

Any individual who is at least 18 years old and a resident of Texas at the time of the decedent’s death is qualified to act as the personal representative.

A person who is not a resident of Texas cannot qualify as a personal representative unless they are a relative or the spouse of a close relative.

Trust companies incorporated under Texas law are eligible to serve as personal representative. In addition, state or national banking associations, savings associations, and federal savings and loan associations authorized to exercise fiduciary powers in Texas are qualified to serve as personal representative.
An attorney licensed in the State of Texas must represent every personal representative in Texas.

**What are the duties and responsibilities of the personal representative?**

Once the personal representative is appointed, takes the oath of office, and posts bond (if required), the he or she is authorized to administer the decedent’s estate. A personal representative has a fiduciary responsibility to the creditors, the IRS, and the beneficiaries for proper administration of the estate. The personal representative must not comingle the estate’s funds with their own funds, and needs to be fully accountable for all of the decedent’s property during the administration of the estate. The personal representative may sell some or all of the assets of the estate to raise cash to pay the debts and expenses of the estate.

The personal representative is obligated to:

a) Identify, gather, value, and safeguard the assets.

b) Publish the "notice to creditors" in a local newspaper, giving creditors an opportunity to file claims relating to the estate.

c) Serve “notice of administration” on specific persons, giving information about the estate and giving notice of requirements to file any objections relating to the estate.

d) Conduct a diligent search to locate "known or reasonably ascertainable" creditors, and notify them of the time by which their claims must be filed.

e) Contact the Social Security Administration and the Veteran's Administration to apply for any death benefits or survivor benefits for which the decedent’s estate may be eligible.

f) Locate insurance policies and apply for benefits if the proceeds are payable to the estate.

g) Contact the decedent’s employer and any club or fraternal organization to which the decedent may have belonged to determine if the estate or surviving family members are entitled to any benefits.

h) Examine the circumstances surrounding the decedent's death to determine if there are any claims against third parties, which need to be asserted or preserved, such as claims for wrongful death or worker's compensation.
i) Collect rents, accounts receivable, interest, dividends and other income due to the
decedent prior to death and that becomes due to the estate thereafter.

j) Assume the responsibility for any litigation or settlement of pending lawsuits in which
the decedent had an interest.

k) Keep the property of the estate in good repair.

l) Keep the estate property invested properly until the administration is complete.

m) Locate and access any safe deposit boxes in the decedent's name.

n) Object to improper claims and defend suits brought on such claims.

o) Pay the valid claims.

p) File all past due and current tax returns.

q) Pay the taxes.

r) Employ necessary professionals to assist in the administration of the estate.

s) Pay the expenses of administration.

t) Distribute the statutory amounts or assets to the surviving spouse or family if claims are
made.

u) Distribute the appropriate assets to beneficiaries.

v) Close the probate administration.

Is the personal representative entitled to a fee?

Unless the will states the contrary, the personal representative is entitled to the fee specified
by statutory guidelines. Generally a Texas personal representative is entitled to a fee of five
percent (5%) on all sums they actually receive in cash, and the same per cent on all sums they
actually pay out in cash. The fee varies depending on the number of personal representatives
and the responsibilities of each.

It is important to understand that the fee is not calculated for the value of a Texas Homestead
as that is not considered an asset subject to probate.

In addition, a Texas personal representative shall be allowed further compensation, as is
reasonable, for any extraordinary services including, but not limited to:
a) The sale of real or personal property.

b) The conduct of litigation on behalf of or against the estate.

c) Involvement in proceedings for the adjustment or payment of any taxes.

d) The carrying on of the decedent's business.

e) Dealing with protected homestead.

f) Any other special services which may be necessary for the personal representative to perform.

Upon petition of any interested person, the court may increase or decrease the compensation for ordinary services of the personal representative or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant.

In determining reasonable compensation, the court shall consider all of the following factors, giving weight to each as it determines to be appropriate:

g) The promptness, efficiency, and skill with which the administration was handled by the personal representative;

h) The responsibilities assumed by and the potential liabilities of the personal representative;

i) The nature and value of the assets that are affected by the decedent's death;

j) The benefits or detriments resulting to the estate or interested persons from the personal representative's services;

k) The complexity or simplicity of the administration and the novelty of the issues presented;

l) The personal representative's participation in tax planning for the estate and the estate's beneficiaries and in tax return preparation, review, or approval;

m) The nature of the probate, non-probate, and exempt assets, the expenses of administration, the liabilities of the decedent, and the compensation paid to other professionals and fiduciaries;

n) Any delay in payment of the compensation after the services were furnished; and

o) Any other relevant factors.

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**Must the personal representative post a bond?**

The court is free to determine if and how much of a bond will be required even if the will states that no bond shall be required. The purpose of posting a bond is to insure creditors and beneficiaries against loss caused by the improper administration of the estate. The Probate Court has the discretion to waive the requirement of filing a bond, or require a personal representative to post a bond. The Court may also increase or decrease the bond at any time.

**Obtaining a copy of the Will**

We often get calls from clients stating that they believe they are included in a person’s will, but have been unable to obtain a copy of the will to verify their belief. It is important to understand that just because you are included in a will; it does not necessarily mean that you will receive what the will states. For example, if a parent has remarried and all of the assets are jointly owned with his or her new spouse, there is nothing to pass through probate. Since the will only transfers assets that are subject to probate, the will’s beneficiaries would not receive anything.

This concept is hard for people to understand and even harder when an unfriendly stepparent is involved. Regardless, many people still want to see their parent’s will. Generally we will send the custodian of the will a letter informing them of their obligation under Texas law to file the will within 10 days. If they refuse to do so, you have three choices:

1) do nothing or wait until they comply;

2) file a lawsuit asking that the court direct the custodian of the will to deposit it and reimburse you for your costs; or

3) open a probate and ask the court to order the custodian of the will to deposit it and reimburse you for your costs.

**What if there is a revocable trust?**

If the decedent had established a revocable trust or living trust the trustee may be required to pay the expenses of administration and pay the creditors of the decedent. This can be a big issue when the beneficiaries of the decedent under the will are different than the beneficiaries of the trust.
**Do I have to file an Inventory?**

The Personal representative shall file an inventory within 90 days after the issuance of letters of administration. The inventory must contain notice of the beneficiaries’ rights, list the assets with reasonable detail and its estimated fair market value at the date of the decedent’s death. Homestead property is also listed and designated as a protected homestead. The court can extend the date the inventory is due with cause and no notice is necessary. If there is an extension, the PR must serve copies of the petition and order on Department of Revenue, the surviving spouse, each heir at law in an intestate estate, each residuary beneficiary in a testate estate, and any other interested person who may request it in writing. The personal representative shall file proof of such service.

**Tax issues**

A personal representative needs to be concerned with five separate tax situations:

(1) the decedent's final income tax return (for income paid or accrued prior to death);

(2) the estate's income tax return (for income accrued during the term of the estate);

(3) gift tax returns;

(4) an estate tax which is imposed on the transfer of wealth; and

(5) state estate or intangible taxes (Texas no longer has an estate tax).

The personal representative is responsible for preparing and filing all applicable state and federal tax returns on behalf of the decedent for the period of time the decedent was alive and on behalf of the estate while it is being administered. The personal representative must understand that the date of death terminates the decedent's tax year and thereafter the decedent's estate is a separate taxpayer. Therefore, the personal representative is responsible for reporting and paying taxes incurred by the decedent prior to death as well as taxes incurred by the estate as a separate taxpayer.

**Objecting to claims**

Clients often object to claims of creditors when they believe them to be inaccurate. If the probate estate is insolvent and there are claims, it is not proper to object to them just because there are not funds in the estate to pay the claims. If the personal representative object to a claim, the PR always takes the risk that the creditor will file a lawsuit over the validity of the claim. This could involve the estate in unnecessary litigation and expenses. It is okay to have
claims that are unpaid at the time a Texas Probate case is dismissed, but this will require that a final accounting or waiver is filed.

**Can I settle a claim with a creditor in a Texas Probate?**

If there is a proposal to compromise or settle a claim, whether in suit or not, the court may enter an order authorizing such a settlement is in the best interest of the estate.

**Probate litigation**

We often see situations in which an individual has changed beneficiaries or where a caretaker has exerted influence over the decedent to have him or her change a will, a trust, or asset ownership to manipulate how assets will be distributed. If you are a beneficiary whose expectancy was interfered with, it may be possible to sue the estate for recovery of the assets that should have been distributed to you.

**Conclusion and contact information**

We hope you have found this handbook useful and that it will make the probate process you are involved in easier to understand. If you have any questions or comments we would like to hear from you and try to help you. If you are represented by an attorney we are able to give a second opinion but cannot offer you legal advice according to the rules regulating the Texas Bar.

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