



# Question & Answer

## *Probate Essentials*

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### What is probate?

Contrary to what most people may think, a “will” is not an effective legal document until it has been proven and established as a will in court. Probate is the word that describes this process. In a popular sense, “probate” has become associated with all matters relating to a decedent’s estate, including: proving a will, determining heirship if there is no will, appointing and supervising executors or administrators, and, in some cases, resolving disputes over the validity or construction of a will.

The main purpose for the probate process is to determine who will succeed to a deceased individual’s estate under his or her will. Assets that typically require probate to establish who receives them are personal property, real estate, automobiles, and securities. Some types of property, however, are not distributed under a will—these are called “non- probate assets” because they are transferred to the deceased individual’s beneficiaries without having to go through the probate process. Examples of non-probate assets are life insurance proceeds or retirement accounts that are payable to a named beneficiary.

### Is probate even necessary?

In estates with no outstanding debts, a will can be probated as a “muniment of title only.” This means that the court will issue an order that allows the family to wind up the deceased person’s affairs informally. One purpose of probating a will as a muniment of title is to provide a link in the chain of title for certain types of assets, like real estate. It also assures that those relying on the will won’t be held liable when dealing with the deceased individual’s estate.

A “small estate administration” can be done for estates with less than \$50,000 in assets (not including the homestead and exempt personal property). In a small estate administration, the court will issue an affidavit that gives the person holding it the authority to collect and distribute the decedent’s assets. For real property, however, a small estate administration can be used only to clear title to the decedent’s homestead—if the decedent owned other real property, it would be necessary to probate the will as a muniment of title.

### What is an Executor, an Independent Executor, and an Administrator?

Basically, the administration of an estate involves assembling a decedent’s assets, settling his or her debts and claims (including taxes), and distributing the remaining estate to the beneficiaries. The person responsible for this is the decedent’s personal representative, and in Texas, there are three types of personal representatives: an executor, an independent executor, and an administrator.

An “executor” is the personal representative named in a decedent’s will. Unless the will provides otherwise, the executor is subject to the control and supervision of the probate court.

An “independent executor” is also the personal representative named in a decedent’s will, but an independent executor is one appointed under a will that states that the executor won’t be subject to the control and supervision of the probate court, except for a few limited purposes. This is the most common type of personal representative named in a will in Texas, because it is less costly and cumbersome than an administration by an executor who is subject to the probate court’s control and supervision. Independent executors are also more common because, even if the will doesn’t provide for it, the executor can still be independent if all of the will beneficiaries agree.

An “administrator” is the court-appointed personal representative of a decedent who has no will, or who has a will that doesn’t name a personal representative. Administrators are subject to the control and supervision of the probate court.

### What Are the Duties and Liabilities of an Executor or an Administrator?

In short, an executor or administrator is responsible for gathering all of the decedent’s assets and paying off the

decedent's debts (see document entitled "Description of Basic Steps Required in an Independent Administration of an Estate" for a more in-depth discussion of a personal representative's duties). The personal representative owes a duty of loyalty to the estate, and must exercise reasonable care in administering the estate.

If the estate is "insolvent," which means that it does not have enough assets to cover its debts, the personal representative is not liable for the deficiency. However, the executor or administrator could be personally liable for federal estate taxes if he or she pays other estate debts without leaving enough funds to pay the estate taxes.

## What is a trustee?

Property can be owned in two ways: "legal" ownership and "beneficial" ownership. A legal owner of property has the right to manage the property, but does not necessarily have the right to consume or enjoy it. A beneficial owner has the economic benefit of property, but not the right to manage it. In most cases, a property owner holds both legal and beneficial ownership in an asset. However, an owner of property can "sever" the title by granting one person legal ownership over property and directing that legal owner to manage the property for the benefit of the person who owns the beneficial title.

A "trustee" is a person who holds legal title for the benefit of another. Property held in this type of arrangement is said to be held "in trust," and the terms and conditions under which the trustee receives, holds, and administers the property are referred to as the "trust." A trust is sometimes named as a beneficiary under a will. In that event, the executor will take all actions necessary to administer the estate, and will distribute the estate assets to the trustee. (The executor will not be authorized to make distributions directly to the trust beneficiaries.)

## What is a guardian?

A guardian is the representative of a person suffering from a legal incapacity. A person can be legally incapacitated for a number of reasons, but the predominant legal incapacity encountered is that of minority. In Texas, a minor is a person under the age of eighteen. Generally, those suffering from a legal incapacity are unable to hold title to property, so someone must be appointed to hold the property for them until they are no longer subject to the incapacity.

There are two types of guardians. The "guardian of the person" is assigned physical custody of a legally incapacitated person (also known as a "ward"). The "guardian of the estate" is assigned legal title to the ward's assets (his estate).

A surviving parent has the natural right to be guardian of the person of his or her minor children. If there are minor children of the decedent and there is no other surviving parent, the will may designate the guardian of the person and the guardian of the estate of the minor children. Because a guardianship of the estate is expensive and cumbersome, it's advisable to avoid it by drafting a provision in a will that distributes assets to a trust for minor children instead of a distribution to them outright.

## What is "Community Property" and "Separate Property"?

A decedent's will controls the disposition of his or her separate property and his or her one-half interest in community property. Therefore, the concepts of separate property and community property are important to determine the passage of title (and also for determining the assets in the estate for tax purposes.)

Texas and seven other states have adopted the system of community property law. In Texas, a married person's separate property is all property that can be established as having been acquired before marriage, by gift, by inheritance, or by award in settlement of a personal injury claim. A married person who owns separate property does not share ownership of it with his or her spouse. The estate of an unmarried person is composed entirely of separate property.

Community property is all property of a married person other than his or her separate property. Community property is considered to be owned equally by both spouses. Because separate property must be proven as such, there is a "community presumption" in Texas. This means that community property includes property that was once separate property but can no longer be established as separate property. For example, if a person brings \$5,000 in cash into a marriage, but fails to keep records tracing that \$5,000, it can eventually lose its character as separate property.

These property rules can become quite complex when attempting to classify changes in property, gains or losses upon sales of property, or appreciation in property.

## What happens if you die without a will?

If there is a need to establish title to the decedent's real property, or if the estate needs to be formally administered because there are outstanding debts, the interested parties would file an application with the probate court to determine heirship and to have an administrator appointed. This is called a "statutory heirship proceeding." After heirship is determined, the court enters an order that directs to whom and in what shares the administrator must distribute the decedent's estate. This is much more cumbersome and costly than a normal administration because of the court's extensive involvement.

For more information, please contact:

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