No Reason To Fear Texas Probate

by
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Harris County Probate Court No. 1

Late night cable television, radio and direct mail advertisements implore us to consider the living trust as an alternative to the Texas Probate system. The impression we receive from these ads is that the probate system is akin to a Byzantine labyrinth of judicial pitfalls that are both costly and time consuming. These impressions are far from the truth.

Texas allows the practitioner not less than a dozen probate alternatives for the settlement of a decedent's estate. I will discuss some of them and mention all of them. The probate procedure most frequently used is the formal probate of a will that conforms to section 59(a) of the Texas Probate Code. Succinctly stated, this procedure allows the admission of a will that is properly executed, witnessed and supported by a self-proving affidavit. Holographic and non-self proven wills can be proven up pursuant to the requirements of §84(b) T.P.C. The estate's attorney simply files an Application to Probate Will answering the ten (10) questions contained in §81 T.P.C., schedules a hearing after the expiration of ten (10) days; and, appears with or without his client to prove up the will in accordance with §88 T.P.C. The named executor then signs an oath to truly perform all his duties and files with the Court an Inventory, Appraisement and List of Claims within ninety (90) days of the oath evidencing the assets and value of the estate. Thereafter, the estate is administered *free* of court supervision. The procedural, cost and time requirements of this formal probate procedure are so easy that a lawyer who graduated magna cum difficulty could complete the process within a month.

Should a client find probating a will and appointing an executor too exhausting, the probate code provides a perfect alternative in §89A, i.e. Probate of a Will as a Muniment of Title. Any attorney with a stratolounge recliner in his office can breeze through this procedure in less than a month. The estate's attorney files the decedent's will with an application and alleges there are no unpaid debts owing by the estate, excluding debts secured by liens on realty. The attorney or his client can prove up the self-proven will after the expiration of the ten (10) day posting period. The court's order will reflect there is no necessity for further administration and no need to file an Inventory, Appraisement and List of Claims. This ancillary probate procedure allows, inter alia, third parties purchasing estate property to be protected against claims of estate creditors and the expeditious transfer of title to estate property *free* of court review and approval.

Amazingly, attorneys appearing before the bench often find it difficult to find §145 relief in their yellow colored edition of the probate code. I politely point out that their edition has been superseded over the past twenty years and now has a maroon cover.

Section 145(c) and (d) allows, inter alia, the probate of a will that fails to make an executor independent of court review or names no executor or if named, is deceased, disqualified or unwilling to serve. This code section allows the practitioner to obtain and file with the court waivers of service and consent to the appointment of an independent administrator without bond from all distributees and heirs of the decedent's estate. Minors and incapacitated persons awaiting the premier of Star Trek should have their consent executed by a court appointed guardian. Some probate courts will not allow a guardian's consent, hence, check with your court beforehand. This relatively simple alternative allows a client to expeditiously receive the benefits of an independent administrator *free* of court review after the filing of an Inventory, Appraisement and List of Claims.

Section 145(e) T.P.C. is a contemporary panacea of probate benefits to a client who's loved one died without a will. This code section allows the decedent's heirs to petition the Court to name an independent administrator. The court will again require that all heirs execute a waiver of service and consent to the named applicant. The consent should include a waiver of any bond or the court will impose a bond pursuant to §145(p) T.P.C. The major complication to this application is the general requirement that an Application to Determine Heirship be filed and completed before entry of the §145(e) order. The heirship requirement ensures the Court that all distributees of the estate are before it.

This two-fold procedure can be expeditiously accomplished. The attorney can combine the waiver of citation for the heirship with the waiver and consent to the §145(e) appointment. The heirship hearing should be scheduled to immediately precede the §145(e) application hearing. Thereafter, the independent administrator will file an Inventory, Appraisement and List of Claims and the heirs can get on with the business of life *free* of court supervision.

In other situations where a decedent has died without a will, a myriad of simple solutions to estate problems exist. The earlier mentioned Application to Determine Heirship is one example. The application need only answer the eight issues raised in §49 T.P.C. The Court will appoint an attorney ad litem to represent all unknown heirs or living heirs whose whereabouts are unknown. Two disinterested witnesses who have no interest in the estate should testify to the genealogy of the decedent. The Court will thereafter enter its order declaring the name, address and percentage interest of each heir. This simple procedure allows a family to obtain a judgment within sixty (60) days. The usual delay revolves around the attorney ad litem ascertaining the existence or whereabouts of unknown heirs. The bench enjoys these proceedings because of the often described colorful family histories and reviewing the arithmetic skills of attorneys who deftly explain their exceeding the aggregate percentage interests of 100%.

Similarly, §52 T.P.C. provides that an Affidavit of Heirship evidencing the decedent's family history, genealogy, marital status and identity of heirs can be received as prima facie evidence in any suit involving title to real or personal property. Hence, a family can obtain two or more heirship affidavits to provide a title company or other transfer agent

for the transfer of title to or from a decedent's heir in a simple estate situation that requires no probate procedure.

The Small Estate Affidavit, §137 T.P.C., is the favorite probate alternative for attorneys that love to drive inexpensive cars and dine with wine aged in vehicular transit. This probate procedure allows the heirs to execute an affidavit, thirty (30) days after the decedent's death, transferring title to personal property and cash not exceeding $50,000.00. Also, title to the homestead can be transferred, regardless of its value, along with all exempt personal property under §42.001 Texas Property Code. Exempt personal property for a family can have an aggregate value of $60,000.00 or $30,000.00 if owned by a single adult. Texas Property Code §42.0021 provides an additional exemption for a retirement plan or assets held under any stock bonus, pension, profit sharing or similar plan for self employed individuals.

The Small Estate Affidavit must be signed by all heirs and there is no requirement for a guardianship of a minor or heirship hearing. However, since banks, title companies and stock brokers loath the disbursement of funds to a minor, a guardianship should be seriously considered. The Court can sign the order after a posting period of ten (10) days. This procedure allows the heirs to a small or large estate consisting primarily of a homestead, furniture and furnishings, automobile and pension/profit sharing plan, to expeditiously transfer title to same and enjoy life *free* of court supervision.

Common law relief is available to estates that wish to resolve litigation costs associated with a will contest. The Informal Family Agreement has been recognized in Texas law for decades. Estate of Morris, 577 S.W.2d 748 (Tex. Civ. App. - Amarillo 1979, writ ref'd, n.r.e.) Two elements must be addressed in a family settlement agreement. The interested parties must agree not to probate the will and agree to the disposition of the estate property. Court approval is generally sought to obtain a judgment and the appellate time tables for review. In some cases court approval is required. Family settlement agreements are otherwise enforceable under Texas contract law.

There are five infrequently used ancillary probate procedures. The Application For Order of No Administration, §139 T.P.C. comes first to mind. This procedure should not be confused with a Court's finding of no necessity for administration in a §89A Muniment of Title or §48 T.P.C. Determination of Heirship proceeding. The effect of the Court's order is to allow sufficient legal authority to persons owing money, having custody of estate property or acting as a transfer agent to turn over estate property to the persons named in the order without the necessity of a court supervised administration.

Section 143, T.P.C. is the Summary Proceedings for Estates. It is utilized when an inventory, appraisement and list of claims has been filed and the estate, exclusive of homestead, exempt property and family allowance, does not exceed in value claims in the first four classes. The personal representative pays the claims ordered paid by the court and files a final account. Upon its approval the administration is closed.

An Unqualified Community Administration , §155, 160, 177(b) T.P.C. generally occurs when a spouse dies intestate and *all children are born of the marriage*. Essentially, this procedure allows a surviving spouse statutory authority to collect the decedent's final paycheck, including sick and vacation pay, while releasing the employer from liability for tendering same. It also allows the survivor to collect assets and settle debts before engaging in a more formal probate procedure. Inevitably, some probate procedure will be required to transfer title to property.

The Qualified Community Administration, §161 T.P.C., generally occurs when a spouse dies intestate leaving *children born from a former marriage*. The Courts are reluctant to allow this ancillary probate procedure because there is no citation by posting requirement, i.e. an obvious notice problem regarding heirs; there is no legal determination as to who is the surviving spouse, i.e. no formal heirship determination; and, applicants can rarely obtain a bond from a surety company because of the applicant's unsupervised powers.

The remaining alternative probate procedure is the Informal Probate, §501 T.P.C. This procedure usually causes hysterical blindness among the ranks of probate practitioners and is received by the Court with the joy of one's 40th birthday. Its principal problem relates to the compression of information requirements in one formal application, coupled with real world problems requiring immediate attention by an estate representative during the fact gathering process for the application.

You should not believe the Texas probate system will engulf you in turmoil, excessive costs and delays. Conversely, we have discovered there are numerous avenues to user friendly, inexpensive and expeditious probate procedures.