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FREQUENTLY ASKED QUESTIONS

About

Beginning The Probate And Estate Administration Process

What is the first step in the probate and estate administration process?

The first step in the probate and estate administration process is to schedule an appointment with a probate and estate attorney to discuss your particular situation. The initial estate administration conference provides an opportunity for your attorney to obtain information about the deceased and his or her family, assets, and existing estate plan. It is your opportunity to get the attorney's preliminary recommendations and to get to know the attorney and his or her firm. It is a "no-obligation" meeting that lasts approximately one hour. At the conclusion of the meeting, the attorney will make recommendations about the appropriate course of action for the estate. If you elect to hire the attorney at that time, you will be asked to sign a formal engagement agreement and provide an initial retainer.

What should I bring with me to the initial conference?

You should bring the *original* of the deceased's Will and/or Living Trust, if any, and any Codicil or other existing estate planning documents. If you have one, bring a copy of the death certificate. You should also bring a Preliminary Estate Questionnaire (attached as Exhibit A) filled in with as much information as possible. A summary financial statement, listing major assets and liabilities with approximate values, is also *very* helpful in charting an anticipated course. Some people use a computer program or an existing financial statement. As an alternative, you can use the Summary Financial Statement attached as Exhibit B.

Is there anything else that I should bring to the initial conference?

If the deceased was a business owner, you should bring financial statements for the business and copies of the business's organizational documentation, such as corporate articles and bylaws, partnership agreements and certificates, and any buy-sell agreements. If the deceased was the beneficiary under someone else's Will or trust, you should bring a copy of that document. In addition, if the deceased ever signed a premarital agreement or other marital property contract, that document should be brought along as well. If these documents are not readily available, they can be provided after the initial conference.

What else should I do before the initial conference?

Generally, you should not allow any easily preventable damage, theft or loss to occur. For example, if the deceased owned a home, make sure the home is securely locked. If the deceased owned a car, it should be garaged or parked in a safe location. Pets and livestock should be cared for. Utility bills and casualty insurance premiums should be paid to prevent termination or cancellation.

Is there anything I should NOT do before consulting an attorney?

You should not hurry to assume ownership of property you expect to inherit; otherwise, important tax savings options may be permanently lost. In particular, there is a very important post-death planning device called a "qualified disclaimer" that we often recommend to our clients. However, a disclaimer will not be "qualified" if the beneficiary has assumed any aspect of ownership of the disclaimed assets. For example, if a surviving spouse files a claim with the insurance company, receives a check for the insurance proceeds, and deposits that check in his or her personal account, then the surviving spouse has accepted the insurance and the disclaimer option is lost. Likewise, if the surviving spouse is named as the primary beneficiary of a retirement plan or an IRA and, following the first spouse's death, does a "spousal IRA rollover" of the deceased spouse's funds into a new IRA in his or her name, the spouse has effectively accepted that gift, and the disclaimer option is again precluded.

> ***Rule of Thumb:*** *Do not transfer any funds or retitle any accounts or other property of the deceased into the name of a beneficiary until after you have discussed the matter with a probate and estate attorney.*

What is an Executor, Administrator, Trustee, fiduciary, or personal representative?

"Fiduciary" is the generic term applied to anyone acting on behalf of another to manage assets that have been entrusted to the fiduciary. Most Wills appoint two types of fiduciaries, an Executor and a Trustee, and every trust agreement appoints a Trustee. An "Executor" is generally responsible for collecting the deceased's assets, handling the deceased's debts, filing any required tax returns, winding up the deceased's affairs, and carrying out the provisions of the Will (i.e., creating trusts, distributing assets to the proper recipients, etc.). Where the Will does not name an Executor or no named Executor is able to serve (or there is no Will), the

Court appoints an "Administrator" to handle these duties. The term "personal representative" refers to both Executors and Administrators. An Executor or Administrator who is "Independent" is a special type of personal representative who is authorized to administer the estate without Court supervision.

A Trustee is the person responsible for the more long-term job of administering trusts (i.e., managing investments, making distributions to the beneficiaries of the trust, etc.). The same person can be both a Fiduciary and a beneficiary; the same person can be both an Executor and a Trustee; and different trusts can have different Trustees. The powers, duties and liabilities of personal representatives are set forth in the Texas Estates Code; Trustees are governed by the Texas Trust Code. In both cases, the Will or trust agreement can create special additional powers, duties and liabilities. Regardless of the specific title held, the job of a fiduciary should not be taken lightly. The duties and obligations imposed on fiduciaries are stringent and complex, and the failure to fully discharge those duties and obligations may lead to personal liability, Court removal or other sanctions.

What steps are involved in the estate administration process?

For most estates, the administration process involves three basic--and somewhat overlapping--steps: (1) probate and estate administration, (2) compliance and reporting, and (3) funding. Probate and estate administration includes: determining whether formal probate is necessary or desirable; preparing the required Court pleadings and documents; scheduling and attending a Court hearing in which the Will is "admitted to probate" and the personal representative becomes authorized to act; and assisting in the collection and administration of estate assets. Compliance and reporting includes: determining whether federal estate and state inheritance tax returns are required; determining whether and to what extent an "Inventory" is required; and preparing the tax returns and the Inventory as necessary. Funding is essentially the winding up and distribution of the estate and the actual implementation of the deceased's estate plan. This includes: verifying the gifts made, the trusts created, and other requirements of the estate plan; establishing the required trusts; making the tax and other computations provided for in the estate plan; allocating income, expenses and taxes among the estate beneficiaries; satisfying all gifts and making the final distribution of estate assets; and closing the estate administration. All of the above steps are governed by the Will and other applicable estate planning documents, if any, and all applicable laws, including the Texas Estates Code, the Texas Trust Code, the Texas Tax Code, and the Internal Revenue Code.

How long will the estate administration process take?

The probate hearing is usually completed within about one month after the attorneys are hired. Estate and inheritance tax returns are usually completed and filed 9 to 15 months from the deceased's date of death, and the IRS typically completes its review of the estate tax return and issues its "closing letter" about 3 to 6 months later. Funding and closing the estate generally requires anywhere from a few weeks to several months after the IRS's closing letter is received. Of course, these time estimates will not apply in every estate; depending on the number of complicating factors present, the administration process for any particular estate could take substantially longer. These complicating factors include:

- *Unavailability of accurate financial information* (e.g., complex or extensive property and investments and/or poor books and records; lost signature cards, account agreements or other records; failure by the executors or family to deliver requested information in a timely and organized fashion).

- *Problem assets and/or hard-to-value assets* (e.g., property in other states; mineral interests; annuities; joint/survivorship accounts; partial interests in land or other assets; interests in a family business, private partnership or other asset that is not traded on a public exchange; stocks held individually–actual certificates–rather than in brokerage accounts. Note: It is usually the nature of the assets, not the overall value of the estate, that causes delays or complications).

- *Community property/separate property issues* (e.g., the deceased and/or surviving spouse had significant property before they were married but they did not have a premarital agreement; there was a premarital agreement but it was not prepared by attorneys who were experts in marital property issues; the deceased and his or her surviving spouse lived in states other than Texas during their marriage).

- *Family and personal complications* (e.g., a deceased or surviving spouse who is not a U.S. citizen; prior marriages; children from prior marriages; "dysfunctional" families; actual or threatened Will contests).

- *Problems with the Will* (e.g., the Will was not prepared and signed in Texas; the Will includes provisions that are potentially ambiguous; a family member questions the validity of the Will; the deceased prepared his or her own Will; there isn't a Will).

- *Problems with the IRS* (e.g., the IRS audits the estate tax return or prior income or gift tax returns; the deceased failed to file income or gift tax returns; the deceased had tax liens or deficiencies).

- *Clients who desire additional legal consultation* (e.g., family members or executors who desire detailed or frequent explanations of the attorney's decisions and actions, or who disregard the attorney's advice; co-fiduciaries who disagree, don't communicate or otherwise require extra efforts by the attorneys; financially inexperienced fiduciaries; out of state fiduciaries).

- *Complications with prior estate planning by/for the deceased* (e.g., substantial lifetime taxable gifts; irregularities with gift tax returns; beneficiary designations that are not properly coordinated with the estate plan; trusts created by or for the deceased that were not administered properly; unfunded trusts or other problems with the estate of a previously deceased spouse or other family member).

Also, the estate administration process does not always proceed at an even pace: At times there may be significant visible progress. At other times it may appear that little is being accomplished; however, in these cases attorneys and staff are often working hard "behind the scenes" or waiting on others to provide information or documents necessary to proceed. *In any case, the ultimate goal is the same: to conclude the estate administration process promptly yet avoid the unnecessary legal fees that result from trying to move the process along faster than the circumstances dictate*.

How much will the estate administration process cost?

In our experience, legal fees for "typical" estates vary from 1/2% to 3% of the assets involved in the estate administration, depending on the number of complicating factors that are present. (These factors are discussed above.) The legal fees for estates with none or only a few of these factors are likely to be near the low end of the range. As the number of factors increases, the legal fees tend toward the high end, and major problems or unforseen difficulties can push the fees higher. *However, it is rarely possible to accurately predict how many complications will arise in any particular estate; therefore, it is very difficult to provide a meaningful and precise fee estimate for a particular estate*. As often as not, when several attorneys provide widely varying fee estimates, the attorneys with the low estimate are simply more hopeful than the others that the estate will have no complications. Unfortunately, estimates based on optimism (or inexperience or salesmanship) typically say very little about what the total legal fees will actually be at the end of the day. In our view, the best predictor of legal fees for any specific estate is the experience and expertise of the attorneys and their support staff, and their ability to spot, pre-empt and otherwise handle whatever complications the particular estate may have in store. For this reason, we urge you to select an attorney based on reputation, experience, demonstrated ability, trusted recommendation, etc.

> ***Note:*** *Prior to 2018, attorney fees (and most other probate and estate administration expenses) were fully deductible as either income tax or estate tax deductions. This meant that, in taxable estates, the net out of pocket cost to the estate and the heirs could have been 39% to 50% less than the amount paid to professionals. For example, if a taxable estate incurred $10,000 in attorney and accountant fees, the $10,000 administration expense deduction potentially saved almost $3,900 (as an income tax deduction) or $5,000 (as an estate tax deduction). The net cost to the estate was as low as $5,000 to $6,100.*
>
> *The Tax Cuts and Jobs Act ("TCJA") suspended the deduction for miscellaneous itemized deductions for individuals until 2025. The issue for estates and trusts is that the fiduciary tax laws follow individual tax law, unless explicitly exempted. Since the Act did not provide any explicit exemptions, the deductibility of many of the fiduciary deductions was*

uncertain. The IRS's Notice 2018-61 clarifies that an estate or trust may continue to deduct expenses incurred in the administration of an estate or trust, which would not otherwise be incurred if the property were not held in such estate or trust. For example, investment advisor fees are incurred whether an estate or trust holds a brokerage account or whether an individual holds the brokerage account outright. Therefore, under the TCJA, estates and trusts can no longer deduct investment advisor fees. However, trustee fees, attorney fees, accounting fees and some other administration expenses such as appraisal fees, for example, incurred by an estate or non-grantor trust would still be deductible.

Another issue that the IRS needs to clarify is whether a beneficiary will still be able to deduct final year expenses upon the termination of an estate or trust. Previously, these final year expenses passed through as a miscellaneous itemized deduction for an individual. Since the TCJA suspended miscellaneous itemized deductions for all individuals, the IRS has yet to confirm if the deduction will be lost or if there will be a means for the beneficiary to still take the deduction. Any net operating losses and capital loss carry-overs that are passed through to a beneficiary upon an estate or trust termination will still be deductible at the individual level. At this time, we will need to wait for the IRS to release the final regulations to provide further guidance as indicated in the Notice.

How are legal fees actually determined?

Unlike many other states, Texas has *no* statutory attorneys fees and *no* percentage attorneys fees for estate administration. Instead, our legal fee for probate and estate administration are always a reasonable fee based primarily on the time we expend on behalf of the estate (including time for conferences and communications, in person, by phone, by letter or by e-mail, with the clients or others on their behalf). We generally charge our time in minimum units of ¼ hour--15 minutes. More than one attorney or paralegal with our firm may assist with respect to each particular estate. In accordance with the applicable standards for reasonable attorney fees, we also may adjust our fee for such factors as the complexity, novelty, and magnitude of the issues involved, the speed with which the clients need or desire our services, the value to our clients of the results achieved, the extent to which one client may benefit from work we have done for other clients, the extent to which work we do for one client may benefit other future clients, etc. In addition to our legal fees, we bill for firm expenses and expenses incurred on the client's behalf, including court filing fees, photocopying, long distance, faxes, messenger services, travel, staff overtime (when requested or as circumstances dictate) and other miscellaneous expenses. Because we bill monthly, our clients are kept informed of the fees on a regular basis.

How do I manage professional fees?

Every client desires to minimize attorney, CPA, appraiser, and other professional fees. There are several things you can do to help keep the fees lower. First, remember that professionals normally bill in ¼ hour increments: A 5 minute telephone call costs as much as a 15 minute call, so, manage your phone calls and questions wisely. Second, take advantage of the lower billing rates of assistants, such as paralegals and associates, by calling them instead of calling a partner assigned to the file when you have a question. Even if they cannot immediately answer the question, they can often synthesize your issues into clear questions that they can pose to the partner. Finally, it can create inefficiency (and increase the bill) when an estate administration progresses too slowly or when you try to conclude the administration too quickly. Thus, you can keep bills lower by both responding to requests for information promptly but not pushing for an overly quick and sometimes more costly resolution, when matters are moving more slowly than you prefer. Of course, if you have questions about invoices at any time, do not hesitate to ask. Finally, keep professional fees in perspective. Maximizing value and not simply minimizing fees is the most important goal. In the long run, you will be better off if it is done the "right" way rather than by cutting corners or ignoring planning options and other issues.

Why do attorneys handle probate and estate administration matters?

As the discussion above indicates, most aspects of the probate and estate administration process involve questions of law. Even the federal estate tax return–which may appear comparable to a balance sheet or an income tax return–involves primarily legal issues (such as Will and trust interpretation, marital property issues, analysis of corporate, partnership and other agreements and their effect on proper asset valuation, estate inclusion, proper elections and allocations, etc.). Just as most attorneys are not familiar with the relevant tax issues, most

accountants are not familiar with the relevant legal issues. (Many experienced accountants have never prepared an estate tax return.) By contrast, when the estate administration is handled by an experienced probate and estate attorney with a skilled support staff, the day-to-day tasks can be handled at the lower hourly rates of the paralegals and other staff, yet the attorney's direct supervision keeps him or her familiar with the estate, substantially reducing the risks that legal issues will be missed and substantially increasing the odds that valuable planning opportunities will be identified and considered.

In the right circumstances, e.g., where the CPA is experienced in estate tax return preparation, has special knowledge of the assets and background of the particular Estate, etc., it can be appropriate for the CPA to prepare the estate tax return. However, it is imperative that the attorney remain in charge of the probate and estate administration, work closely with the CPA, and have an opportunity to review the estate tax return before it is filed, so that duplication of effort and the risk of missing legal issues can be minimized.

EXHIBIT A

Preliminary Estate Questionnaire - Estate of _____, Deceased ("D")

General information
(Note: the death certificate will include most of the following information.)

D's full legal name: _____
D's other legal names, (e.g., alias name): _____
D's place of birth (City, County & State): _____
D's date of birth: _____ D's date of death: _____
D's place of death - (City, County, State): _____
_____
D's "domicile" (permanent residence) at death - (address, City, County, State): _____
_____
Date on which D established the above domicile: _____ D's Social Security No.: _____
D's Driver's License Number, State_____

Will; Executor

Did D leave a Will? Yes / No *If so, bring the original Will (and all Codicils, if any) with you.*

Is the primary Executor(s) named in the Will, if any, living *and* willing and able to serve? Yes / No
If so, please provide his/her/their complete, current name and address *and* relationship to D; otherwise, provide this information for the named successor(s) or other person(s) who *will* serve as executor:

(1) Name and relationship to D: _____
Address & phone number: _____
_____
Driver's License Number, State:_____ E's Social Security No.: _____

(2) Name and relationship to D: _____
Address & phone number: _____
_____
Driver's License Number, State:_____ E's Social Security No.: _____

Surviving Spouse

Was D married at death? Yes / No If so, complete the following information for D's surviving spouse.
(Notes: (i) a "common law" marriage counts as a legal marriage, and (ii) D would still be validly married even if legally separated or involved in a pending divorce at the date of death.)
Name: _____ Date of this marriage: _____
Address, and phone number: _____
_____

Marital History

Was D ever married to any person other than his/her surviving spouse (if any) identified above? Yes / No
If so, provide the following information for *each* prior spouse (continue on back if necessary).

Name of prior spouse: _____
Date of marriage to D: _____ marriage was terminated by death / divorce (circle one)
Date of divorce / prior spouse's death: _____
City and State of divorce: _____

Name of prior spouse: _____
Date of marriage to D: _____ marriage was terminated by death / divorce (circle one)
Date of divorce / prior spouse's death: _____
City and State of divorce: _____

EXHIBIT B

Summary Financial Statement - Estate of _____, Deceased

Assets	**Beneficiary, POD[1] (if any)**	**How Titled**	**Approximate Value**
Residence			
Other real estate (vacation home, rental property, etc.)			
Oil, gas and other mineral interests			
Stocks, bonds, mutual funds and other investments			
Cash, CDs, money market accounts			
Automobiles and other vehicles			
Valuable collections/collectibles/heirlooms			
Other household furnishings and personal effects			
Retirement assets, such as 401(k) plans, profit sharing plans, pension plans, IRAs, etc.			
Life insurance proceeds			
Closely held business interests			
Other miscellaneous assets			
Total Assets			

Liabilities (Debts)	**Approximate Current Balance**
Mortgage on Residence	
Other real estate mortgages	
Personal debt (credit cards, car notes, etc.)	
Accrued taxes	
Other debts	
Total Liabilities	

Net estate (Total Assets minus Total Liabilities)	

[1]Please indicate all items: (i) payable to a named beneficiary, or to a "pay on death" or "transfer on death" payee, or (ii) held as "joint tenants" and/or with "rights of survivorship."