

# **ALTERNATIVES TO REGULAR PROBATE**

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**SPRING 2019 PROBATE ACADEMY**

**TEXAS ASSOCIATION OF COUNTIES**

**Lubbock, Texas**

**May 8, 2019**



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Private Practice, Columbus, Ohio (1980)  
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Professor, St. Mary's University School of Law (1981-2005)  
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Visiting Professor, Boston College Law School (1992-93)  
Visiting Professor, University of New Mexico School of Law (1995)  
Visiting Professor, Southern Methodist University School of Law (1997)  
Visiting Professor, Santa Clara University School of Law (1999-2000)  
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)  
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Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)  
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)  
President's Academic Achievement Award, Texas Tech University (2015)  
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)  
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)  
President's Excellence in Teaching Award (Texas Tech University) (2007)  
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)  
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)  
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)  
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)  
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## SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (7<sup>th</sup> ed. 2019); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4<sup>th</sup> ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2018); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (4<sup>th</sup> ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).



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# ALTERNATIVES TO REGULAR PROBATE

## I. INTRODUCTION

When a person dies, some type of formal process is required for two main reasons. First, successors in interest need proof that they are indeed the new owners of the decedent's property by virtue of being heirs under the state's intestacy law or by being beneficiaries under the decedent's valid will. Second, the decedent's creditors need to be paid. In a sense, death is like going bankrupt. Estate administration assures that creditors get paid to the fullest extent possible.

A traditional estate administration begins with the personal representative collecting all of the decedent's probate assets. The personal representative preserves this property and manages it in a fiduciary capacity. The personal representative then pays the creditors and if property still remains, distributes it to the appropriate heirs or beneficiaries.

The traditional type of administration, dependent administration, is strictly supervised by the court every step of the way from start to finish. The personal representative must get permission before taking most actions, such as selling estate assets and paying creditors, and then get those acts approved by the court after doing them. *See* Tex. Est. Code § 351.051. Dependent administration is cumbersome, inconvenient, costly, and time-consuming.

On the other hand, the testator may provide for (or the beneficiaries of the will or the intestate heirs may agree to) an independent administration which allows the representative to work without court supervision unless an issue requires court involvement or an interested person complains about the way the representative is conducting the administration. *See* Est. Code §§ 401.001–.003.

Under certain circumstances, however, an abridged or simplified form of administration may be available and preferable to an independent administration. This article reviews the short-form administration methods which are available in Texas, many of which are designed with a small estate in mind.

## II. NON-PROBATE ASSETS

Many of the assets the decedent owned at the time of death may *not* need any special administration because they pass outside of the probate process. Intestacy statutes and the decedent's will can control only property included in the decedent's probate estate. Before distributing property under intestacy or a will, you must first determine which property is part of the probate estate and which property has its new owner determined in some other way. The law provides a vast array of property disposition methodologies that prevent property from being included in the probate estate. Typical non-probate arrangements include the following:

- Joint tenancies of real property with rights of survivorship. *See* Est. Code §§ 101.002, 111.001.
- Motor vehicle ownership at death titles. Transp. Code §§ 501.031–.0315.
- Community property governed by a community property survivorship agreement. *See* Est. Code § 112.051.
- Joint bank accounts with rights of survivorship. *See* Est. Code § 113.151.
- Pay on death account. *See* Est. Code § 113.152.
- Trust account. *See* Est. Code § 113.153.
- Retirement, pension, and similar plans. *See* Est. Code § 111.052.
- Life insurance proceeds unless payable to the insured's estate. *See* Est. Code § 111.052.
- Inter vivos trusts.

In many estates, a significant amount of the decedent's property is non-probate in nature making its distribution relatively quick and easy.

### III. PROBATE WILL AS A MUNIMENT OF TITLE

#### A. When to Use

##### 1. No Need for Administration

Probating a will as a muniment of title is useful when there is no need for an administration, but it is necessary to transfer title to property from the testator to the beneficiaries named in the testator's will.

##### 2. Too Late for an Administration

Under normal circumstances, an administration may not be opened more than four years after the testator's death. *See* Est. Code § 301.002. Thus, if you are attempting to clear up title to property which passed under the unprobated will of a decedent who has been dead for over four years, the muniment of title procedure must be used. Note that the applicant must prove that he or she was not "in default" in failing to probate the will within four years and must give notice to each of the testator's heirs whose addresses can be ascertained with reasonable diligence. *See* Est. Code §§ 256.003(a)–(b), 258.051.

##### 3. Combine With Declaratory Judgment

Note that it is permissible to combine a muniment of title action with a declaratory judgment action to determine the person who is entitled to property under the will or to resolve a will construction question. *See* Est. Code § 257.101.

#### B. Application

The contents of the application are set forth in Estates Code § 257.051. They are very similar to those for the probate of a will when the applicant is seeking letters testamentary.

#### C. Requirements

##### 1. Threshold Requirement

One of the following two threshold requirements must be satisfied to permit probate as a muniment of title.

##### *a. No Unpaid Debts (except those secured by real property liens)*

At the time of the court hearing, the decedent must have no unpaid debts other than those secured by real property liens (e.g., mortgages and deeds of trust). *See* Est. Code §§ 257.001(1), .054(5). Note that this is *not* a requirement that the decedent died with no unpaid debts, only that there are not *now* any unpaid debts. Thus, the beneficiaries may pay the debts out of their own pockets to enable the use of this procedure and avoid an estate administration.

##### *b. No Necessity for Administration*

Alternatively, the court must determine that for some other reason there is no reason that an estate administration is necessary. *See* Est. Code § 257.001(2).

##### 2. Testator is Deceased

##### 3. Court has Jurisdiction and Venue Over the Estate

##### 4. Citation Properly Served and Returned

##### 5. Will is Admissible to Probate

The applicant must demonstrate that the will is admissible to probate in basically the same manner as if the applicant were asking for appointment as a personal representative. *See* Est. Code § 257.054.

#### D. Duty of Applicant

Unless waived, the applicant must report to the court that all provisions of the will have been complied with (or not) within 180 days. It is very common to request this waiver in the application. *See* Est. Code § 257.103.

#### E. Effect

Once the court admits the will as a muniment of title, property passes under the terms of the will. In addition, anyone holding any of the testator's property or owing money to the testator may deliver the property to the appropriate beneficiary named in the will. *See* Est. Code § 257.102.

#### IV. FAMILY ALLOWANCE SMALL ESTATE

If the decedent's testate or intestate estate is so small that there would be no property remaining for creditors after payment of the family allowance, there is no reason to conduct a traditional estate administration.

##### A. Requirements

The requirements to use the family allowance small estate procedure are listed below. *See* Est. Code § 451.001.

- Decedent survived by spouse, minor children, or adult incapacitated children.
- Value of the estate, not including homestead and exempt property, does not exceed the family allowance.

##### B. Application

The contents of the application are listed in Estates Code § 451.001(c). Basically, the application lists the heirs or will beneficiaries, the creditors and the amounts of their claims, and the assets of the estate and their value.

##### C. Effect

The court determines the family allowance, sets aside the property needed to pay the family allowance to the surviving spouse, minor children, or incapacitated children, and then orders that no administration is necessary because there are no non-exempt assets available for creditors to reach to satisfy their claims. *See* Est. Code § 451.002.

The order is sufficient legal authority to all parties holding the decedent's property to transfer or pay the persons described in the order as being entitled to the property. *See* Est. Code § 451.003.

Within one year of the order, an interested person may file an application to revoke the order if additional property has been discovered or if the property was undervalued such that it would not have been proper for the court to issue an order of no administration. *See* Est. Code § 451.004.

#### V. SUMMARY PROCEEDINGS FOR CERTAIN INSOLVENT ESTATES

Estates Code § 354.001 describes a rarely used procedure for handling certain insolvent estates in a summary process. The procedure is available when the estate is not large enough to pay class one through four claims under § 355.102. Note that § 355.102 has been amended many times revising the contents of the various classes of claims since the procedure was first codified in the Probate Code in § 322 in 1955. However, there has been no corresponding amendment to § 354.001 so the section does not refer to the same claims as it originally did. Except for being codified from the Probate Code to the Estates Code, § 354.001 and its predecessor have *never* been amended.

#### VI. \$75,000 SMALL INTESTATE ESTATE

Estates Code §§ 205.001–.008 provide an abbreviated procedure which the heirs may use when an intestate decedent dies with a relatively small estate.

##### A. Requirements

1. Decedent Died Intestate
  2. No Personal Representative has been Appointed and no Application is Pending
- If a creditor is afraid that this procedure may jeopardize the creditor's chance of recovery, the creditor may ask for an administration and stop this procedure from being used. *See* Est. Code § 205.001.
3. At Least 30 Days Have Elapsed from the Intestate's Death
  4. Value of Probate Assets, not Including Homestead and Exempt Property, Does not exceed \$75,000

Note that this procedure could be used when a very wealthy person dies intestate if the person

had most of his/her wealth in non-probate assets and the homestead.

## B. Affidavit

### 1. Contents

Under Estates Code § 205.002 the affidavit must show the following:

- The requirements to use the procedure as listed above.
- All assets of the estate, and indicate which assets are claimed as exempt.
- All liabilities of the estate.
- Names and addresses of the distributees.
- Family history facts concerning heirship to determine that the distributees are the proper heirs.

### 2. Sworn to

The affidavit must be **sworn to** by:

- all distributees (or guardians, if minors or incapacitated), and
- two disinterested witnesses.

## C. Effect

### 1. Personal Property

A certified copy of the affidavit is then given to the persons who hold the intestate's property. These persons may then deliver estate property or pay estate claims to the heirs and are protected just as if they were making payments to a personal representative. *See* Est. Code § 205.007.

### 2. Real Property

The only real property that can be transferred by a small estate affidavit is the homestead. *See* Est. Code § 205.006(a). The affidavit must be filed in the deed records of the county in which the homestead is located.

## VII. DETERMINATION OF HEIRSHIP

### A. Requirements

The determination of heirship procedure is used in two circumstances. *See* Est. Code §§ 202.002–.008. The first is as part of a normal intestate administration to determine the intestate's heirs. For the purposes of small estate administration, we are interested in the second use which is when the decedent died intestate and there has been no administration. In effect, the determination of heirship in this context is analogous to probating a will as a muniment of title, that is, a method of transferring title without the necessity of an estate administration.

### B. Venue

Estates Code § 33.004 provides that venue is as follows.

#### 1. If Real Property Located in Texas

County where any real property is located.

#### 2. If no Real Property Located in Texas

County where any personal property is located or where decedent died.

#### 3. If no Real Property and the Decedent Died Outside of Texas

County where the nearest kin lives.

#### 4. If Intestate Was Under a Guardianship at Time of Death

County where the guardianship was pending.

## C. Application

### 1. Contents

Estates Code § 202.005 contains a detailed list of things that must be included in the application which provides comprehensive coverage of the intestate's family situation and assets.

## 2. Under Oath

Each applicant must swear to the truthfulness of the contents of the application. *See* Est. Code § 202.007.

### D. Notice

Estates Code §§ 202.051–.056 contains special rules regarding who is required to receive notice and how notice is served.

#### 1. Heir at Least 12 Years Old

An heir who is at least 12 years old (not 18) is entitled to notice by registered or certified mail. However, the court may require personal service. *See* Est. Code §§ 202.051(1), .054.

#### 2. Heir Under 12 Years Old

If an heir is under 12 years old, service is on the heir’s parent, managing conservator, or guardian. *See* Est. Code § 202.051(2).

#### 3. If Heir or Address of Heir Not Known or Reasonably Ascertainable

If there are unknown heirs or the address of an heir is not known or reasonably ascertainable, notice is by publication in the county (1) where proceedings are taking place and (2) where the intestate lived at the time of death. *See* Est. Code § 202.052.

#### 4. Posting

Unless there is a publication notice, notice is also given by posting in the county (1) where proceedings are taking place and (2) where intestate lived at time of death. *See* Est. Code § 202.053.

### E. Protection of Unknown or Incapacitated Heirs

Estates Code § 202.009 contains provisions to protect unknown and incapacitated heirs.

#### 1. Unknown Heirs – § 202.009(a)

The court *must* appoint an attorney ad litem to represent unknown heirs. *See* Est. Code § 202.009(a).

#### 2. Unknown or Incapacitated Heirs

The court *may* appoint an attorney ad litem or guardian ad litem if necessary to protect the interests of unknown or incapacitated heirs. *See* Est. Code § 202.009(b).

### F. Evidence

The court will examine the following types of evidence to determine the identity of the heirs.

- The in-court testimony of the applicant and the two disinterested witnesses. *See* Est. Code § 202.151. The court may require that the testimony admitted as evidence be reduced to writing and subscribed and sworn to by the witness.
- Affidavit of heirship. If the affidavit has been on the public record for at least five years, it will act as prima facie evidence of the facts contained therein. *See* Est. Code § 203.001. *See* Est. Code § 203.002 for a sample affidavit of heirship.
- Court judgments. If the judgment has been on the public record for at least five years, it will act as prima facie evidence of the facts contained therein. *See* Est. Code § 203.001.
- Other documents acknowledged or sworn to filed in deed records. If the documents have been on the public record for at least five years, they will act as prima facie evidence of the facts contained therein. *See* Est. Code § 203.001.

### G. Effect of Determination of Heirship

Assuming the court also finds that no administration is needed, then the holders of the

intestate's property may deliver it directly to the heirs. *See* Est. Code § 202.205.

### H. Filing

A certified copy of judgment should be filed in all counties where the intestate owned real property to be sure chain of title is clear. *See* Est. Code § 202.206

### I. Omitted Heirs

#### 1. If Not Served with Notice

If an omitted heir was not served with notice, the heir has four years to seek a bill of review. *See* Est. Code § 202.203(1)(A).

#### 2. Actual Fraud

If the omitted heir can prove actual fraud, the heir may seek a bill of review after the passage of any length of time. *See* Est. Code § 202.203(1)(B).

#### 3. Recovery from Heirs

The omitted heir may recover from the other heirs and those claiming under these heirs. However, bona fide purchasers from the heirs are protected. *See* Est. Code §§ 202.203(2), 202.204.

### J. Statute of Limitations to Bring Heirship Action

The statute of limitations to bring an heirship action appeared to be four years from the date of death. *See Cantu v. Sapenter*, 937 S.W.2d 550 (Tex. App.—San Antonio 1996, writ denied) (applying the residual four-year period of Civ. Prac. & Rem. Code § 16.051 because the heirship provisions do not contain an express limitation period). In dicta, the court indicated that the limitations period does not begin to run until a party discovers facts establishing the cause of action.

However, the Supreme Court of Texas in *Little v. Smith*, 943 S.W.2d 414 (Tex. 1997), held that the discovery rule was unavailable in suits to assert a right of inheritance by adoptees. The court stated that it would be unwise “to apply the discovery rule to hold open for years or even decades the

right to assert inheritance claims on the chance that adoptees may learn the identities of their biological relatives.” *Id.* at 420.

Similarly, in *Frost National Bank v. Fernandez*, 315 S.W.3d 494 (Tex. 2010), the Supreme Court of Texas held that the discovery rule was unavailable in suits to assert a right of inheritance by non-marital children.

The 2013 Legislature added Estates Code § 202.0025 to make it clear that there is no statute of limitations with regard to a proceeding to declare heirship of a decedent.

## VIII. AFFIDAVIT OF HEIRSHIP

Title to real property needs to be ascertained if nothing has been done. Although there is no clear statutory procedure for handling this situation, Texas custom has developed a procedure referred to as the affidavit of heirship.

### A. Procedure

An affidavit of facts establishing heirship is filed in the public records in a format similar to that provided in Estates Code § 203.002. The facts stated therein are then accepted as being true and sufficient to support good title to property even though there has been no court action. After the affidavit has been on record for five years, it becomes prima facie evidence of the facts stated therein. *See* Est. Code § 203.001.

### B. Effect

This procedure does *not* bar action by heirs, creditors, or beneficiaries. Section 203.001(b) provides that “[i]f there is an error in a statement of facts in a recorded affidavit \* \* \*, anyone interested in a proceeding in which the affidavit or instrument is offered in evidence may prove the true facts.”

Although this seems like a very *weak* procedure, it is ingrained in Texas custom. Title companies often use affidavits of heirship to substantiate a chain of title. In some areas of Texas, the title companies prefer three affidavits of totally disinterested persons.

Note that this procedure is not very useful with personal property. For example, a bank is unlikely to deliver account funds based on an affidavit of heirship.

## IX. WITHDRAWING ESTATE FROM ADMINISTRATION

An heir or beneficiary may not want the hassle/delay of the administration process. An heir or beneficiary who wishes to obtain the property immediately may stop the administration process and receive the property. *See* Est. Code §§ 354.051–.058.

After the return of the inventory, appraisal, and list of claims, the heir or beneficiary makes a request to withdraw the estate from administration. The applicant must post a bond for an amount which is at least double the gross appraised value of the estate. *See* Est. Code § 354.052. This bond protects the creditors who could be harmed by the withdrawal.

## X. ADMINISTRATION OF COMMUNITY PROPERTY

Two procedures may be available if the decedent died with a surviving spouse who now needs to administer what was their community property.

### A. No Administration of Community Property

#### 1. Requirements

No administration of community property is needed if the following two conditions are both satisfied. *See* Est. Code § 453.002.

- spouse dies intestate, and
- all community property passes to surviving spouse, e.g., there are no children or all of the deceased spouse’s descendants are also descendants of the surviving spouse.

#### 2. Limitation

This procedure does not clear title to property. Thus, if the surviving spouse needs to provide title transfer, some other procedure would be

necessary (e.g., a determination of heirship, a small estate affidavit, etc.).

### B. Unqualified Community Administration

Estates Code §§ 453.003–.004 authorizes an “unqualified,” that is, none court-involved, method of administering community property.

#### 1. Requirements

This procedure is available for both intestate and testate estates if no personal representative has qualified.

#### 2. Surviving Spouse’s Powers

The surviving spouse has the power to take the following actions:

- Administer all community property.
- Sell community property but only to pay community debts.
- Collect the deceased spouse’s final paycheck, including unpaid sick pay or vacation pay, upon an affidavit stating that no personal representative has yet been qualified. The deceased spouse’s employer may pay the surviving spouse and the employer is protected even if the payment is wrongful. *See* Est. Code § 453.004(a).

#### 3. Procedure Does Not Clear Title

This procedure does not clear title to property. *See* Est. Code §§ 453.003(b), .004(c).

## XI. FAMILY SETTLEMENT AGREEMENTS

### A. Generally

The heirs and beneficiaries may enter into a family settlement agreement in which they agree (1) not to probate the decedent’s will, if any, and (2) to the disposition of the decedent’s property. As stated in *Estate of Morris*, 577 S.W.2d 748 (Tex. App.—Amarillo 1979, writ ref’d n.r.e.),

the property belongs to the beneficiaries under the will and since they may, by transfers made immediately after the distribution, divide the property as they wish, there is no reason why they may not divide it by agreement before they receive it in the regular course of judicial administration of the estate.

*Id.* at 755. The avoidance of a will contest or other litigation is the consideration which supports a family settlement agreement.

Note that an unpaid creditor may initiate an estate administration even though the heirs and beneficiaries do not wish to do so.

### **B. Court Approval**

Court approval of a settlement agreement is generally not necessary. However, in the following situations, court approval should be obtained.

- The will has already been probated and the agreement disposes of property in a different manner than the will.
- A minor is an interested party.
- Unknown or unascertained individuals are interested parties.
- The agreement modifies or terminates a testamentary trust without the agreement of all of the trust beneficiaries.

### **C. Filing**

The settlement agreement should be filed in the deed records if it impacts the transfer of real property. Accordingly, it is prudent practice to have family settlement agreements be acknowledged so they will be accepted by the County Clerk for filing.

## **XII. FORMS**

You may obtain forms for the small estate procedures discussed in this article from the following sources:

- Harris County Clerk's Office at <https://www.cclerk.hctx.net/forms/I/I0222.pdf>.
- Affidavit of Heirship for a Motor Vehicle, Texas Department of Transportation, Form VTR-262 available at <http://txdmv.gov/forms-tac>.
- Statement of Inheritance, Texas Department of Housing and Community Affairs, Manufactured Housing Division, Form C available at <https://www.tdhca.state.tx.us/mh/docs/1014-formc.pdf>.
- Gerry W. Beyer, Administration of Decedents' Estates and Guardianships (12 & 12A West's Texas Forms 4th ed. 2019 and most recent Pocket Part).