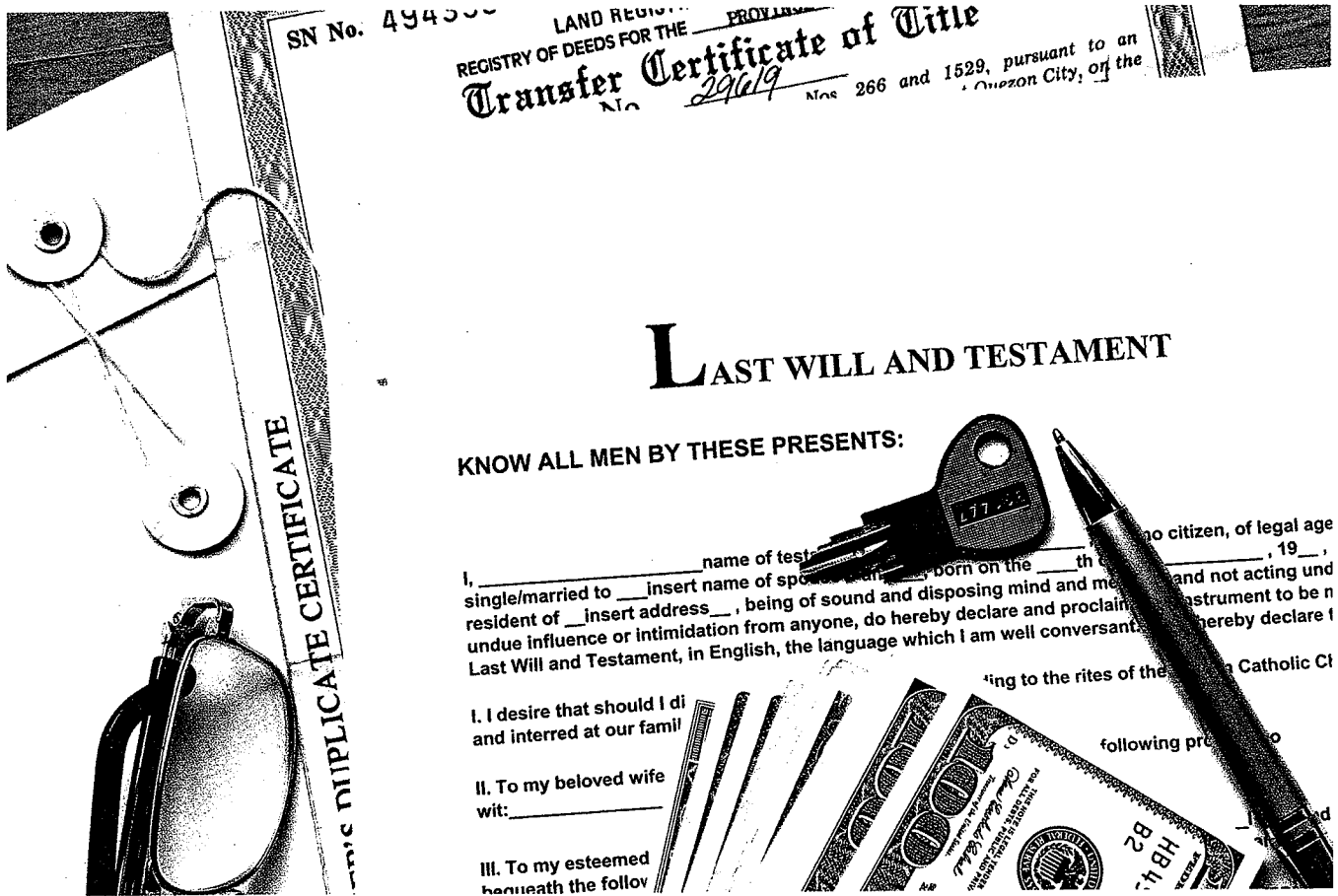




## INFORMATION FOR CLIENTS OF TEXAS ATTORNEYS

The information included in this column is for educational and informational purposes only. Please consult an attorney regarding specific legal questions.



# Texas Probate Passport

## A Guide to Probate and Estate Planning in Texas

### WHAT IS PROBATE?

Probate is the process of winding up the business affairs of a person who has passed away (the decedent). A court determines whether a testamentary document (a will or other document that transfers assets or property) is the true last and valid will of a decedent through the completion of certain requirements. Probate assets are assets controlled by the decedent's will and/or estate, including assets titled in the decedent's name without a designated beneficiary. The successful completion of probate distributes

probate assets among beneficiaries, creditors, and any others with a valid interest in a decedent's estate.

### CAN I PROBATE AN ESTATE WITHOUT A WILL?

Yes, but the process becomes more cumbersome. For example, a court will have to determine the decedent's heirs before designating an independent administrator. You should review all of your administration options with your attorney, because an alternative to probate may be a better option in your situation.

### WHAT IF I CANNOT FIND THE ORIGINAL WILL, BUT ONLY A COPY?

The Texas Probate Code does allow for a copy of the original will to be probated in the case of a lost will, but this is a difficult and expensive process. There is a presumption that the testator (the person who wrote the will) revoked it. Thus, a judge may not always admit a lost will to probate.

### DO I HAVE TO HAVE AN ATTORNEY REPRESENT ME?

Yes, in nearly every court. Most courts will not let you serve as an independent



executor (the person charged with carrying out the wishes of the decedent) without an attorney because the probate process affects many creditors and beneficiaries. The executor position is fiduciary, meaning the person has a duty to act for the benefit of others (i.e., the beneficiaries). Therefore, most courts require attorneys to represent executors. Check with the court that has jurisdiction over your case to verify its specific rule.

**HOW LONG DO I HAVE TO PROBATE AN ESTATE?**

Ordinarily, an application to probate a will must be filed within four years of the date of death of the decedent. Letters testamentary or letters of administration cannot be issued more than four years after the date of death of the decedent.

**DOES PROBATE MEAN I HAVE TO GO TO COURT?**

Yes, if you are named the executor of an estate. While most of the probate process can be handled by your attorney, an executor should: (1) attend a hearing before the judge in order to admit the will to probate and (2) take the oath of executor before the court or the court clerk. Both of these tasks can be accomplished in a single trip to the courthouse.

**I WAS TOLD THAT PROBATE IS EXPENSIVE AND TO AVOID IT. IS THAT TRUE?**

Generally, probate is not expensive in Texas. Legal fees for probate are typically

based on an hourly charge as opposed to a percentage of an estate or a flat rate. Texas permits "independent administration" of estates, which avoids costly probate court procedures. Be sure to discuss costs in your initial meeting with your attorney.

**IF THE DECEDENT HAD A LIVING TRUST THAT MEANS THAT THE ESTATE DOES NOT HAVE TO GO THROUGH PROBATE, RIGHT?**

It is possible, but unlikely, that a living trust allows one to avoid the probate process. Probate can be avoided if all of the estate's assets are in the trust. However, people seldom transfer all of their assets to the living trust. Assets outside the trust may still be subject to probate.

**IF I WANT MY CHILD, WHO IS NOT A RESIDENT OF TEXAS, TO BE MY EXECUTOR, WILL THAT BE A PROBLEM?**

Texas Probate Code specifically excludes a non-resident of Texas from qualifying to serve as estate executor. However, if the non-resident appoints a resident agent to accept service of process in all actions or proceedings with respect to the estate, and such appointment is on file with the court, then a non-resident can serve as an executor.

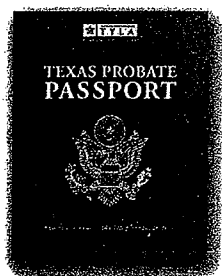
**WHAT ARE LETTERS TESTAMENTARY?**

Letters testamentary are official documents issued by the court authorizing the executor to act for the estate. They

are the proof to others that the court has qualified the executor.

**IF I DO NOT HAVE A WILL, DOES THE STATE GET ALL OF MY ASSETS?**

When a person dies without a will, probate courts in Texas distribute estate assets according to Texas' laws of intestacy. Your property will be distributed to your heirs according to a formula that the court applies based on specific rules of distribution to your surviving family members. If no heirs are available to inherit your assets, then your property may escheat (be transferred) to the State of Texas. The state must file a petition for escheat and successfully show that there are no heirs to the estate before it can properly claim the property for the state. ☼



The information in this article is excerpted from *Texas Probate Passport: A Guide to Probate and Estate Planning in Texas*, prepared as a public service by the Texas Young Lawyers Association with assistance from the State Bar Real Estate, Probate, and Trust Law Section. For a complete copy of *Texas Probate Passport*, visit [tyla.org](http://tyla.org); write Texas Young Lawyers Association, P.O. Box 12487, Austin, TX 78711-2487; or call (800) 204-2222, ext. 1529.