
The Challenges Surrounding Probate

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Our approach is to provide our clients with a short form questionnaire and welcome kit. We ask our clients to fill out this questionnaire and send it to us prior to the first consultation. This not only facilitates a more productive first meeting but helps our clients focus on the issues and decisions they must make in order to develop the most effective plan to meet their goals.

Challenges to the Validity of Wills

It's not uncommon for people to talk about their wills with family members and loved ones. But what happens when the terms of the will are drastically different from what the decedent (the deceased person) discussed? What if something just doesn't seem right about the will? You may be able to challenge (or contest) the validity of the will if you meet the two requirements in Texas.

Who Can Challenge a Will?

In Texas, you must be an interested person to challenge a will. This is a person or entity who has a right or claim to the decedent's estate, meaning they have something to gain from the estate. Spouses and heirs (people related to the decedent by blood, marriage, or adoption) are examples of interested persons. Anyone named in the will (also known as a beneficiary) is an interested person too.

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Ways to Challenge a Will's Validity

The second requirement to contest a will in Texas is to have a valid reason. Not getting what you want or think you deserve under the will doesn't count. Keep in mind, it can be difficult to provide the necessary evidence to prove your theory, but this is where an estate litigation attorney can help.

Forgery

The person creating a will (the testator) must write and sign the document in the presence of two or more witnesses. A potential challenge to a will is alleging forgery, which is a form of fraud. For example, you may argue that the testator's signature was forged. Often, a handwriting expert must testify and compare examples to support your claim. You may also need to collect statements from the witnesses who attested the testator's signature. Challenging a will on the basis of forgery is difficult and requires strong evidence.

Mental capacity/sound mind

A testator must have the requisite mental capacity to create a valid will. Testamentary capacity, or being of sound mind, means the testator can understand that they are creating a will, what assets and family members they have, and how their property will be distributed under the will. If there is evidence that the testator did not understand these things at the time of signing, the court will declare the will invalid.

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Multiple wills

It's common to revise and revoke a will over the course of a lifetime. Circumstances change that often warrant creating an entirely new will. However, if there are multiple wills or different versions of the same will, how do you know which one to follow? A court must intervene to determine which will the testator intended to be their last will and testament.

Undue influence

A testator must freely and willingly create their will. Undue influence occurs when the testator is coerced or under extreme pressure and executes a will or includes certain provisions that don't reflect the testator's intentions. For example, if the will disproportionately favors one person, especially a caregiver, this may be a red flag.

Witness testimony from friends, family, and others who knew the testator well is key to being successful with this type of claim.

Invalid execution

Each state has its own requirements to form a valid will. In Texas, a will must be written, signed, and witnessed. If there is evidence that the will doesn't meet all three requirements, the court may invalidate it.

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Allegations Surrounding Fiduciary Duties

Executors are under a fiduciary duty to act in the best interest of the estate and its beneficiaries. When the executor fails to fulfill their fiduciary responsibilities, the beneficiaries may take legal action against the executor and ask the court to remove them and appoint a new executor.

Understanding Fiduciary Duties in Probate Cases

An estate executor is a fiduciary because they are handling another person's estate. A fiduciary duty is a special relationship between individuals, where the fiduciary must fulfill their responsibilities in a way that benefits the person to whom they owe a duty. An executor's duties include the following:

- Notifying heirs, beneficiaries, and creditors;
- Identifying and protecting the decedent's assets;
- Paying the decedent's debts;
- Preparing and filing tax returns;
- Accounting for payments made to the estate;
- Completing pending legal action against the decedent; and
- Distributing remaining assets to the heirs and beneficiaries.

When carrying out these tasks, the executor has a fiduciary duty to act for the estate's benefit.

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What Is a Breach of Fiduciary Duty?

A breach of fiduciary duty occurs when the executor puts their own interests in front of those of the estate beneficiaries or fails to properly carry out their responsibilities. Examples of breach of fiduciary duty include:

- Mismanaging, hiding, or misappropriation of estate assets;
- Failing to notify heirs and beneficiaries of their interest in the estate;
- Using estate assets for their own benefit;
- Overcompensating themselves for their work;
- Failing to account for assets or money paid to the estate; and
- Failing to follow instructions in the decedent's will.

Estate beneficiaries may seek removal of the executor and sue them for their breach of fiduciary duty.

What Is Fiduciary Abuse?

Fiduciary abuse is when a person uses their position of trust in an illegal or unethical manner for personal gain. For example, if the executor is commingling personal funds with the estate's, concealing information, or acquiring funds through fraud or coercion, that is fiduciary abuse.

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Unwilling or Unavailable Executor

An executor has a legal obligation to carry out their duties at a high moral and ethical standard. It's a lot of responsibility, and not everyone wants to do it. However, when an executor is either unwilling or unable to serve, the beneficiaries' inheritance is held up. Fortunately, there are options.

Order of Preference for Whom the Court Will Appoint to Be Executor

Texas law has the following default order of preference for whom the court will appoint to be an executor:

- The person named in the will;
- The decedent's spouse, if surviving;
- The principal devisee of the decedent;
- Any devisee of the decedent;
- The decedent's next of kin;
- A creditor of the decedent;
- Any person of good character living in the county who applies to be executor;
- Any other person who is not disqualified from serving as executor; and
- Any appointed public probate administrator.

To clarify, a devisee is someone who receives property under the will, and they don't necessarily have to be related to the decedent.

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What If a Person Is Not Qualified to Serve As an Executor?

Being named in a will as the executor does not automatically qualify you to serve. Those disqualified from serving include an incapacitated person, a convicted felon, a corporation not authorized to act as a fiduciary, and a person unsuitable for the role as determined by the court. Out-of-state residents can serve as executor only if they meet certain qualifications. If the person named in the will is disqualified, the court will follow the order of preference listed above and select someone else.

What Happens If the Person Appointed in a Will Does Not Want to Be the Executor?

If the appointed person doesn't want to accept the role of executor, they don't have to. The court will choose another individual or entity based on the order of preference under the law.

Disputes Over the Value of the Estate

Having an accurate value of the decedent's estate is important for several reasons. First, a valuation determines the type of probate required for the estate. In Texas, estates with a value of \$75,000 may qualify for a simplified version of probate called a small estate affidavit. Second, the law requires an estate valuation. The executor must provide an accurate inventory and value of the decedent's assets. Third, asset values help determine the potential inheritance for heirs and beneficiaries. Fourth, estates above a certain value are subject to federal estate taxes.

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How to Determine the Value of Assets in an Estate

In general, you need to determine an asset's value as of the decedent's date of death. Some assets are easier to value than others. For example, the value of a checking account or shares of stock in a brokerage account can easily be found on an account statement. For tangible assets like a car or house, you can use resources like the Kelly Blue Book value or consult with a real estate agent about comparable home values. If the estate has an asset that's difficult to value, such as a piece of artwork or a private business interest, you may need the help of a professional appraiser.

What Assets are Included in Estate Probate Value?

In the world of probate, assets are divided into two categories: probate and non-probate. Probate assets are those solely in the name of the decedent. Only probate assets are included in the estate's value. Non-probate assets are assets with either a beneficiary designation or a joint owner. For example, IRA accounts, life insurance policies, pay-on-death (POD) accounts, and real property titled as joint tenants with rights of survivorship are all non-probate assets. These assets transfer automatically to the beneficiary or joint owner when the decedent dies without the need for probate.

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How Assets in Different States are Addressed

If going through probate once isn't bad enough, in some cases, you may have to do it again in another state. Two probate proceedings may be necessary if the decedent lived in one state but owned real estate in another. For example, if the decedent's primary home was in Texas, but their beach house was in Florida, Florida's law governs the distribution of the beach house. Real estate is subject to the laws of the state where it's located, not where the property owner lives.

What Is Ancillary Probate?

Ancillary probate is an additional probate proceeding in another state. When the executor initiates probate in the state where the decedent was living, that's known as domiciliary probate. If the decedent owned out-of-state real property solely in their name, the executor needs to open an ancillary probate in the state where the property is situated. Keep in mind, if the decedent owned real estate in multiple states, that means multiple ancillary probate proceedings (i.e., more paperwork, more costs, and more time).

How to Avoid an Ancillary Probate?

There are ways to avoid ancillary probate, but these options must be done by the decedent while still alive.

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Joint property

Co-owning property eliminates the need for ancillary probate. If the real estate is titled as joint tenants with rights of survivorship, the property automatically transfers to the joint owner without probate. For married couples, almost all property that they acquire during marriage is considered community property and owned equally by both spouses. With a community property survivorship agreement, the couple can agree that certain property transfers to the surviving spouse when the other spouse dies. This avoids probate.

Revocable living trust

Placing property into a revocable living trust eliminates the need for ancillary probate. With this type of trust, you still maintain control over the out-of-state property while you're alive. However, your executor won't have to go through probate in another state because the trust owns the property, not you.

Transfer on death deed

A transfer on death (TOD) deed is a type of deed that allows you to designate a beneficiary to receive the real property at your death. The beneficiary has no interest in the property during your lifetime. Once you pass away, however, the property automatically transfers to the beneficiary, eliminating the need for ancillary probate.

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Missing Assets

Estate executors must account for and properly manage every asset in the decedent's estate. There are instances when an asset goes missing—for example, an item may be misplaced while moving everything out of the decedent's home. But what can you do if you suspect the executor is mishandling the assets?

What to Do When the Deceased's Assets Go Missing

Missing assets can cause a whole host of issues, such as a drastic decrease in the value of the estate. If the estate beneficiaries are suspicious of the executor's actions, it's imperative to contact an estate litigation attorney to discuss taking legal action. The beneficiaries may have grounds to file a case alleging breach of fiduciary duty.

Dealing with Assets Found After Probate

If someone locates assets after probate is complete, it may be necessary to reopen the estate. The executor must recalculate the estate's value for estate tax purposes and to equally redistribute assets to the estate's beneficiaries.

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Conflict Among Family Members

Death and money changes people, whether anyone admits it or not. While probate is mostly a legal proceeding, it's also an emotional rollercoaster for those involved. An inheritance can completely change someone's life, so when an estate plan is ambiguous or completely unexpected, you may see a different side of people.

What Can Cause Conflict Among Family During Probate?

Misunderstandings between parents and children regarding inheritance

An off-hand comment by a parent can cause a child to expect a certain inheritance. When that doesn't happen, the child may take issue with what they're getting (or not getting) under the will. It's important to note that parents have no legal obligation to leave an inheritance for their adult children.

Conflicts over decedent's will

Suppose a parent tells their child they can have a specific family heirloom. When it comes time to carry out the terms of the parent's will and there's no provision about the coveted heirloom, an issue may be brewing. The child will likely be upset and feel entitled to that piece of property.

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Beneficiaries not properly named

When a beneficiary isn't properly named, the court looks at the testator's intent. For example, if the testator left his home to his only daughter, Anne Brown, but Anne now uses her married name, Anne Smith, the testator's intent is clear. Now, if he left his home to his "son," but failed to name which of his three sons, the probate court needs to intervene.

Ambiguous wording in a trust or will

The probate court deciphers any unclear language in the decedent's trust or will. It's not up to the siblings to decide what mom and dad "actually meant" or "would have wanted."

Disagreements over selling the family home

Conflicts can quickly arise when one sibling wants to keep their parent's home in the family but the other siblings just want to cash out on the property.

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Resolving disputes during probate

Although each situation and family dynamic is unique, there are some methods that can help resolve conflicts between families during probate.

First, it's important that everyone understands the law governing probate and what rights they have. Simply educating family members about the process can help alleviate issues. If there are still legitimate concerns, the next option is for each affected family member to hire their own attorney to negotiate. The goal is to come up with a resolution that works for everyone.

If negotiations are too informal, mediation may be necessary. Mediation provides structure and a final resolution, but it isn't as formal (or costly or lengthy) as litigation. Keep in mind that any estate litigation costs are paid out of the estate. This often incentivizes families to resolve their issues outside of court. However, if all else fails, probate litigation is the last resort. Depending on the issue, the family members may choose to contest the will or petition to remove the executor.

Contact the Law Offices of Kyle Robbins, PLLC

If you are looking for assistance with the challenges surrounding probate, reach out to our team at the Law Offices of Kyle Robbins, PLLC. We can answer your probate questions and prepare you for the process. Contact us today so we can discuss how we can best serve you.