

PRESENTED AT
ESTATE PLANNING, GUARDIANSHIP, AND
ELDER LAW CONFERENCE

August 3-4, 2017
Galveston, Texas

TEN PESKY PROBATE PROBLEMS

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INTRODUCTION

While the area of probate and estates is generally a landmine for the unwary, there are particular “pesky” issues which seem to crop up regularly. This article attempts to identify and discuss ten of these “pesky” issues and how the practitioner might address or resolve them.

PESKY PROBLEM #1: ATTEMPTING TO OBTAIN POSSESSION OF ESTATE ASSETS

Upon his appointment and qualification, a personal representative of an estate (administrator or executor, independent or dependent) has a right to possession of all assets belonging to the Decedent's estate. Tex. Estates Code §101.003 (West 2017). In fact, the personal representative is required to "collect and take possession of the estate's personal property, record books, title papers, and other business papers". Tex. Estates Code §351.102 (West 2017). With respect to property jointly owned by the Decedent with another party, the personal representative of the estate is entitled to possession of the property in common with the other part owner or owners in the same manner as other owners in common or joint owners are entitled to possession of the property. Tex. Estates Code §351.103 (West 2017). It often occurs that family members (and sometimes non-family members) rush to the Decedent's house after (or before) the funeral and begin dividing up the Decedent's property. Although title to the Decedent's assets vests in the rightful beneficiaries (if there is a will) or heirs (if the decedent died intestate), their right to possess those assets is subject to the right of the personal representative to possess the assets during the period of the estate administration. Tex. Estates Code §§101.001, 101.003 (West 2017). In addition to the instance described above when the Decedent's personal property is divided pre-maturely, there are instances when there is an heir or often a third party in possession of the Decedent's property who refuses to turn over possession of the property or relinquish control.

In light of the personal representative's duty to take possession of the personal property belonging to the estate, the personal representative is generally required to take some affirmative action to get possession of the property. If the person has no right to the property, a suit for conversion is one possibility. However, a lawsuit is not really required for the personal representative to exercise his statutory right of possession of estate property. *See In re Estate of Hutchins*, 391 S.W.3d 578, 588 (Tex. App.- Dallas 2012, no pet.). A better option is for the personal representative to file a "motion to show cause" in the court which is exercising jurisdiction over the estate. A show cause order is a creature of the common law. *See Texas Mexican Ry. Co. V. Locke*, 63 Tex. 623, 1885 WL 7097 (1885); *Turner v. Turner*, 576 S.W.2d 452 (Tex. App. - Houston [1st Dist.] 1978); *Green v. Green*, 424 S.W.2d 479 (Tex. Civ. App. - Tyler 1968, no writ). The motion requests the court enter a show cause order *ex parte*, requiring the party in possession of the property to appear before the court at a date and time certain to show cause why he should not be required to relinquish possession of the property to

the personal representative. The order is then served by constable or process server upon the party in possession. Often, the filing of the motion and service of the show cause order alone will bring the issue to a head. The party in possession often contacts the representative or his attorney and works out the details of turning over possession of the property. Unfortunately, many parties in possession dig in and appear in court to attempt to justify their possession of the property. However, if there is evidence the decedent owned the property at the time of his death and did not gift the property or lease the property to the person, the court will grant a "turnover order" which will then require the party to turn over possession of the property to the personal representative by a date certain. Note that this is not the same "turnover over" sought by a judgment creditor pursuant to Section 31.002 of the Texas Civil Practice and Remedies Code. *See In re Estate of Hutchins* , 391 S.W.3d 578, 588 (Tex. App.- Dallas 2012, no pet.).

Taking possession of real estate requires the personal representative to consider other issues. If there is surviving spouse or minor child who has chosen to exercise the probate homestead right over the property, then that person is entitled to possession of the property regardless of the administration of the estate. Tex. Estates Code §353.051(West 2017)(homestead shall be set aside for the use and benefit of the surviving spouse and minor children); Tex. Estates Code. §403.001(same rule made applicable to independent executors). Texas does not require designation of a probate homestead; it arises automatically. *Blake v. Fuller*, 184 S.W. 2d 148 (Tex. Civ. App.-Dallas 1944, no writ); *Good v. Good*, 293 S.W. 621 (Tex. Civ. App. Waco 1927, no writ) (homestead rights vests immediately on death and continues until abandoned) . The homestead rights and the respective interests of the surviving spouse and children of a decedent are the same whether the homestead was the decedent's separate property or was the community property of the surviving spouse and the decedent. Tex. Estates Code §102.002 (West 2017). The homestead of a decedent who dies leaving a surviving spouse descends and vests on the decedent's death in the same manner as other real property of the decedent and is governed by the same laws of descent and distribution. Tex. Estates Code §102.003 (West 2017). The probate homestead forms no part of the estate to be administered by the probate court, and an attempted sale by the probate court of the homestead for any purpose other than permitted by the Constitution is void. *Thompson v. Thompson*, 236 S.W. 2d 779, 788 (Tex. 1951). However, the probate court has jurisdiction to determine a surviving spouse's homestead rights despite the appointment of an independent executor. *Womack v. Redden*, 846 S.W. 2d 5, 9 (Tex. App.- Texarkana 1992, writ denied). The homestead right is not merely during the widowhood of the surviving spouse, but so long as she might elect to use or occupy the same as the homestead. Tex. Const. Art. 16, §52 (West 2017). Property that has been designated as a homestead will only lose that character through abandonment, death, or alienation. *Majeski v. Estate of Majeski*, 163 S.W.3d 102, 107 (Tex. App.-Austin 2005, no pet.).

However, there is often real estate, such as rental properties, which is not protected by the probate homestead right. The personal representative is entitled to possession of such properties unless the person in possession has a legal right of possession. *Donald v. Bankers Life Co.*, 133 S.W.2d 171, 174 (Tex. Civ. App.- Dallas 1939, writ dismissed) (an administrator's right to possession of the estate of a deceased as it existed at time of death does not authorize

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First appeared as part of the conference materials for the
19th Annual Estate Planning, Guardianship and Elder Law Conference session
"10 Pesky Probate Problems"