

**PRESENTED AT**

22<sup>nd</sup> Annual Estate Planning, Guardianship, and Elder Law Conference

July 30-31, 2020

Via Webcast

**Probate Avoidance:  
Non-Testamentary Planning Choices**

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# Probate Avoidance: Non-Testamentary Planning Choices

Paul Premack, CELA

## | IS PROBATE A DIRTY WORD?

We all know that probate has a terrible reputation. Anecdotally, who hasn't been told by a client or potential client that their main goal is to avoid probate court? We can explain the purposes behind the law, the protections provided by probate, and the ways in which we can simplify probate. We can describe Independent Probate in Texas. They still want to find a way to keep their families out of court. And who can blame them?

As attorneys we have access to a variety of tools when pre-planning a client's estate. Probate of a Will or of an intestate estate is the traditional old-school approach to settling an estate. Alternatives to probate are less traditional, more cutting edge, and sometimes less lucrative for the practitioner. But our focus needs to be on finding the most effective solution for each individual to whom we are providing legal services. Sometimes the best answer to an individual's overriding goals is probate, and sometimes the best answer to those goals are non-testamentary planning choices.

When does a Will need to be probated, and when can you skip the whole process? The answer depends on what assets and debts exist, and how assets are legally titled. For instance, if the person who died had no debts and owned only a checking account and a CD that were both held jointly with Rights of Survivorship then probate is probably not necessary. The surviving account holder can simply claim ownership by presenting a death certificate at the institution where the account or the CD is held.

On the other hand, if the person who died was sole owner of a home, was sole owner of a bank account or stock certificates, wants a complex distribution of assets, or desires to impose restrictions on the heirs – which is not too unusual a scenario – then probate becomes more likely.

Thus, the need for probate depends primarily on these factors:

- The estate's complexity in terms of debt and obligations of the decedent.

- What the estate owns. Assets that rely heavily on paperwork to show ownership—like stocks, bonds, real estate, and bank accounts—tend to force an estate into probate without careful advance planning. Financial institutions desire to be protected from certain liabilities, which they can get if they deal with a duly appointed Executor.
- The heirs’ desire for clear and unquestionable title to assets.
- Requirements in the plan itself, for instance, creation of a testamentary trust for minors, for a disabled person, or for tax purposes.
- Efforts of the Testator at avoiding probate by preplanning.

## | TWO POST-DEATH PROBATE ALTERNATIVES

### || *Small Estate Affidavit*

A Small Estate Affidavit may be used when someone with a modest estate dies intestate. It is limited to situations where 1) the estate is valued under \$75,000 other than a homestead and exempt property, and 2) the estate owns no real estate other than a homestead. Since no Will exists, the laws of descent and distribution determine the identity of the heirs. Also, at least 30 days must pass since the date of death before the Affidavit can be filed in court. Some probate courts, like those in Bexar County, impose by local rule a specific form which is the only style the court will find acceptable.

This process is available for transferring homestead ownership but cannot be used to transfer title to any non-homestead real estate. If other land is involved, then a Dependent Probate may be required. Also, the homestead may only be passed to the surviving spouse or minor children. If there are other heirs (like adult children) then a Small Estate Affidavit may not transfer title to the homestead. As of 2015 the legislature said title could only pass to someone entitled to the family exemption, and that does not include adult children<sup>1</sup>.

The Small Estate Affidavit and approving Order identify which assets the heirs are entitled to receive and to authorize banks, transfer agents, and other persons who hold assets of the estate to deliver those assets to the heirs.

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<sup>1</sup> Tex. Estates Code § 205.009

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## Title search: Probate Avoidance: Non-Testamentary Planning Choice

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First appeared as part of the conference materials for the 22<sup>nd</sup> Annual Estate Planning, Guardianship and Elder Law Conference session "Probate Avoidance - Non-Testamentary Planning Choice"