

---

# Basics of Texas Estate Planning and Probate Law

---

Claiborne L. Cowan  
Cowan & Associates, PLLC  
1403 West 6<sup>th</sup> Street  
Austin, Texas 78703  
(512) 476-8591  
[ccowan@cowanlegal.com](mailto:ccowan@cowanlegal.com)

---

# Basic Estate Planning Documents

- Last Will and Testament
  - Beneficiary Designations
  - Revocable Living Trust
  - Durable Power of Attorney
  - Medical Power of Attorney
  - Directive to Physician
  - Appointment of Guardian for Minor Children
-

---

# Last Will and Testament

## ■ Terminology

- Testator = the individual who signs the Will
  - Decedent = Testator after death
  - Beneficiary = the individual or charity which receives property under the Will
  - Executor = the person or financial institution named in the Will to administer the decedent's estate
  - Trustee = person or financial institution in charge of administering a trust
    - Trust may be created by Will or by a separate document
-

---

# Last Will and Testament

- Most customary way to leave property to beneficiaries
  - Only effective at death
  - Can be revoked or amended during lifetime
  - Texas requirements:
    - Wholly written in the decedent's handwriting and signed by decedent, or
    - Typewritten and signed by decedent and two attesting witnesses
    - Decedent should have capacity and free of duress and undue influence
-

---

# Last Will and Testament

- What should be in a well prepared Will?
    - Revoke all prior Wills
    - Contain date Will is signed
    - Clearly state gifts
    - Address what happens if a beneficiary does not survive the testator
    - Name an executor and one or two alternates
-

---

# Last Will and Testament

- What should be in a well prepared Will?
    - Address what happens if a beneficiary is a minor or incapacitated
    - Create trusts for beneficiaries where appropriate
      - Lifetime trusts for beneficiaries have become very popular
      - Trusts can protect property from taxes, creditors, spouses of beneficiaries
      - Beneficiary can have control over trust management and distributions
      - Beneficiary can direct where trust property goes upon beneficiary's death by use of a power of appointment
-

---

# Last Will and Testament

- What should be in a Texas Will?
    - Will should request an independent administration
      - Allows executor to perform almost all actions without any court involvement
    - Will should contain a self-proving affidavit signed by testator and witnesses
      - Eliminates any requirement that the witnesses appear at hearing when Will is admitted to probate
-

---

# Last Will and Testament

- What happens when testator dies?
    - Will is admitted to probate
    - If individual dies with a Will, probate is generally the process of
      - (1) a court's declaring that a document is the valid last will and testament,
      - (2) a court's appointment of a personal representative of the estate, and
      - (3) the subsequent administration of the estate by the personal representative.
-



---

# Probate

- Probate is simplified if an individual dies with a well prepared Texas Will (testate estate)
    - Main steps include:
      - Admitting Will to probate
      - Notifying beneficiaries that Will has been admitted to probate
      - Notifying creditors about decedent's death and that administration has begun
      - Collecting assets of the decedent
      - Paying debts and expenses and filing tax returns
      - Distributing property to beneficiaries
-

---

# Probate

- What if a person dies without having signed a Will (intestate estate)
    - All of the steps for a testate estate, plus
      - The heirs of the decedent must be determined
        - Court will appoint an attorney ad litem to help identify heirs
        - Publish a notice in local newspaper to notify potential heirs
      - Dependent administration is general rule (but independent administration may still be possible)
        - Administrator must get court permission before disbursing money or selling assets
        - Administrator must file and obtain court approval of an accounting
-

# Probate

- Who receives property in an intestate estate?
  - If married:
    - If (i) no children, or (ii) all children of marriage, then all **community property** goes to surviving spouse
    - Separate property:
      - If decedent has descendants, surviving spouse receives  $1/3^{\text{rd}}$  of personal property and descendants receive rest
        - Surviving spouse receives life estate in  $1/3^{\text{rd}}$  of real estate and descendants receive rest
      - If decedent has no descendants, then the surviving spouse receives all personal property
        - Surviving spouse receives  $1/2$  of the real property and other  $1/2$  passes as if there was no surviving spouse

---

# Probate

- Who receives property in an intestate estate?
    - If not married
      - Property passes to descendants
      - If no descendants, then to father and mother in equal shares
        - If only one parent survives, then 1/2 to surviving parent and 1/2 to siblings (or their descendants)
        - If neither parent survives, then to siblings (or their descendants)
        - If no surviving parents or descendants, then to more distant relatives
      - No escheat to State of Texas (theoretically)
-

---

# Non-Probate Assets

- Are all of the decedent's assets subject to probate process?
    - Probate does not control “non-probate” assets
    - Major types of “non-probate” assets include:
      1. Beneficiary designations,
      2. JTWRROS,
      3. Deeds with life estates,
      4. Another type of contractual arrangement, and
      5. Property owned in trust
-

---

# Non-Probate Assets

- Beneficiary Designations generally override provisions in the Will
    - Common beneficiary designated assets include life insurance and retirement accounts
      - Many times, these are the largest assets at death
      - Can designate individuals as beneficiary
      - Or, sometimes preferable to name a trustee as a beneficiary
-

---

# Non-Probate Assets

- Revocable Living Trust
    - Also known as a “Will substitute”
    - During decedent’s lifetime, trust is amendable and revocable
    - Not as popular in Texas because of progressive Texas Probate Code
    - Avoids probate if all of decedent’s property is transferred to trustee during decedent’s lifetime
    - Trust terms control who receives property upon decedent’s death
    - May be appropriate for out-of-state real property and for other situations
-

---

# Who needs a Will?

- Own real property
  - Have children, or possibility of minor/incapacitated beneficiaries
  - Desire to give property to someone other than intestate heir or find the intestacy statutes confusing
  - Blended families
  - Want to choose your executor
  - Possibility of family disagreements
  - Desire to protect property from beneficiaries' creditors and/or spouses
-



---

# Durable Power of Attorney

- Another very important document
  - Appoints an individual (known as an “agent” or “attorney-in-fact”) to make financial decisions for the principal
  - Usually effective immediately, but has most value if principal is incapacitated
    - Helps avoid a complex and expensive guardianship
  - POA should clearly designate an agent and one or two alternate agents
-

---

# Medical Power of Attorney

- Statutory document (created by Texas legislature)
  - Appoints an agent to make medical decisions on behalf of principal
  - Agent's authority is dependent upon ability of principal to make and communicate medical decisions
  - Document should clearly appoint a primary agent for medical decisions and one or two alternates
-

---

# Directive to Physician

- Another document created by the Texas legislature
  - Principal selects whether he or she would like life sustaining treatment in two different scenarios
    - Terminal condition – expected to die within 6 months
    - Irreversible condition – may live longer in six months but condition is still critical (e.g., major organ failure and cannot communicate)
  - Overrides medical power of attorney
-

---

# Appointment of Guardian for Minor Children

- Allows parents to designate who should and should not serve as guardian for minor children
  - If trust is set up in Will for the benefit of children, trustee will be in charge of property
    - Guardian's only job would be custody of the children
-