PLAN, PROTECT, & PRESERVE

Info On Wills, Trusts, Probate, & Real Estate
That May Be Useful For Every Texas Resident

ROY NEAL LINNARTZ LAW OFFICE OF PLLC | Roy Neal Linnartz, Esq.

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FOREWORD

I have worked with many clients who have done their planning and winding up their estates is a simple task for the family. I have also worked with many clients who have family who had not planned very well or not at all which left them with a mess to clean up. Additionally, I have worked with clients who never did probate because they didn't realize they needed to do so and now they are left with titling issues to the property they thought was theirs. Having seen the good, the bad, and the ugly when it comes to planning or the lack thereof, I wanted to provide some information that I thought would have been useful to those clients who I have worked with. I hope you find the information in this book useful and educational.

— Neal

DEDICATION

I want to thank my parents, Roy and Faye Linnartz, for always encouraging me to get an education. Without their love, support, and encouragement, I would not be where I am today. I would also like to thank all the attorneys and judges who have been mentors or supporters in my practice of law. Often times, the legal field is adversarial but I have had the good fortune of working with attorneys and judges who have taught me, guided me, and mentored me into being a better attorney.

DISCLAIMER

This publication is intended to be used for educational purposes only. No legal advice is being given, and no attorney-client relationship is intended to be created by reading this material. The author assumes no liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal or any other advice, please consult an experienced attorney or the appropriate expert who is aware of the specific facts of your case and is knowledgeable of the law in your jurisdiction.

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TESTIMONIALS

"I am from outside the state and had some civil issues with family. I had looked online for someone who seemed well-educated in family law and found Mr. Linnartz. I am glad to say that he went above and beyond doing what he could and was most helpful. He even takes the time to listen, which I never expected from a lawyer. So I would definitely recommend him for legal help and advice if needed in the Guadalupe County area." ***— John N.***

****

"Neal Linnartz is an honest and trustworthy person and lawyer. I recommend him to anyone looking for great representation."

— Sheryl R.

****

"Neal recently helped us with our will. Very professional and answered all our questions." ***— Ron H.***

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About The Author

Roy "Neal" Linnartz was born and raised in New Braunfels, Texas. He graduated from Canyon High School, received his Bachelor of Science from Texas A&M University and his Juris Doctorate from St. Mary's University School of Law. Neal practices in Estate Planning, Wills, Trusts, Powers of Attorney, Real Estate, Probate, Guardianship, and Business Transaction Law. When he is not working, Neal enjoys brewing beer and serving his community through roles in many organizations and committees.

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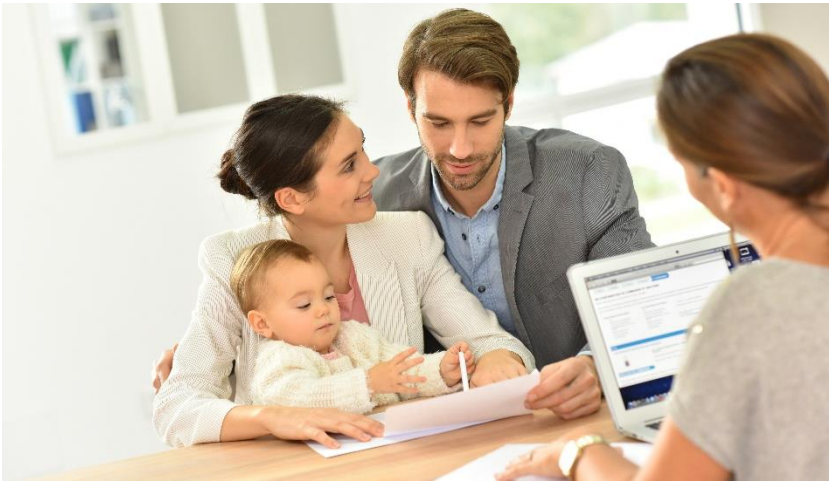
CHAPTER 1

ESTATE PLANNING



An estate plan is a way of simplifying things in the event that you're incapacitated or you're deceased. If you don't have a plan, the state has a default plan for you. Of course, falling back on the default plan can be lengthy and expensive because they've put a lot of protections in place to make sure that no one is forgotten. Estate planning allows your wishes to be fulfilled rather than enacting some default plan assigned by the state, in addition to saving your family time and money.

Neal's Experience In Estate Planning Law

Law is a second career for me and when I first started practicing, I dabbled in a little bit of everything and particularly enjoyed this area. I've narrowed my practice to this being one of the few areas that I practice in. I enjoy it because it's fulfilling in that I'm helping people accomplish something important. It's not typically an adversarial situation, like other areas of the law. A good percentage of the time it's doing things that are positive rather than fighting. It's rewarding to be able to help people prepare a plan and to help people get through probate and move on with their lives after someone has passed.

What Sets the Law Office of Roy Neal Linnartz Apart In Handling Estate Planning And Probate Matters?

Estate planning is one of the very few areas of law that we practice. We are experienced and have been handling these cases for quite some time. We stay up to date with statutes and case law. I'm not doing this as a general practitioner, I'm doing it as a niche area of practice.

CHAPTER 2

WHY DO PEOPLE AVOID OR DELAY CREATING AN ESTATE PLAN?

No one wants to talk about death or incapacity. It's not a fun subject to think about. We find that a good number of people come to us because either they're planning the birth or adoption of a child, there's been a death in the family, there's been a divorce, they are planning to travel, or there's been some other prompting factor. Some people just realize that it's time to start planning because it's the adult thing to do.

In General, People Think They Don't Have Enough Assets to Warrant Planning

Many times, people just don't understand how estate plans work. People assume that when they pass, their property and possessions will automatically go to either a spouse or to their children. Often, we find that the spouse or children, when they try to sell or transfer that property, run into issues where they had no idea that something more needed to be done upon someone's passing.

When parents are deceased and there are multiple children in question, sometimes the children no longer get along or some of them have passed. They are left with a very complicated situation with many heirs involved. At that point, the property may be so diluted that it becomes cost-prohibitive to clear up the title because if they don't all cooperate and agree, going to court takes so much time and expense that it eats up the value of the property. Many times, people don't understand the importance of making a plan so that what they want to be done actually happens.

What Happens If Someone Passes Away Without Having An Estate Plan Or A Will In Place?

If you have a will, the will gives you control. You get to determine what actually happens. The legislature wants to protect heirs. If you don't have a will, there has to be a determination as to who the heirs are, in addition to appointing someone to be the administrator of the estate. Without the agreement of all the heirs, it requires an administration, which is lengthy and expensive because it involves the court. Having an estate plan drastically reduces the time and expense it takes for the beneficiaries or heirs to clear up the estate and ensures that when you're gone, what you want to happen will happen. Having an estate plan is not for the person making it, it is for the people left behind dealing with it.

CHAPTER 3

PARTIES INVOLVED IN AN ESTATE PLAN

In regards to a will, you've got the person making the will, who is the testator, and the beneficiaries, who are going to benefit from that will. Oftentimes, we'll include contingent trust provisions in the will, so there might be trustees involved. If there are minor children, we usually designate guardians. In incapacity planning, there are powers of attorney to handle financial and medical decisions. Sometimes, someone may foresee the need for

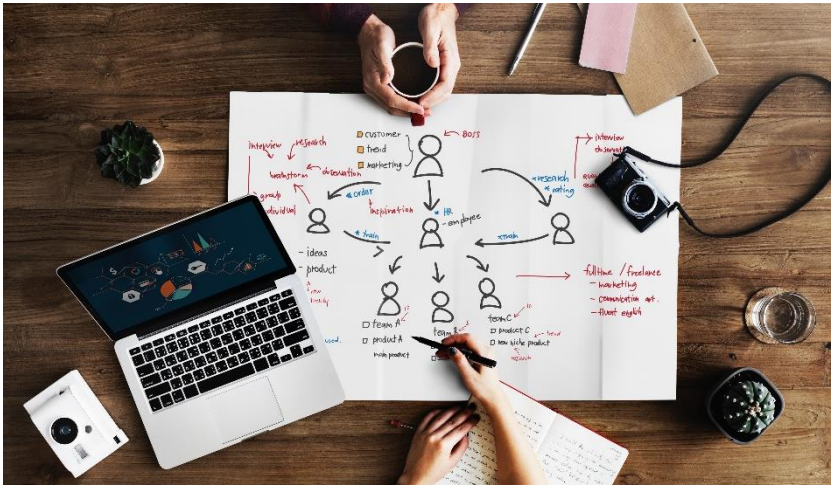
adult guardianship. In that case, there can be designations of guardianship made as well.

Do Most People Plan For Mental Incapacity When Setting Up Their Estate Plan?

Mental incapacity is part of the conversation we have with clients. We typically would prepare powers of attorney for that scenario. The court can certainly authorize a guardianship over someone if they're incapacitated, but the less restrictive alternative is having powers of attorney. This simply gives someone the authority to handle things on behalf of the incapacitated person, whether it be handling their finances or making medical decisions. We can also plan for future incapacity by making guardianship declarations, mental health declarations, and supported decision-making agreements. As part of our conversation and work with clients, it is important that we try to address their concerns for any potential future mental incapacity of any level.

CHAPTER 4

BASIC ITEMS IN AN ESTATE PLAN



In a basic estate plan, there would be a will, which would be a designation of beneficiaries who are going to receive property from the decedent. It could also have a contingent trust or a "testamentary trust" built into the will for minors or other family members to whom they don't want to make outright gifts. It could include guardian designations and things like funeral arrangements or other wishes. The will would also appoint an executor to administer the estate, paying

creditors, collecting debts owed to the estate, and making disbursements to the beneficiaries.

Also necessary would be a durable power of attorney, which would designate an agent to handle financial transactions on behalf of the person making the estate plan. There would also be a medical power of attorney to designate someone to make medical decisions if the person making the estate plan should become physically or mentally unable to make those decisions for themselves.

We also prepare a HIPAA release naming the people in the medical power of attorney to authorize them to receive medical information. Many times, people want a living will or advanced directives designating what they want if they're incapacitated and they have an injury or illness that would render them unable to make the end of life decisions.

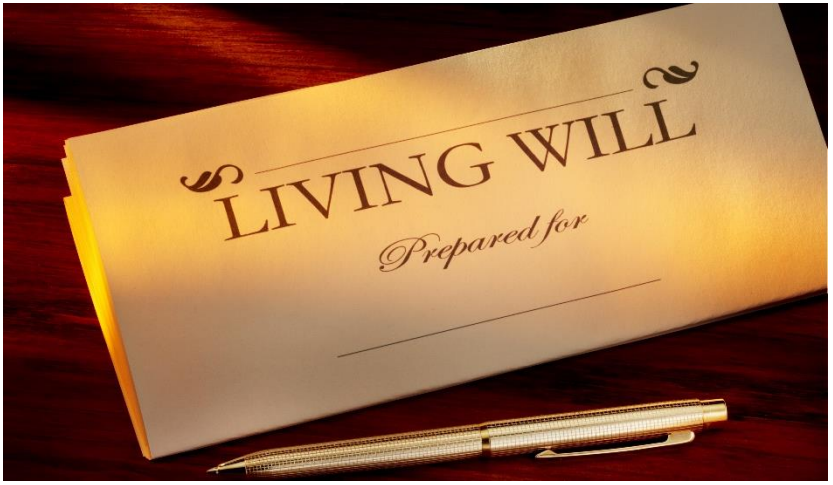
How Often And Why Should We Give Our Estate Plan A Check-Up?

I recommend to my clients that anytime there's a change in their lives, like a birth or adoption, a death, or a divorce, they take a look at their estate planning. Also, it's

worth reviewing every five years, even if nothing has changed. Take a look at your documents to be sure that everything is accounted for, especially the life changes that have taken place since the last update.

CHAPTER 5

WHAT IS A WILL?



A will is a document whereby the testator can name beneficiaries to receive property upon their passing. It can also define other roles, such as the executor, who would be the person to wind up the estate. It could designate guardians for minor children and provide for the care of pets. If there is a contingent trust named within the will, then it can name trustees and can also provide for alternates in all of those roles.

Benefits And Limitations Of A Will In Estate Planning

The benefits of a will are that it gives the testator control over the fate of their estate. That testator can define who gets what and how it's disposed of. It also simplifies the process for the executor. It would take more time and more expense to probate the estate without a will as compared to when there is a valid will.

Some of the limitations are apparent when people download wills from the internet and try to create their own documents. Whether they have the proper language, are not drafted properly, or they have intended one thing and inadvertently written another, we often see unintended consequences from poorly drafted wills.

Do I Even Need A Will If I Already Have Other Estate Planning Tools In Place?

There are certain estates that, with the proper planning, can be set up to not require probate. With some proper planning, if there's any real property, it could be set up, through a transfer on death deed, to pass to someone outside of probate. Financial accounts can be set up with

beneficiary designations. Life insurance and retirement plans can be set up with beneficiary designations. Bank accounts can be set up with either the right of survivorship or payable on death benefits. We usually still recommend having a will, just in case there are any assets that are overlooked when someone is attempting to establish an estate that completely bypasses probate.

Difference Between A Will And A Trust

Wills are primarily to designate beneficiaries, the disposition of assets upon passing, and the roles of people such as executor, guardian, or trustee.

There are many different types of trusts and they're built for a specific purpose. One of the most common trusts would be a living trust that is set up to avoid probate. In many other states, these are used because probate is much more complicated.

There are trusts dealing with large estates to minimize the estate tax paid. There are trusts set up for receiving government benefits for people who have special needs. There are trusts to satisfy many different purposes

in an estate plan. Occasionally there's a need for a trust, but, by and large, much of the population in Texas doesn't really need a trust. We address that on a case by case basis.

Is A Will Ever Enough As An Effective Estate Planning Measure On Its Own?

A will alone is not enough. We would recommend having at least powers of attorney to go with the will. People tend to think only of death, and not what will happen if they are incapacitated. Many times, it's even more important to deal with the things that may arise while you're still alive. Powers of attorney will allow you to designate someone who can take care of those things for you, during your lifetime, if you are unable to.

CHAPTER 6

WHAT ACTUALLY IS A TRUST?

A trust is not a contract. It's not an entity. It's an arrangement with three different roles. You have the grantor, or settlor, who creates the trust. Then, you have the trustee, who manages the trust. Next, there's the beneficiary of the trust, who benefits from the trust itself. The same person or persons can serve in multiple roles, sometimes being in all three of those roles. A spouse could be the grantor, the trustee during their lifetime so long as they have mental capacity, and the beneficiary as well.

Benefits And Drawbacks Associated With Using Trusts

One benefit of a trust is that it can help you avoid probate if all assets are held in the trust. Trusts do have more flexibility than a will. If someone wants to put conditions on the disposition of assets, the trust would allow more flexibility for that sort of thing. Trusts are a little more expensive to set up initially than just a will and they do require a bit more work. It's an abstract concept for most people to own their property in a trust and manage it for their own benefit, rather than just owning it.

Components That Constitute A Strong And Effective Trust

A trust must assign all three roles: a grantor, or "settlor", who creates the trust, a trustee who manages the trust, and beneficiaries who benefit from the trust. The trust has to be funded. We caution clients about the ads in the newspaper or mailers, offering a free steak dinner if you'll come to learn about how to avoid probate. They will often sell you fill in the blank trust document that is not set

up for your circumstances and will never help you actually fund the trust. Often you get a worthless pile of paper. If it never has defined roles or is never funded, the document never becomes effective.

CHAPTER 7

DIFFERENT TYPES OF TRUSTS

There are many different types of trusts. Most people would not need more than one trust but you could need more than one, depending on what you're trying to accomplish. You could benefit from having more than one type of trust, or you could include provisions for multiple things in a single trust. There's no cookie-cutter-one-size-fits-all trust. Each trust is prepared for a specific purpose.

What Does Irrevocable Mean When Referring To A Trust?

If a trust is irrevocable, it usually means that it cannot be changed or revoked. A typical trust is revocable, which means that if someone wants to make changes to it or if they want to do away with the trust, they can do so. If they fund an irrevocable trust, they're giving up control. They generally cannot make changes or revoke that trust. Typically, an irrevocable trust is used for a specific purpose such as qualifying for government benefits, shielding assets from creditors, or minimizing estate tax. This type of trust is not recommended for just avoiding probate.

Can A Trust Avoid Probate?

A trust can avoid probate, but most the time there's not a necessity to avoid probate in Texas, with a valid will that appoints an executor to serve independently. To set up a trust merely to avoid probate would be an additional expense and would have to be managed. Most people struggle with the concept of trust, in that all their assets are owned by the trust and they are serving a role as a trustee and benefiting from their trust. We often see people go out and purchase real property in their own names after they've formed their trust.

At that point, if something happens, they would need a pour-over will and we'd still have to do probate on the will to pour those assets into the trust upon their passing.

What Is Involved In Trust Administration? How Does That Compare With Probate?

Probate usually takes about three to six months, assuming there's a valid will. Upon someone's passing, the trust will say what happens next. After the grantor dies, the trust would define exactly what happens and would authorize the trustee to do as instructed in the trust, whereas probate is asking the court to acknowledge the will and to appoint the executor. Then, the executor would do what the will says, after being acknowledged and appointed by the court.

How Long Does The Initial Trust Administration Generally Take?

If trust says that assets are to be distributed, they can be distributed immediately. If assets are to be held, it could be for many years. Trust administration depends on what's in the trust, how the trust is written, and what instructions are in the trust.

CHAPTER 8

WHAT IS PROBATE?

Probate is the legal process of wrapping up an estate. It is getting the court to authorize someone to serve as the executor and to liquidating the estate. If there is a will, it's getting the court to acknowledge that the will is valid, to acknowledge the executor named in the will, and to acknowledge the powers of that executor for the will. Liquidation of the estate would include paying any bills of the decedent, collecting any money that's owed to the decedent, and then following the instructions for dispersal of assets that the decedent had in their will.

Without a will, probate would be asking the court to determine who the heirs are. If there is no will, there are no designated beneficiaries. If the court doesn't know who these heirs are, then the Texas Estates Code defines who the heirs are. The court would have to have a determination whereby the applicant would define who they think the heirs are. The court would appoint a third party attorney, called an attorney ad litem, to investigate the family and the affairs of the family to determine and report back to the court who those heirs are.

Then, there'd be a second proceeding to appoint someone to be the administrator of the estate. If all the heirs can agree that the administrator should serve independently, then the court can authorize that administrator to do so. If any heir disagrees, the court would order a dependent administration and the court would need to approve anything that the administrator does before any property is sold, disposed of, or any bills are paid. The court would have oversight on each step, which adds time and expense to the probate process.

What Type Of Assistance Do You Provide To Clients Going Through The Probate Process?

We generally have an initial meeting to discuss the affairs of the decedent: what assets they have, what liabilities they have, and whether they had a will or not. Once we gather the initial information, we would prepare the probate pleadings and file them with the court. These would be the applications to probate the estate, whether they are to probate the will or to determine the heirs and appoint an administrator. We would answer questions for whoever our client is on what's going to happen in the process. When the case is set for the court, we would go with them and present the evidence to the court on their behalf and introduce any testimony necessary for the court to make a decision. We would also coordinate the preparation and signing of the necessary paperwork as well as notary service when required.

If there is no will, then we would coordinate getting the applicant's signature and submitting the proper paperwork to get the heirship determined and work with the attorney ad litem to determine those heirs. Whether they get letters testamentary or letters administration, we help them

with filing any necessary notices to creditors, publishing the notice to unknown creditors in the newspaper, and sending the required notices to beneficiaries or heirs. Then, we help with any winding up that they need help with, including communicating with creditors or beneficiaries and the transfer, or re-titling of any property.

CHAPTER 9

IS PROBATE NECESSARY?

Sometimes probate is necessary, sometimes it is not. Occasionally, we will have an estate where planning has been done so that there is no probate necessary. If there is no real estate or if the real estate is in a transfer on death deed or in a trust, then the real estate would not need to go through probate. If their financial accounts have beneficiary designations set up for payable on death or with a right of survivorship, then it would not need to go through probate. Survivorship can pass outside of probate. If someone has done some planning, they may not need probate.

Factors That Set The Stage For Probate To Occur

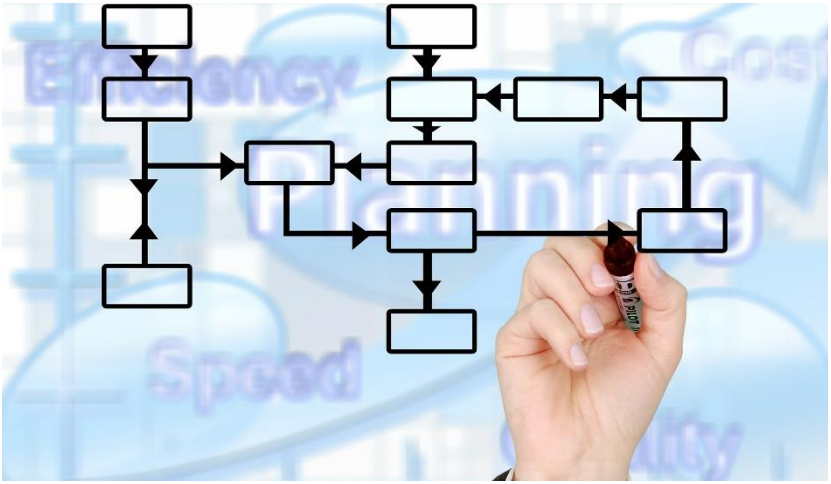
Death sets off probate. First, someone has to pass away. The purpose of probate is to have someone placed in charge of the decedent's estate (Administrator or Executor), pay creditors of the decedent, collect money owed to the decedent, and disburse or re-title property in the decedent's estate to the heirs or beneficiaries. Sometimes, people understand the necessity for probate and, right after the passing of the decedent, they will come to see us about probate and get the estate settled. Other times, it's not until someone attempts to transfer property or gain access to an account and realize that they can't.

Options For Avoiding Probate

The first way to avoid probate would be to not own any probate assets. Probate assets typically are real estate, financial accounts, and vehicles. If everything either has a right of survivorship, a payable on death designation is in a trust, or has a transfer on death deed, there are ways to avoid probate. Those are things we would certainly discuss in the initial meeting and during the estate planning process.

CHAPTER 10

THE PROBATE PROCESS



Assuming there's a will, we would file the original will with the court, along with an application to probate the will, and appoint our client as the executor. We would prepare an oath for that client whereby they would swear that they're going to fulfill the terms of the will and they will sign that in front of the clerk. We would prepare a proof of death, which is an affidavit stating the facts of the decedent's life and that they are deceased. We would schedule the probate hearing, attend the probate hearing with the client, and provide the necessary documents and

testimony to the court to get letters testamentary. After the court signs the order, the clerks issue letters testamentary, which is basically the court's authority to step in, in place of the decedent.

Once the executor has letters testamentary, the executor can access accounts to transfer property and distribute property outlined in the will. We would send a notice to any known creditors, secured and unsecured, as well as posting a notice to unknown creditors in the newspaper. There are certain statutory guidelines, as far as creditors making claims against the estate, and the sending of the notice starts that process and timeline. We would also send notices to any beneficiaries. We would work with the executor in making a list of the assets of the estate and that would get filed with the court as an inventory, appraisement, and list of claims. We would assist the executor in getting any creditors paid, determining if they're valid creditors or not, and distributing assets. If anything requires documentation to transfer the title, we would prepare deeds for them to transfer that property. If necessary, we could close the estate. Typically, we leave the estate open, so if any other assets become known in the future, we don't have to reopen the probate.

If there is not a will, in addition to the above, as related to an administrator of the estate, we would also file an application for the court to determine who the heirs are. We would ask the court to appoint an attorney ad litem to investigate the affairs of the decedent and who the heirs are. We would work with that attorney ad litem in getting them the names of disinterested parties who can testify as to the facts of the decedent's life and who the heirs are, and then we would go to court with the client and present the necessary evidence. If there's a will, the client is typically called an executor; if there's not a will, the client is typically called an administrator. We would, without the will, assist the administrator with all the steps above assuming that it's independent. If it's dependent, we would go back to court with them and file the necessary motions to get the court to approve any action that they needed to take in winding up the estate.

How Long Does The Probate Process Take?

Generally, probate takes three to six months. What typically takes the longest is just identifying any creditors that are out there and making sure that we don't distribute the assets before we've accurately identified the creditors and gotten them paid. It usually takes three to four weeks

to get in front of the court and get the letters testamentary. If there is no will, then the probate process can take six months to a year or longer. Sometimes, it can take six months just to get in front of the court, depending on how long it takes the attorney ad litem to get appointed and to do their investigation.

CHAPTER 11

MISCONCEPTIONS ABOUT THE PROBATE PROCESS

The most common misconception is that probate is difficult, expensive, and needs to be avoided. Many times, we have people who come to us and they want to plan to avoid probate. We walk through what they have and whether it makes sense to try to avoid probate or not. In Texas, probate is, if you have a valid will, a simple and inexpensive process. Another misconception is that people just don't know that probate needs to be done. They assume if they are a surviving spouse or a surviving

child, that they just inherit everything, and unfortunately, sometimes many years go by and they don't realize that they need to go through the probate process to clear up title to the property. When they go to sell the property years later, they find out that all or part of the property is still in the estate of the decedent. It can then take more time and expense to clear things up than if it had been done right away.

Why Do We Hear So Many Horror Stories About Probate?

The negative experiences with probate will always stand out. There are people out there who will challenge wills and family members who do not get along, who will try to make each other's lives miserable. There are horror stories out there and we run into them occasionally, but those are the minority. We never hear about the majority of times when probate goes smoothly and everyone moves on afterward. It's those few bad ones that make people fear the probate process.

In addition, many other states have dependent administration and more difficult probate procedures

and laws. Texas has one of the simplest, if not *the* simplest probate process if you have a valid will. We've met with people from other states who have grown to fear the probate process, but in Texas it is generally not something to be afraid of.

CHAPTER 12

ROLE OF AN ATTORNEY IN THE PROBATE PROCESS

The attorney prepares the application and the initial pleadings. Additionally, the attorney prepares all the motions and documents that the court requires. We typically provide the notices to creditors and to beneficiaries. An attorney's job is to make the client's life as smooth and simple as possible and to take that burden off of them during the stressful time of not only grieving but trying to clear up these financial matters of the decedent. It's really doing whatever we can to make that

process as simple as possible for them as we walk them through everything.

Can Someone Realistically Navigate Through The Probate Process Without An Attorney?

It would be difficult for someone to make it through probate on their own. Typically, the courts will require that they hire an attorney. Most courts will not let someone do it on their own because the courts do not want to end up giving legal advice to the applicant. If someone is trying to do it on their own, usually they're missing steps and there is some liability for not doing it correctly. By having an attorney help you through the process, you are less likely to wind up in trouble. If you don't meet certain timelines, you can be removed as the executor or administrator, or you might have to pay fines to the court.

CHAPTER 13

WHAT ABOUT MEDICAID?

If qualifying for Medicaid and asset preservation are a concern, we can help the client prepare. Medicaid, unlike some other government programs, is not an entitlement program; if you receive benefits, the State of Texas wants to be reimbursed upon your passing. There are also income and asset requirements to qualify.

The income threshold to qualify for Medicaid is very low and, oftentimes, people make too much money to qualify but cannot afford to pay for the care they need with

the income they have. A solution to this is the use of a Qualified Income Trust, or frequently called a Miller Trust. Income is directed to the Qualified Income Trust where a small allowance can be paid to the person and their spouse but the remainder goes to pay for their care and reduces their income to a threshold that qualifies for Medicaid.

The asset threshold to qualify for Medicaid is also very low. People are required to spend down their assets to qualify for benefits. One solution that helps some people is a Medicaid qualified annuity. This is a method of turning cash or other liquid assets into non-countable resource but provides an income stream.

The State of Texas has a Medicaid Estate Recovery Program ("MERP") which attempts to get reimbursement after a person passes for Medicaid dollars spent on that person's care during their lifetime. Medicaid will file a claim into the decedent's estate for payment and typically the only asset remaining is the homestead. However, equity in a homestead can be protected. Sometimes people think they will just give away assets when they foresee a need for Medicaid in the future. The State of

Texas anticipates people will try to do this so they have a five-year lookback period. If assets are liquidated during the five years prior to the Medicaid application, there is a penalty period. The five-years look at gifts of interest in property during the lookback period. A Transfer on Death Deed is a conveyance that takes place after someone dies and passes property outside of probate, thus protecting the homestead property and the equity in it for beneficiaries.

If someone is concerned about Medicaid qualification or protection of assets, we include that in the planning we do with them.

WHAT IS THE NEXT STEP?

If you have not made plans for your estate, we urge you to do so for the sake of your family or whoever is going to have to deal with the probate of your estate. If you have lost a friend or family member and believe that you should receive property through their will or as an heir, you should visit with an attorney to make sure you do actually receive the property and that it is titled properly. This may require probate but an attorney can help you avoid future headaches.

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NOTES

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That May Be Useful For Every Texas Resident

Roy Neal Linnartz, Esq.

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- John N.

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- Sheryl R.

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- Ron H.

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