

Better Estate Planning

COSTS OF AN ESTATE IN PROBATE

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Estate Planning attempts to create an equitable compromise between minimizing the amount of taxes due, distributing the property as desired to the designated heirs and assuring a financial source of security.

This fact sheet on Costs of an Estate in Probate was prepared by Eugene M. McElyea, L.L.B., College of Business, Texas A&M University and consultant to the Texas Agricultural Extension Service program for this series of fact sheets on Estate Planning.

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Probate courts handle various types of estates. The most common ones concern deceased persons' property including those having a will and those dying without a will. "Probate" stems from the Latin root meaning "to prove." In its most narrow definition the probate process is used to prove a deceased person's will genuine. It has also become the probate courts' duty to administer affairs of those dying without a will even though no "probate" in the strict sense is involved.

A probate court also involves itself in affairs of the living. By appointing guardians for minors and incompetent persons, the court supervises the business of those who are unable to responsibly act for themselves. Guardianship proceedings represent a substantial portion of the work load in the probate court system.

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Since the scope of an action in probate necessarily requires detailed day-to-day court control in the estate's business and financial matters, the cost and expense potential is understandable. Determining the exact costs in a given case is impossible. The many factors involved that can increase costs often make reasonable estimates inaccurate.

While there can be no fixed rule on the duration of a particular proceeding in probate, guardianship is frequently a continuing matter. While a guardianship on a minor may last until the minor attains legal age, the guardianship on an incompetent person may continue for as long as that person might live. Costs in such cases are continuing items of concern. The time factor makes it extremely difficult to accurately project the cost of a guardianship.

In deceased persons' estates the time factor is certainly important but not a dominant concern. After death the court strives to "wind-up" estate affairs in relatively short time. There is no set rule, but as a practical matter a deceased person's estate can be closed within a period of months to perhaps 2 or 3 years. This rule has its exceptions.

Another important cost factor is the amount of property involved and the effort necessary to manage it. An awareness of the work that an estate requires and the time it takes to perform that work, helps one understand the costs which necessarily arise.

Even a routine, uncomplicated proceeding in probate court has certain requirements which involve an attorney. An attorney is almost an indispensable part of any probate court action. Court costs generally accompany every case in probate.

Whether or not appraisal fees, executor (one acting under a will) or administrator (one acting by court appointment) fees or other administrative expense items are incurred, depends on the particular circumstances in the individual estate.

Attorney services represent a major expense item. The attorney's fee is not set by law, but the law has traditionally allowed the attorney a "reasonable" fee for his services. To assist the attorney in charging a proper fee which does not undervalue or overvalue his services, Texas attorneys' have a recommended minimum fee schedule prepared by the State Bar of Texas. This minimum fee establishes a "floor" for the fee in most cases and charges which do not grossly exceed this "minimum" are considered proper. Emphasis is placed on the fact that suggested fees are "minimum" fees and not "maximum" fees. Generally the fee schedule is only one of many guides an attorney relies upon in charging for his work.

The attorney in an ordinary case involving a deceased person will most likely perform the following services:

- Prepare and file an application for probate of a will (or appointment of administrator).
- Have a court hearing on the application.
- Prepare the order probating the will (or creating the administration).
- Prepare and file an oath (or bond).
- Give notice to estate creditors.
- Prepare and file an inventory of estate property which has been properly appraised and valued, together with a list of creditors' claims, if any.
- Prepare for the judge's signature, the order approving the inventory as correct.
- Prepare and file the death tax (federal estate and state inheritance) returns and consultations relating to them.

For services within the framework of the activities in a routine estate detailed above, the State Bar suggests that the attorney's fee be no less than 3 percent of the deceased person's gross estate value. This suggested minimum does not take into consideration additional services and charges which may be necessary. Some of the activities for which an additional charge is necessary would include the following:

- Handling another legal matter for the estate in another court.

- Contested items in probate court or lawsuits arising in connection with the estate's death tax liability.
- Unusual management problems connected with a particular property item in the estate or other duties normally performed by the executor or administrator which fall to the attorney because of the executor or administrator's inexperience, lack of ability or absence from the estate administration place.
- Work involved in the sale of property or annual report preparation to the court.

Another substantial expense item in an estate is the executor or administrator's fee. This fee is set out in the law and in no event shall it exceed 5 percent of the estate's gross value. The fee is determined by allowing the executor or administrator a commission of 5 percent on all amounts actually received by them in cash (not counting cash which deceased had in a bank at death) and a commission of 5 percent on all amounts actually paid out in cash during the administration (not counting distributions to heirs or named beneficiaries). In actual practice the executor or administrator's fee might not reach the maximum percentage limit. One provision says if an executor or administrator manages the estate's farm, ranch, factory or other business and the percentage allowed by law appears unreasonably low, the court may permit additional compensation for such services.

In those instances where the estate's primary beneficiary is also the executor or administrator, there is no reason for such a fee. It is not reasonable, however, to expect one who gets no bequest or inheritance in an estate to serve without compensation.

It is possible to limit by will the fee an executor will be allowed. If the executor agrees to serve at a reduced rate, he cannot receive additional pay.

The executor or administrator has an important function in tending to estate affairs. One can designate a person in his will to act as executor, but in the absence of such an appointment in a will the court appoints an administrator. This power to appoint by will if used wisely, can be of untold benefit to the estates' beneficiaries. The executor's duties include hiring the attorney to represent the estate, assembling estate assets, securing appraisals and generally handling all the business affairs of the estate. Accounting and record keeping is involved in every estate and in the more complex business transactions, these items can be major tasks. In deciding whether or not an impersonal executor such as a bank's trust department

should be used, consider the benefits it offers such as experience, solvency and continuity.

In selecting an executor, additional choices are available. Depending on an individual's desires, the executor might be an accountant, attorney, a friend or other individual. In naming an executor, it is important that the person designated be both trustworthy and capable. With individual executors, estate management problems sometimes prove burdensome particularly to an inexperienced individual. When the person named is unable to serve, the will should name a substitute. Without such a designation, the court will designate a person to act as the estate's administrator but provisions of the will would still govern the manner of estate property distribution.

Fees charged by the estate's guardian are set out in laws and are similar to the commission allowed executors in the estate of deceased persons. However, when a guardianship is finally settled, the 5 percent commission is not charged on money paid for settlement purposes nor is such commission allowed on invested estate funds. Again if unusual business management expenses for a guardian occur in managing a farm, ranch, factory or business, extra compensation above the percentage limit can be permitted.

The exact amount of court costs (clerk's fees) can with small effort, be determined precisely. Depending on the number of documents filed, charges on the average range from \$50 to \$100 in a decedent's estate. Probating a will always costs less in court costs than does an administration. A guardianship's lengthy nature naturally necessitates higher cost. The fee for court appointed appraiser is \$5 per day for every day of actual work. In actual practice appraisers may charge more. In instances where the extra charge occurs it generally represents bona fide work and the extra charges are reasonable.

Other costs might include a bond to assure the administrator or guardian's faithful performance. Most wills eliminate the need for an executor to

post a bond. The bond premium is based upon rates set by the State Board of Insurance and varies in accordance with the bond amount set by the court. The court considers the estate's value, less real estate, in setting bond. The bond premium cost is an annual charge.

The rate schedule currently allowed for bond premiums follows:

Up to \$2,000	\$10 per thousand (10 minimum)
\$2,000 to \$50,000	\$ 5 per thousand
Over \$50,000	\$ 4 per thousand

Example: A bond premium for \$100,000 would be computed as follows: \$2,000 @ \$10 per thousand, \$20; \$48,000 @ \$5 per thousand, \$240; and \$50,000 @ \$4 per thousand, \$200; for a total premium of \$460 per year.

If an estate's property requires an accountant's services his charges are generally based on an hourly rate for time actually spent in rendering service. The need for an accountant does not generally occur in smaller estates.

In reviewing areas giving rise to cost and expense, it becomes clear that proper financial and estate planning can eliminate some expenses and materially reduce other expense items. By reducing expense, an individual can substantially increase the estate's amount which will ultimately go to his offspring. Failure to act promptly in curtailing this wasteful erosion demonstrates that in some instances it can cost to do "nothing."

This publication is designed to provide accurate and authoritative educational information in regard to the subject matter covered.

It is distributed with the understanding that the publisher is not engaged in rendering legal services. An attorney should be contacted for legal advice.

SUGGESTED READING

Listed below are additional Extension fact sheets on Estate Planning.

- L-950 The Importance of a Will in a Texas Estate
- L-951 Texas Laws on Descent and Distribution
- L-952 Community and Separate Property in Texas
- L-954 Charitable Gifts
- L-955 Federal Estate and State Inheritance Taxes
- L-956 Gifts and Trusts: Effective Estate Planning Tools