



Probate And Executors

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Background

PROBATE is a legal proceeding by which a deceased person's property is distributed to the rightful heirs and/or beneficiaries. Probate proceedings are governed by the law of the state where the deceased person resided at the time of death and by the probate laws of any other state where the property was owned. The main purpose of probate is transferring title of the decedent's property to the heirs and/or beneficiaries. If the decedent had no assets, there is typically no need for probate. Probate also allows for collection of taxes due and payment of outstanding debts. The term "probate" refers to a "proving" of the existence of a valid Will or determining and "proving" who one's legal heirs are if there is no Will.

All property of a decedent may not be subject to the probate process. Life insurance, retirement accounts, real estate held as joint tenants with right of survivorship and other joint [TENANCY](#) property can pass directly to the appropriate [BENEFICIARY](#) automatically. The involvement of the court to transfer such property is not required. Property held in the trust is not subject to probate. A bank account or motor vehicle title may also specify a death beneficiary and thus be exempt from the probate process.

An Executor or Personal Representative (sometimes referred to as "The PR") is the person or institution named in a will and appointed by a court to carry out the will's instructions and to handle all of the matters of probate. Duties of the Personal Representative include making an inventory and [APPRAISAL](#) of all property and appropriately distributing the estate.

Personal Representative

The Personal Representative (also called the "executor" or "executrix" if there is a Will or the "administrator" or "administratrix" if there is no Will) is appointed as part of the probate proceeding. The Personal Representative can either be an entity, one individual, or two or more individuals (although this arrangement can become extremely complicated).

Duties

The Personal Representative has the responsibility for managing the estate in accordance with established probate rules and procedures of the [JURISDICTION](#) where the probate takes place. Responsibilities of a Personal Representative include:

Locating, inventorying, and obtaining an appraisal of the assets of the decedent

Receiving payments owed to the estate, including unpaid salary, vacation pay, or other benefits due the decedent

Opening a checking account for the estate

Determining how property is distributed

Noticing potential creditors

Investigating the validity of claims against the estate

Paying bills, debts, valid claims and expenses of administrating the estate

Discontinuing utilities and credit cards, closing accounts and notifying appropriate private and governmental agencies of the death

Filing and paying income and estate taxes

Closing the probate

Compensation

Personal Representatives are generally compensated about 2% of the probate estate for their work. This varies moderately from state to state and generally decreases as a percentage as the size of the estate increases. All fees and reimbursed expenses are subject to court approval. Additional fees may be allowed if permitted by the court in certain circumstances. However, if a Personal Representative is incompetent or does not perform as required, the court may deny compensation, and the Personal Representative may be held personally responsible for any damages caused. Liability may arise from improperly managing the assets of the estate, failing to collect claims and moneys due the estate, overpaying claimants, selling an asset without authority or at an inappropriate price, neglecting to file tax returns promptly, or distributing property incorrectly to beneficiaries.

Probate Court

Probate usually occurs in the local court where the deceased permanently resided at the time of death. If the deceased did not have a Will, each state will have its own pattern for distributing the deceased's real property. Generally it is necessary to go through probate or, in the case of smaller estates, a less formal procedure that is still under the general supervision of the probate court, before the deceased's property can be legally distributed. If a person dies with a Will (which is known as dying "testate"), a court needs an opportunity to allow others to object to the Will. A number of objections, might invalidate a Will, for example, an [ALLEGATION](#) that there is a later Will or that the Will was made at a time the deceased was mentally

incompetent. Additional challenges to a Will can include [FORGERY](#), improper [EXECUTION](#) (signature), or a claim that the decedent was subject to undue influence. Dying without a Will is known as dying [INTESTATE](#); however, such estates remain subject to the law and rules of the probate code of the decedent's domiciled jurisdiction.

The Personal Representative typically must file a probate petition and notify all those who would have legally been entitled to receive property from the deceased if the deceased died without a Will, plus all those named in the Will, and give anyone who chooses a chance to file a formal objection to the Will.

A [HEARING](#) on the probate petition is typically scheduled several weeks to months after the matter is filed. If no objections are filed the court generally approves the petition and formally appoints the Personal Representative. While it is not required that there be representation by an attorney in probate court, probate is a rather formalistic procedure. The death of a family member is typically a stressful time even when the death is expected, such as with a person of quite advanced age or with someone who is terminally ill. Employing an attorney may be the less expensive alternative in the long run.

Ancillary Probate

The probate court or division has jurisdiction over all [PERSONAL PROPERTY](#) the deceased owned, plus all the real property the deceased owned which is located in that same state. If the decedent owned out of state real property, the laws of that jurisdiction will apply, unless there is a Will. If there is no Will, Probate is usually required in each state where the real property is situated, in addition to the home state. Even if there is a Will, after it is admitted to probate in the home state, it usually must be submitted to probate in each other jurisdiction in which the deceased owned real property. A separate probate action for such circumstance is known as [ANCILLARY](#) probate. Some states require the appointment of a Personal Representative who is a local resident to administer the in-state property.

Will Contests

A Will Contest take place where a second, different Will of the decedent is produced or in the event there is an objection to the Will. An individual or entity must have proper standing to contest a Will. This means they must have a claim for some type of interest in the estate based on either another Will or a lawful relationship to the decedent. If the Will is held invalid, the probate court may invalidate all provisions or only the challenged portion. If the entire Will is held invalid, generally the proceeds are distributed under the laws of [INTESTACY](#) of the probating state. The fact that the decedent even attempted to create a new Will may invalidate the older one, even if the new Will is found not to be valid. Hiring an attorney is usually necessary to determine whether contesting a Will is even worth the expense.

Lawsuits

In addition to a Will Contest, estates can be involved in other lawsuits. Estates are legal entities, which can file suit, and be sued. Typically, such suits involve prior acts of the decedent, which gave rise to some claim. There are time limits involving such claims if the estate is to be sued. Potential claimants would be considered potential creditors.

Creditors

Rules regarding notification of creditors are different for each state. However, in every state, creditors must make a claim for any amounts owed within a fixed period of time. This claim can be made directly to the

Personal Representative in some jurisdictions, but in other jurisdictions, it must be made with the court. The PR can pay the claim out of the estate, but if the PR disputes its validity, the [CREDITOR](#) must seek a court order to receive payment. If there is not enough money to pay all the debts of the estate, state law dictates which creditors are paid first. It is not possible to "inherit" a debt. Beneficiaries and Personal Representatives are not personally liable for the debts of the estate, although the court may order estate property sold to pay certain creditor claims.

Avoiding Probate

In many estate plans, the Trust is the central tool that is used to control and manage property. A Trust continues despite the incapacity or death of the grantor. It determines how a TRUSTEE is to act with respect to the Trust estate. It determines how property is to be distributed after the death of the grantor. A properly drawn Trust is a separate entity that does not die when the creator dies. The successor Trustee can take over management of the Trust estate and pay bills and taxes and promptly distribute the Trust assets to the beneficiaries, without court supervision, if the Trust agreement gives the Trustee that power. Trusts, unlike Wills, are generally private documents. The public would be able to see how much the decedent owned and who the beneficiaries were under a Will, but typically not with a Trust. Like a Will, however, a Trust can be used to provide for minor children, children from a prior marriage, and a second spouse in the same trust, transfer a family-operated or closely-held business, provide for pets, provide for charities, and can remove life insurance benefits from a taxable estate, while still controlling the designation of insurance beneficiaries.

Taxes

One of the duties of the PR is to pay all taxes due the federal government and the state government, including estate tax, real property tax, and prior to death [INCOME TAX](#).

Individual Income Tax

In the United States, even death does not relieve the liability for income tax. Even if the taxpayer is dead on December 31, an income [TAX RETURN](#) has to be filed for the year of death. As always, the income tax return is due by April 15th of the following year. Only the income received and any deductions paid through the date of death will be reported on the return. Income such as dividends and interest received after the date of death will not be reported on the individual income tax return but on the estate income tax return. Any medical deductions on the decedent's part paid within one year of the date of death may be deducted on the final return. All other deductions must have been paid before death to be allowable.

Estate Income Tax

Income which comes in after the date of death should not be reported on the decedent's personal income tax return. Interest, dividends, or other income paid to the estate, must be reported on the estate income tax return. A separate tax identification number is obtained for the estate. This separate tax return lists the [TAXABLE INCOME](#) such as dividends, interest, capital gains, and rents, and allows for deductions such as legal and executor's fees. If the estate has been distributed and closed during the tax year, each beneficiary must list his or her proportionate share of the taxable income on his or her personal tax return. If the estate is open, the taxes are paid from the estate.

State Law

Trusts are often created as an alternative to or in conjunction with a Will. Trusts are today usually considered an estate planning tool. The Uniform Probate Code includes provisions dealing with affairs and estates of the deceased and laws dealing with nontestamentary transfers such as trusts. The theory behind the Code is that wills and trusts are in close relationship and thus in need of unification. Since its creation, over thirty percent of states have adopted most provisions of the Code.

ARIZONA: Without a Will, all property passes to the surviving spouse unless there are children of the decedent. If there are children only the separate property and the one-half of [COMMUNITY PROPERTY](#) that belongs to the decedent, passes to the surviving spouse. The remaining goes to the children unless the children are not also children of the surviving spouse in which case one-half of the intestate separate property and all of the community property that belonged to the decedent passes to the children. Creditors have four months to notice the estate regarding claims.

CALIFORNIA: In California Probate [STATUTORY](#) attorneys and Personal Representatives' fees are usually calculated based on the gross value of the estate. California has a simplified legal process known as a spousal confirmation proceeding in which, if no one objects, the court approves the transfer of all assets to the spouse. This procedure can only be used for married couples.

FLORIDA: Florida implemented a number of major changes in its probate code as of January 2002. Florida [PUBLIC POLICY](#) protects the spouse and, in some circumstances, children from total disinheritance. Absent a [PREMARITAL AGREEMENT](#), a surviving spouse may have [HOMESTEAD](#) rights, elective share rights, family allowance rights, and exempt property rights.

In addition, certain surviving children of the decedent may also have homestead rights, pretermitted child rights, family allowance rights, and exempt property rights.

SOUTH CAROLINA: Without a Will, all assets go to the surviving spouse unless there are children in which case one-half goes to the children. Protective provisions of the South Carolina Probate Code grant a spouse who is left out of a Will an election to take a one-third share of the estate. A similar provision grants a share to a child who is left out of a parent's will written before the child's birth.

SOUTH DAKOTA: South Dakota has adopted the Uniform Probate Code.

UTAH: Utah has adopted the Uniform Probate Code.

WEST VIRGINIA: Without a Will, all assets go to the surviving spouse unless there are children in which case one-half goes to the children. If there is a Will, the surviving spouse can also renounce the Will and take the elective share instead. The elective share depends on the length of the marriage. Renouncing the Will requires that papers be filed with a court within certain time frames.

Additional Resources

Beyond the Grave: The Right Way and the Wrong Way of Leaving Money to Your Children (and Others). Condon, Gerald, HarperCollins, 2001.

Organizations

The Elder Law Project Legal Services For Cape Cod And Islands, Inc.

460 West Main Street
Hyannis, MA 02601 USA
Phone: (508) 775-7020

National Academy of Elder Law Attorneys, Inc.

1604 North Country Club Road
Tucson, Arizona 85716 USA
Phone: (520) 881-4005
Fax: (520) 325-7925
URL: <http://www.naela.com/>

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