

## 20. PROBATE PROCEDURES

### Testacy and Intestacy

The two basic types of probate are testate (with a valid will) and intestate (without a valid will). The type depends on whether or not the decedent left a valid will disposing of his/her entire estate. This discussion will focus on the estate where a valid will exists, with indications as to procedural variances when there is no valid will.

Inasmuch as each state has adopted a probate code, all information in this chapter should serve as nothing more than a beginning point for further research. In addition, each jurisdiction will have different procedures and forms.

In working with a probate court, contact with the judge may be minimal compared to contact with the probate clerk or register of wills. Typically clerks are glad to provide information, although they cannot give legal advice. The court may also maintain a website where valuable information and forms can be obtained.

To institute probate proceedings, the original of the last known will should be filed with the court at the death of the testator. No will, regardless of its form or content, is of any legal significance until it has been reviewed and accepted by the probate court. If the original cannot be located a copy may be acceptable to the court depending on legal counsel.

### The Process

The first major document filed is the petition for commencement of proceedings. This document usually contains jurisdictional information for the court, the name of the decedent, the decedent's Social Security number, the date of the Last Will and Testament, the names of witnesses, an estimate as to the value of the estate, and a list of the heirs and devisees. The petition usually contains a request that the will be admitted to probate and that administration be granted to the personal representative (executor/trix) named in the will. Where the will and/or statute expressly allows, the court can waive the requirement of a surety bond.

Unless all "Parties in Interest" (a term usually defined by court rule) consent to the admission of the will to probate and the appointment of the personal representative named in the will, a court hearing is necessary (except for independent or informal probate). A waiver and consent form may avoid the need for a hearing, but if a hearing is necessary, a written notice of hearing will need to be provided to each interested party.

It may also be necessary to publish a notice regarding the decedent's estate. If consent cannot be obtained from all parties, the publication can serve as notice to heirs and devisees whose locations are unknown, but more importantly, the decedent's creditors are notified of the name of the personal representative (executor) and the date by which all claims against the deceased or the decedent's estate must be filed. This date is usually two to four months after publication.

If a hearing is necessary, a proof of service verifying delivery of the notice of hearing, a copy of the will, and a copy of the petition for commencement of proceedings should be filed with the court.

Since certain information regarding the family and heirs of the decedent is necessary even with the use of waivers and consents, a testimony of interested parties is usually used and signed under oath by a person who has personal knowledge of the heirs of the decedent. If a will is involved, there may be supplemental testimony of interested parties that supplies to the court information regarding a devisee who may be named in the will, but who is not an heir of the decedent. This document is also signed under oath by a knowledgeable person.

If all consents and waivers are signed and the documents are in order, a court order admitting the will to probate and appointing the personal representative will be issued. If the person nominated to be personal representative declines, then a declination to serve must be filed.

Where required by the court, bond must be filed before letters of authority are issued to the personal representative. The letters of authority (or in some states “letters testamentary”) evidence the personal representative’s authority to act in the place of the decedent and to conclude the decedent’s affairs. Multiple certified copies of these documents will be needed for distribution to banks or other entities that will require them for their records.

Once the personal representative has had an opportunity to assemble and evaluate the assets, an inventory is usually required. This inventory should be as accurate as possible. If errors are discovered, it will be necessary to file an amended inventory when the correct facts become known.

The assets listed on the inventory and included in the estate should be only those assets in which the decedent had an interest to pass at his/her death. Estate planning utilizes various devices to avoid including property in the estate of the decedent. Depending upon state law, different methods may be employed before death to arrange the decedent’s affairs so as to exclude assets from the probate estate. Some of the more common alternatives are trusts, joint tenancies, pay-on-death clauses, deferred compensation plans, and assignment of insurance policies. These assets and proceeds are excludable from the probate estate under normal circumstances.

Creditors may file a claim. The claim needs to be filed by all creditors within a specified time period. However, tardy claims may be filed after a successful petition to the court. Provision can also be made in wills for claims, or classes of claims, to be paid from certain funds rather than from the general estate.

Another initial duty of the personal representative, if the decedent left a surviving spouse, is to notify the surviving spouse of the option to abide by the terms of the will, take an intestate share, or receive dower benefits, if such are allowed under state law. The personal representative must file a proof of service for the delivery of the notice of election to the spouse.

The estate should be closed in a timely manner. If the estate cannot be closed within the time allotted by the letters of administration, the court may extend the period of administration. However, the personal representative must make an annual accounting of receipts and

disbursements. The annual accounting must indicate the dates covered by the accounting period and start with the balance from the preceding accounting or the inventory, whichever is applicable, add the receipts, subtract the disbursements, and specify the balance. Some accounting forms also require an itemized list of the remaining assets. Generally, no hearing is necessary if all parties agree to the accounting and provide consent. The judge will then sign an order allowing the account. On some occasions, a hearing must be held, notices sent, and a proof of service filed. The final accounting of the estate should also contain a request that the residue of the estate be assigned, the fiduciary discharged, his/her bond canceled, and the estate closed. Upon court approval, an order is entered approving the final accounting.

One of the remaining duties of the personal representative is to provide a summary of the entire estate to the inheritance tax examiner and to pay the inheritance tax, if state law requires one. All inventory fees, taxes, and other costs assessed by government agencies must be paid prior to the order allowing the final accounting and assignment of residue. The residue is what remains after all debts have been paid and all specific devises have been satisfied. The general devises are then made from the residue of the estate. Real property is transferred from an estate by a personal representative's deed, but a receipt for distributive shares should be obtained for any personal property transferred to a devisee. After all receipts of a distributive share have been filed, an order of discharge is entered by the court and the bond is canceled, closing the estate.

For small estates, probate can be simplified and quickly resolved in most jurisdictions.

A new procedure initiated by the Uniform Probate Code is called Independent or Informal Probate. Under this system, there is no court supervision of the personal representative. The personal representative initiates the action and proceeds to gather the assets (advising the heirs and devisees along the way), to pay all debts, and to distribute the estate to the beneficiaries who are entitled to receive assets. The Independent Probate estate must be closed in a timely manner. It is possible that an estate under court supervision could be closed earlier than an estate under Independent Probate.

In jurisdictions that permit it, Independent Probate can be used unless the will expressly forbids it. One significant disadvantage of Independent Probate is that the personal representative is liable for claims and contracts of the decedent for a period of up to six years, depending on the statute of limitations. Independent Probate can be transferred, in part or in whole, to supervised administration at any time, following petition by an interested party. However, once court supervision has been instituted, the estate cannot revert to Independent Probate. When there is a disputed claim, the personal representative should request that the court supervise this aspect of the estate, while keeping the remaining aspects of the estate in Independent Probate.

This brief introduction to the basic probate process does not cover such issues as will contests, ancillary proceedings, temporary personal representatives, sales of real property, continuation of a decedent's business, contested proceedings, or a plethora of other probate procedures and problems.