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# Probate:

## A Process, Not a Problem

*Anyone who has had a close friend or relative pass away has probably heard of probate, the process by which the estate of the deceased is inventoried and distributed according to state laws. While often maligned as a headache, in reality probate offers a solid legal framework with advantages for those who have properly prepared prior to death and who have retained skilled legal counsel. Court oversight at every step, complete control of creditor claims, and the provision of a legal forum for complaints are important features of probate that are often overlooked. At its heart, probate is a process, and like any process, if one steps back, takes an overview of the procedures involved, breaks the whole into manageable parts, and works with qualified legal assistance, the end can usually be reached quickly, efficiently and economically.*

### WHAT IS PROBATE?

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Probate is designed to create a "final accounting" upon death. Now, this is not the same as when one stands before the pearly gates, but is intended to wrap up one's earthly affairs. Probate, the legal process of "proving up" a Will, or verifying that a Will is valid, takes place in one of two instances. First, if a person dies leaving behind a Will, or second, if the deceased has died *intestate*, that is, has not left behind a Will or estate plan of any type or the Will cannot be found. In both of these instances, state law governs the actions taken by those left behind. In the first case, the probate process will verify the existence and validity of the decedent's Will, provide for the appointment of an *executor* who will then carry out an inventory of the estate and pay any claims and estate taxes due against the estate. Then the executor will manage the distribution of any

#### **Intestate:**

Each state has their own set of laws dealing with the procedure to be followed when an individual dies without a Will.

#### **Executor:**

In the case of individuals who have died intestate, the person playing the role of executor is often called the *administrator* or *personal representative*.

remaining assets. If no Will is left behind or the Will cannot be found, each state has its own laws covering distribution of assets, and the probate process will ensure that creditors are paid and distribution takes place according to these laws.

While probate has developed a harsh reputation over the years, this characterization generally applies for people who have not prepared ahead of time for their death, or for those executors who do not have qualified legal assistance. Depending on the complexity of the estate and the thoroughness with which accounting has been carried out before death, probate can either be a relatively simple task or a daunting one. Be aware that no matter the situation, probate may be a lengthy process often taking months or possibly years to play out, and one which may take a considerable amount of an executor's time.

To summarize the process, probate can be broken into six basic steps:

1. Validation of the Will
2. Appoint executor
3. Inventory estate
4. Pay claims against the estate
5. Pay estate taxes
6. Distribute remaining assets

These steps each involve legal documentation and validation, and more importantly, proper accounting each step of the way.

## **PROBATE COURT**

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Probate begins and ends with the special Probate Court set up in each state to handle estate issues. (Sometimes known as the *Orphan's* or *Chancery* Court in certain states.) All actions taken regarding the estate are accountable to this court, and must be noted and reported regularly. This court is staffed by special judges qualified to oversee estate resolution issues.

## **THE PROBATE PROCESS**

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The probate process begins immediately after death. At this time, legal statutes go into effect mandating what must be done regarding any estate. The first thing any potential executor should do upon the death of a loved one or relative after funeral arrangements have been made and personal grief issues have been dealt with is to contact a qualified probate attorney. Usually there is a family attorney who was present at the creation of the Will, or who has handled family legal affairs. Often times, family members may be more comfortable asking someone *they* are familiar with, often seeking out an attorney who concentrates on a "probate related" practice.

## **FIRST STEPS**

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The attorney will take the first steps to initiate the probate process. Step one is the creation and filing with the court of a legal document known as a *petition for probate*. Depending on the state, a hearing date is set, usually several weeks to several months from the date of petition. At this

time, a notice must be sent out to all potential beneficiaries notifying them of this initial hearing. In addition, it is generally required that notice of death be published in a newspaper.

## **INITIAL HEARING**

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At the first hearing in Probate Court, the probate judge will appoint an executor, (generally a close relative unless otherwise specified) and ask if anyone is contesting the validity of the Will or the competence of the Executor. (See box) If there are no contests to the Will or the executor, the court will issue *Letters Testamentary* or *Letters of Administration*, affirming the validity of the Will and the executor and giving the executor power to act. Once these letters are issued, the probate process is now started.

### **Challenging Wills and Executors:**

#### Validity:

The most recent will is generally the one in force at the time of death, unless it can be shown that the writer was incompetent, under undue influence or duress, or the will was executed improperly.

#### Challenging Executors:

Executors can be challenged and disqualified from executorship if they are:

- A convicted felon
- A minor under the age of 18
- Not a resident of the state in which probate takes place. (In many states, the executor must reside in the state the Will is being probated. Check local laws to see if this applies in your state)
- Otherwise physically or mentally incapacitated

## **INVENTORY**

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The next step in the probate process is an inventory of the estate. This inventory, defining fair market value for all items in the estate must then be submitted to the court within a certain time period, varying from state to state. The executor will generally be able to take care of valuing the items of lesser value, but assets such as homes, stocks, real estate or valuable art and collections should be appraised and valued by professionals either appointed or certified by the court. These professional asset valuers appointed by the court are often known as probate referees or commissioners.

## **CLAIMS**

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As part of the inventory process, liabilities as well as assets must be discovered and valued. The executor is responsible for sending out notices to creditors. This notice will state that a certain person has died, and that any party with a claim against their estate should submit that claim to the probate court within a certain time period (Again, varying from state to state). Some states require these notices to creditors be published in a newspaper. As claims are submitted, the executor will accept or reject each claim. If it is accepted, it is paid out of the estate. If it is rejected, then both parties will come before a probate judge who will decide the validity of the claim. In extreme cases where a

settlement is not reached in probate court, creditors can bring suit to collect their claim. Once all claims against the estate have been settled and the final inventory completed, the inventory is submitted to the probate court, where it is reviewed and affirmed by the probate judge.

## **DEATH AND TAXES**

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After the inventory of the estate has been prepared and submitted to the court, all applicable tax forms must be completed and sent to the IRS, and estate taxes must be paid. The IRS requires the

706 tax form for estate taxes to be completed within 9 months of death, unless an extension is granted. Also, a final 1040 must be completed for the deceased for the year of death, as well as 1041 forms for any trusts the deceased may have left behind.

Contingent upon the final inventory of the estate and completion of the necessary tax forms, the taxes are paid out to the IRS. Once the IRS has received the estate taxes, they will issue a closing letter stating that all estate taxes have been paid. This can take as long as 1-2 years after death.

An attorney with experience in probate and estate planning handles the preparation and filing of these important 706 tax forms and coordinates with a CPA for the preparation of the 1040 and 1041 tax forms. A qualified probate attorney can minimize the expense and time necessary for this important step, as well as help to avoid errors that can cause severe tax consequences.

## **FINAL ACCOUNTING**

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After all claims and taxes are paid out, a final accounting is done to summarize the affairs of the estate for the court. This accounting includes the initial inventory, all earnings, sales, and bills and taxes paid. All payouts to heirs are itemized prior to payout, which takes place once the final accounting is approved by the court. Copies of this final accounting are sent to all beneficiaries, who must approve and sign off on this accounting. If there is a dispute about the accounting or the affairs of the estate, the beneficiaries may challenge the executor before the court.

## **THE LAST ROUND-UP**

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Once all beneficiaries have approved and signed off, the final accounting is submitted to the court for approval and certification. The court will then issue an order affirming compliance and ordering distribution. At this time, the heirs are paid out according to the orders contained in the Will. If the deceased has died intestate, without a Will, then the heirs are paid according to the laws of the state in which he or she passed away.

## **DISTRIBUTION**

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All beneficiaries must sign and return the final accounting statements before the estate will send out a check to any beneficiary. It is important not to make any payments until the final closing letter is received from the IRS, as any changes in the taxes due can result in the need to reclaim money from beneficiaries to pay any estate taxes due, often a difficult task.

## **CONCLUSION**

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Although having a Will is an important beginning step in estate planning, more preparation is essential to leave behind an easy transition for family and others who will remain after death. In addition, there are other estate planning options that avoid probate. Living trusts, for example, can be valuable tools in this process. Consult a qualified estate planning attorney to review the role of trusts and probate in any estate plan.

The process of probate can be one with many advantages for the well prepared individual. Engaging a qualified estate planning attorney with experience in probate issues will enable you to take the best pre-emptive steps to minimize taxes and legal wrangling for your executor, family and associates.

## About Our Law Firm

Attorney Vincent J. Profaci is a noted speaker on living trusts & estate planning. Mr. Profaci's law practice is devoted to estate planning, business law, and real estate law. His seminars on living trusts are said to be "informative, entertaining, & easy to understand."

*This Report reflects the opinion of Vincent J. Profaci, Esq. It is based on our understanding of national trends and procedures, and is intended only as a simple overview of the basic estate planning issues. We recommend you do not base your own estate planning on the contents of this Report alone. Review your estate planning goals with a qualified estate planning attorney.*