

CHAPTER 9

PROBATE AND THE POST-DEATH ADMINISTRATION OF ESTATES

Introduction

Death marks the final stage in the implementation of every estate plan. In many cases, death results in final distributions of a decedent's assets and the conclusion of the estate plan. In other cases, the estate or trusts created by the estate plan continue for many years for the benefit of the decedent's family or other intended beneficiaries.

Regardless of the form of the estate plan, some kind of estate administration will likely be necessary following a person's death. The estate administration may be in the form of a probate of the decedent's will or the administration of a living trust. The complexity of the estate administration will depend on a variety of factors including the type of assets subject to administration, the decedent's financial obligations and the provisions of the estate plan. Assuming that the decedent died with some assets that must be transferred to his or her intended beneficiaries, the estate administration may take only a few hours or many years.



What is probate?

Probate may be best described as a legal proceeding or process intended to accomplish the following tasks: 1) identify the assets of the decedent, 2) identify the persons entitled to receive the assets of the decedent, 3) identify the creditors and pay the legal debts of the decedent, and 4) distribute the remaining assets of the decedent to those who are entitled. This process may last for several months to many years depending on the circumstances.

The probate is administered by the designated court (often called the probate court) in each state. The requirements of a probate are specific to each state and the rules may be very different in each state. Some states (such as Washington) have simplified probate proceedings. Furthermore, a person may have probate in more than one state depending on the kind of assets owned at death.

Having a will does not avoid probate. Think of a will as a blueprint for the probate court. Your will tells the court how you want your estate to be distributed and who will be in charge of handling your estate (known as the executor or personal representative).

On the other hand, merely having a will does not require that your estate be probated. For example, a decedent may have a valid will, but if all of his or her assets are held in a living trust (see Chapter 4), a probate may not be necessary. The trust provisions will most likely distribute the decedent's assets to his or her intended beneficiaries.

Basic steps in probate

Although state probate laws (and for that matter, the laws in other countries) differ greatly, certain steps are required in every probate. These steps include the following:

◆ Identification of the decedent's heirs and beneficiaries of the estate

The heirs of a person's estate are those individuals who would receive the estate if the person died without a valid will. This is referred to as intestate succession. As described in Chapter 3, intestate succession assumes that you would want your estate distributed to family members. In effect, the state is writing a will for you if you do not have a valid will at death or if the terms of your will do not completely dispose of all of your assets.



“Beneficiaries of an estate” is a generic term to describe all of the persons who benefit under the terms of your will. Beneficiaries might include a spouse, other family members, certain non-related individuals, and/or charitable organizations.

One of the first steps in the probate of the estate is to identify the heirs and the beneficiaries of the estate. The beneficiaries are normally identified from the decedent's will. Heirs, as indicated above, are identified under state law. For example, a person's heirs include his or her spouse, if any; children and their descendants; parents; siblings; etc. However, under the terms of his/her will, the decedent might have chosen not to benefit any of these heirs but, instead, give his or her entire estate to unrelated individuals or charity at death.

◆ Commencement of the probate

The probate is commenced by filing the decedent's will (if any) with the court along with certain other documents. One document, commonly called a petition, informs the court of basic information, including the name of the decedent, the date of death, the names of the heirs and the beneficiaries of the estate, and who is requesting to be appointed as the personal representative. If the decedent died with a valid will, the appointed personal representative is most likely the person named in the will.

Once the court reviews the will, petition, and accompanying documents, the court will enter an order that directs that the personal representative be appointed, that the clerk of the court should issue a document that is evidence that a personal representative has been appointed and is authorized to administer the estate. In general, the clerk of the court will issue Letters Testamentary if the decedent died with a valid will or Letters of Administration if the decedent died without a will. Once the personal representative has either Letters Testamentary or Letters of Administration, he or she may act on behalf of the estate in handling the estate's business affairs.

◆ The creditor claims procedure

Shortly after the commencement of the probate, notice to creditors must be given. This involves a process of notifying all of the decedent's creditors which will include anyone who has extended credit to the decedent while living, such as the outstanding balance on a loan or credit card, unpaid utilities, unpaid services provided to the decedent (such as medical expenses) and the like.

Notification to creditors is made in two ways. First, the personal representative will publish the notice to creditors in a newspaper. This publication is sufficient notice to any creditor who is not known to the personal representative or could not be identified by a search of the decedent's financial affairs. If the personal representative knows of a creditor, the creditor must receive written notice of the decedent's death and the creditor's right to seek payment of the debt from the estate.

After a certain period of time has passed (frequently no less than four months) from the date that the notice to creditors was published, the creditor claim period expires. After this period of time, a creditor may not bring a claim against the estate for payment. This prevents an unpaid creditor from attempting to bring its claim against the beneficiaries or heirs of the decedent.

It is important to note that the protections to the estate and its beneficiaries afforded through the notice to creditors procedure is highly complex and the failure to meet any of the requirements will render the notice to a creditor defective. A defective notice will allow a diligent creditor to seek repayment even after the claim period has expired.

◆ Assets and liabilities

The personal representative must inventory all of the decedent's assets and liabilities. Often, professional appraisals are necessary for difficult-to-value assets such as real estate and businesses. This valuation is also important if the estate is subject to estate tax and it is necessary to file estate tax returns with the Internal Revenue Service and/or one or more states.

An inventory of the estate must be completed in a short period of time following the commencement of the probate. The inventory is usually filed with the court although some states (such as Washington) have eliminated this requirement.

In addition, the personal representative must account for all income and expenses during the probate process. Some states require that the personal representative file annual accountings of all of the assets, liabilities, income and expenses of the estate with the court.

◆ Management of the estate

During the probate, the personal representative has the duty to manage the assets of the estate for the benefit of the beneficiaries. This includes proper investment of estate assets. In some cases the personal representative will be called upon to sell or lease real estate, manage the decedent's business, carry on the decedent's contracts and otherwise to step into the shoes of the decedent with regard to his or her financial affairs.

Although the personal representative does not need to be an expert at handling the decedent's financial affairs, the personal representative has a duty to seek the advice of appropriate counsel. The use of attorneys, accountants, financial advisors, appraisers and similar professionals are essential to the efficient administration of the estate and to ensure that the personal representative minimizes the likelihood of mistakes in handling the estate.

◆ Tax returns

Depending on the value of the estate and the assets involved, there may be several tax returns that must be completed during the probate. First, if the decedent was required to file a personal income tax return with the Internal Revenue Service or in any state, the personal representative is obligated to file these returns on behalf of the decedent.

The estate will also need to file an income tax return to report the income earned during the period of estate administration. This tax return must be filed on an annual basis. The estate may elect to use a fiscal year instead of a calendar year.

Finally, the estate may be substantial enough in value to require the filing of one or more estate tax returns. These returns report the assets and liabilities of the decedent. The estate tax is imposed on the net value of the estate. Most expenses of administration can be used to reduce the estate tax. In addition, distributions to a spouse or to a charity will also reduce the estate tax otherwise due.

◆ Closure of the estate

Once the business affairs of the estate have been concluded, the estate may be closed. Depending on state law, this process may take several weeks or longer. In some states, only the court may give permission to close the estate and distribute the remaining assets. Similar to the court order that commenced the probate, the court will enter an order directing the personal representative to distribute the assets subject to probate administration. Other states allow the distribution of the estate assets and closure of the estate by the personal representative without a court order.

As part of the closing process, the remaining assets of the estate are distributed by the personal representative in accordance with the decedent's will or according to the state's applicable intestate succession law. Each beneficiary will sign a receipt for the assets distributed to him or her. These receipts are filed with the court.

Other forms of estate administration

In some cases the formal probate of the decedent's estate is not necessary. During lifetime the decedent may have taken certain steps to avoid the probate of his or her estate. For example, the decedent may have transferred assets to a revocable living trust or other form of ownership that will distribute these assets without requiring a probate of the estate.

However, it is important to note that transfer of assets to a revocable living trust during lifetime is a mere change in the *form of ownership*, not a *change in the assets themselves*. Therefore, the same complexities may exist in the administration of the estate even though no probate is required. Assets must still be valued, creditors must still be paid and distributions made—all of the steps required in a probate, but without the court's oversight and involvement. In general, the administration of an estate without a probate will require many of the same steps as a probate. The fiduciary (such as a trustee of a living trust) has most, if not all, of the same responsibilities of a personal representative and the same exposure to liability for mistakes in handling the financial affairs of the estate.

In addition, all taxes must still be paid. Unless the decedent transferred assets during lifetime in a manner that has the effect of excluding the assets from the estate for tax purposes, the mere change in the form of ownership will not reduce the estate taxes payable. As a general rule, if the decedent retained the authority to benefit from the asset during lifetime or control the distribution of the asset at death, the asset is subject to estate tax. As discussed in Chapter 5, the application of the estate tax is not dependent on the decedent's ownership of the asset in question but his or her ability to benefit from and control the asset.

Resolution of disputes

Whether in the form of a formal will contest or other dispute arising in the administration of the estate, one of the most important functions of a probate administration is to resolve any disputes arising with regard to the estate. Proper estate planning can minimize the risk of disputes in the estate.

In some cases the probate of at least a portion of the estate may be warranted. One benefit of probate is that it forces persons interested in the estate to bring any potential claim in a timely manner. For example, a will contest must generally be brought within a short period of time following the commencement of the estate or it is barred.

Similarly, in many states the benefit of the creditor claim procedure (described above) is only available as part of a probate. Some states (including Oregon and Washington) allow the creditor claim procedure to be utilized by any fiduciary even if a probate is not commenced.

Conclusion

The administration of a decedent's estate can take on many forms. Not every estate will require probate; however, not every person should attempt to avoid probate either. Proper estate planning during lifetime can reduce the expenses of the administration of your estate, whether or not a probate of your estate is necessary or desirable.