

# **PROBATE: PRACTICAL ANSWERS FOR EMOTIONAL TIMES**

## **WHAT IS PROBATE?**

Simply put, probate is a court supervised process of gathering the decedent's assets, paying taxes, creditor claims and expenses, and then distributing the assets to the beneficiaries.

## **WHEN IS PROBATE NECESSARY?**

Generally, the only assets that need to go through probate are those assets that are owned solely in the decedent's name at the time of death. If you are married and own everything jointly with your spouse, those joint assets will automatically go to your spouse upon your death (no probate necessary.) However, probate is often necessary for a single person or when the second spouse passes away.

The following assets typically never require probate:

- **VEHICLES.** This includes automobiles, boats, trailers, motor homes and mobile homes.

Upon your death, your beneficiary can simply go to the tag and title office with your car title and death certificate and they will transfer the title into the name of the beneficiary.

- **LIFE INSURANCE AND RETIREMENT ACCOUNTS:** With these assets, you fill out a 'beneficiary designation form'. Upon your death, the beneficiary simply shows the company your death certificate and the company will pay the money to the beneficiary.
- **CERTAIN BANK ACCOUNTS:** Bank accounts held in-trust-for ("ITF") or payable-on-death ("POD") or transfer-on-death ("TOD") for another person, or held jointly with rights of survivorship ("JTWROS") with another person, do not go through probate.

- **REAL PROPERTY HELD IN A LIFE ESTATE:** A life estate deed states that you have the sole use of the property during your lifetime and, upon your death, it will go to the persons stated in the deed (the “remaindermen”) without any probate necessary. This deed cannot be changed at a later date.
- **REAL PROPERTY HELD IN AN ENHANCED LIFE ESTATE:** An enhanced life estate deed also states that you have the sole use of the property during your lifetime and, upon your death, it will go to the persons stated in the deed (the “remaindermen”) without any probate necessary. However, this type deed can be changed at a later date without the joinder or consent of the remaindermen.

## **WHAT IS A PERSONAL REPRESENTATIVE?**

The personal representative is the person appointed by the court to be in charge of the probate estate. The probate judge appoints the

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personal representative and issues to him or her "letters of administration." These "letters" show the world that the personal representative has the authority to perform all actions necessary to probate the estate. The personal representative is obligated to:

- Identify, gather and safeguard probate assets.
- Publish a "Notice of Administration" in a local newspaper and give notice of the administration to all interested persons by certified mail.
- Conduct a diligent search to locate known or reasonably ascertainable creditors and notify them by certified mail to file their claims.
- Pay all valid claims.
- File tax returns and pay all appropriate taxes.
- Distribute the assets to the beneficiaries.

## **WHO HAS PREFERENCE TO BE THE PERSONAL REPRESENTATIVE?**

If the decedent left a valid will, then the person nominated by that will to be personal representative has preference.

If the decedent did not leave a valid will, the surviving spouse has preference and, if there is no surviving spouse, then the person selected by a majority in interest of the beneficiaries.

## **HOW IS THE ATTORNEY FOR THE PROBATE CHOSEN?**

The personal representative chooses the attorney to handle the probate. A will provision mandating that a particular attorney or firm be employed as attorney for the personal representative is not binding.

The attorney for the personal representative advises the personal representative on rights and duties under the law and represents the personal representative in all estate proceedings. The attorney for the personal

representative is not the attorney for the beneficiaries.

## **HOW LONG DOES PROBATE TAKE?**

If the estate is not required to file a federal estate tax return, the estate must be closed within 12 months of its commencement. This period can be extended after notice to all interested parties. However, typically an estate is finished and closed within four to six months. In any event, sale of property and partial distributions can usually be done during the probate process.

## **HOW ARE FEES DETERMINED IN PROBATE?**

The Florida Statutes recommends a fee of 3% each to the personal representative and the attorney for the estate.

## **WHAT ARE THE DIFFERENT TYPES OF PROBATE?**

There are different types of probate that can be used depending on the type and amount of the

assets and other circumstances. The types most commonly used are:

**SUMMARY ADMINISTRATION:** This form of probate can be accomplished in just a few days and is relatively inexpensive. However, it can only be used when the total value of assets going through probate do not exceed \$75,000 (not including the decedent's homestead) and there are no creditors OR when the decedent has been dead for more than two years. You can do this without an attorney, but the probate clerks will not give you forms or assist you in any way.

**FORMAL ADMINISTRATION:** This is the form of probate most people are familiar with. It typically takes four to six months to complete and can last as long as one year when federal estate taxes are due. The law requires that the personal representative be represented by an attorney in the type of probate.

**ADMINISTRATION UNNECESSARY:** This type is used when the probate estate does not exceed the cost of the decedent's funeral. For

example: The decedent only has a bank account with \$1,200 and the funeral expenses were \$1,800. For this type of probate, the court clerks will give you the forms and assist you (it is meant to be done without an attorney.)

## **WHAT TYPES OF TAXES ARE INVOLVED IN PROBATE?**

The personal representative may be required to file the following returns, depending on income of the decedent, income of the estate and the size of the estate:

- Final Form 1040 income tax return.
- Form 1041 income tax return for the estate.
- Final Form 709 gift tax return
- Form 706 federal estate tax return.

In addition, the personal representative has the responsibility to investigate and conclude issues arising from tax years prior to the decedent's death. The personal representative typically retains a CPA to handle of the estate tax matters.

## **WHAT SHOULD I DO NOW?**

I offer free initial office consults regarding a probate that needs to be done. Call me, Attorney Tom Olsen, at (407) 423-5561 to schedule your office conference.

## **QUESTIONS, COMMENTS, SUGGESTIONS?**

Did you read something in this booklet that was not clearly explained? Do you have a question about this topic that was not answered? Have you found a typographical error or a legal inaccuracy in this booklet? Please contact me with your questions, comments or suggestions. Your thoughts and suggestions are greatly appreciated.

## **NOTES:**