PROBATE:

An Executor's Role and Responsibilities

AMERICAN ACADEMY | OF ESTATE PLANNING ATTORNEYS

The passing of someone close to you is a difficult and emotionally draining time. The last thing you likely want to deal with is the business of settling your loved one's final affairs. But, if you are a potential executor, it's one of those things that must be done, and it's not as horrible as you may have feared. The truth is that, like anything unfamiliar, probate can seem intimidating, but if you are armed with a little knowledge and have the help of an experienced advisor, the process is not as bad as you might think.

WHAT EXACTLY IS PROBATE?

Probate is the legal process through which the final debts and taxes of a deceased person are paid, and through which that person's remaining property is distributed.

If the deceased person had a will, then the probate process involves verifying that the will is valid, officially appointing the executor, and providing a framework for the executor to inventory the assets of the deceased, pay valid claims made against the estate, and distribute the remaining assets to the beneficiaries as provided by the will.

If the deceased had no estate plan at all, called dying intestate, then the probate process is slightly different. An administrator is chosen for the estate, and the administrator makes an inventory of the assets of the estate, pays the claims against the estate, and then follows the provisions of state law to distribute the remaining assets to the heirs of the deceased. More is covered on the subject of passing away without an estate plan later in this report.

WHAT DOES AN EXECUTOR DO?

An executor is the person who is responsible for winding down the affairs of a deceased individual. The executor's job is a little more complicated than just reading the will and following the directions it contains. If you have been appointed executor, you'll be handling the probate process on behalf of the deceased under the authority of the probate court and in accordance with state law, as well as the terms of the will. Generally, this involves the following steps:

1. Determine whether probate is needed
2. Begin the probate process
3. Keep track of and protect the property of the deceased until it is all appropriately distributed
4. Manage the day-to-day affairs of the estate
5. Pay taxes
6. Pay creditors' claims

7. Distribute the remaining estate assets according to the will

Throughout the probate process, you'll have to follow the appropriate procedures and you'll be accountable to the court. This makes it necessary to be highly organized and to document your actions on behalf of the estate every step of the way.

NOT ALL PROPERTY IS SUBJECT TO PROBATE

The first step in performing your duties as executor is to figure out which property is subject to probate so that you will know whether probate is necessary. Most property that is jointly owned passes directly to the surviving owner outside of probate. For example, real estate that is held as "joint tenants with right of survivorship" is not subject to probate, nor are most joint bank accounts.

Further, property that is in a Living Trust passes to the trust beneficiaries without the need for probate.

The rules in the probate process can be tricky, and sometimes property that appears to be jointly held is actually required to go through probate. An experienced estate planning attorney can help you determine which property is subject to the probate process and which property is not. Once you have determined that probate is necessary, it is time to initiate the process.

For more information on jointly titled property, request the free report "The Trouble With Joint Tenancy."

BEGINNING THE PROBATE PROCESS

The first step in the probate process is to file a petition for probate with the probate court. Your attorney will prepare and file the petition on your behalf, with the original will attached. All of the potential beneficiaries will be notified that the probate process has started, and will be given a copy of the Petition. Also, a notice of death will be published in the newspaper.

A date for the first hearing will be set by the probate court. This hearing is where the will is validated and the executor is officially appointed. If no one contests the validity of the will or the naming of you as executor, the court issues a document called Letters Testamentary that will allow you to carry out all of your duties on behalf of the estate. This document shows that you have the authority to act for the estate.

© AMERICAN ACADEMY OF ESTATE PLANNING ATTORNEYS, INC.

INVENTORY

Once the will has been validated and you have officially been appointed executor, there will be a certain time period within which you will need to file an inventory with the court. The inventory will include a complete list of all the estate property, along with the fair market value of each item. Valuable property like real estate, stocks, art work, and antiques will need to be professionally appraised, while you as executor can likely take care of placing a value on minor items.

You will be responsible for securing the property of the estate during the probate process, as well as managing the daily affairs of the estate. Depending on the property involved, this may mean changing the locks on certain pieces of property, buying insurance, managing rental property, or selling certain assets to raise cash to pay creditors. You will also establish a bank account on behalf of the estate, and obtain a federal tax identification number for the estate.

Also included in the inventory is a listing of all the bills and debts of the estate, and the amount of each. You as executor will notify all creditors that the death has occurred and that there is a deadline for filing claims with the court.

HANDLING CREDITORS

As the creditors' claims are submitted to the court, you will review them and either accept or reject each claim. If you accept the claim, then the amount due will be paid out of the assets of the estate. If you reject the claim, then a hearing will be scheduled so that both you and the creditor can present your arguments to the probate judge, and the judge will decide whether the claim is to be paid.

Once all of the valid claims against the estate have been paid, you will prepare a final inventory and submit it to the court for approval.

WHAT ABOUT TAXES?

The next step in the probate process is taking care of taxes. As executor, you will be responsible for filling out and submitting all necessary tax forms to the IRS and any state and local taxing authorities, and paying any final income taxes on behalf of the deceased, as well as any estate taxes that are due.

If estate taxes are owed, then you will complete and submit a Form 706 to the IRS within nine months of the date of death (unless you're granted an extension). Any estate taxes that

are due will be paid from the assets of the estate. The IRS will receive the payment and then issue a closing letter verifying that all estate taxes have been paid. Until this closing letter is issued, the probate court cannot close out the estate, so it is important to seek guidance in completing Form 706 properly. Errors can cause lengthy delays and, if serious enough, might result in adverse tax consequences. An experienced estate planning attorney will have the knowledge and resources to help you minimize any potential delays in receiving the IRS closing letter.

THE FINAL ACCOUNTING

After all creditors' claims are handled and all taxes are paid, you will prepare a final accounting for the probate court. This is a document that provides the court with a summary of all actions that have been taken on behalf of the estate. It includes the initial inventory of assets and liabilities, information on any property that has been sold, a statement of any earnings on investments, as well as a record of which creditors' claims have been paid and the amount that has been paid in taxes. The final accounting also totals the remaining assets of the estate and provides the court with an itemization of proposed payouts to beneficiaries.

Not only is the final accounting submitted to and approved by the court, each beneficiary must also review and approve it. If any aspect of the accounting is disputed by a beneficiary, the court will resolve the dispute.

Upon approval of the final accounting by the court and the beneficiaries, the court will issue an order allowing you to distribute the remaining assets of the estate to the appropriate beneficiaries, and probate will be finished.

HOW MUCH WILL THIS COST?

The cost of probate is paid from the estate assets, and not out of your pocket, as the executor. The amount of expense involved varies depending on the circumstances of each individual estate.

Almost every estate incurs court filing fees and attorney's fees. If the estate includes many assets that need to be professionally appraised, then there may be substantial appraisal fees. If there are disputes that must be resolved by the court, then, of course, there will be additional attorney's fees.

In general, the smaller the estate and the fewer disputes that arise, the quicker the process and the lower the cost of probate will be. On the other hand, large estates or those involving drawn out disagreements among beneficiaries are generally more costly and time

© AMERICAN ACADEMY OF ESTATE PLANNING ATTORNEYS, INC.

consuming to probate. An experienced estate planning attorney can help you streamline the process as much as possible, potentially saving money in the long run.

SPECIAL CONCERNS

No two estates are exactly the same, and there are often questions that arise when it looks like the probate process might become complicated. Here are examples of some special concerns that might surround the probate process.

HOW CAN A WILL BE CONTESTED?

A will can be contested by a beneficiary named within the will, or by an heir of the deceased – a family member who would normally stand to inherit from the deceased, but who may not have been named in the will.

In order for a will contest to be successful, the person making the challenge must show that the will itself is not valid. This can be because the person who made the will did not follow state law in having the document properly signed and witnessed, or because the will does not reflect the actual intentions of its maker.

In order to show that the Will does not reflect the maker's intentions, generally the person bringing the challenge has to prove that the maker did not have legal capacity to make the will or that the maker was under undue influence or duress at the time the will was made.

The beneficiaries can also challenge the appointment of an executor. An executor can be challenged and disqualified from serving if any of the following are shown:

- That he or she is a convicted felon
- That he or she is under the age of 18
- That he or she is physically or mentally incapable of fulfilling the duties of an executor

WHAT DO I DO WITH INSURANCE POLICIES AND PENSIONS?

If the deceased left a life insurance policy with a designated beneficiary other than the estate itself, then the life insurance company will send the proceeds to the beneficiary directly, outside of probate. Life insurance can be tricky, though. Even though the proceeds are distributed outside of the probate process, the policy may still be subject to estate taxes, so when you are creating the initial inventory of the estate, you will need to look for life insurance policies. Your attorney can give you guidance on the issue of estate taxes.

The same is true of pensions, IRA's, and certain other retirement accounts. If a beneficiary has been designated for these accounts, then the proceeds of the account are paid to the beneficiary without going through probate. However, estate and/or income taxes may still be payable.

WHAT IF SOME OF THE PROPERTY IS IN ANOTHER STATE?

Probate laws vary from state to state, so if some of the property of the deceased is located in another state, a process called ancillary probate may need to be used to settle all of the affairs of the estate. Under ancillary probate, a separate probate proceeding is opened in the state where the property is located. This is in addition to the primary probate proceeding, which takes place in the state where the decedent resided.

Ancillary probate is usually necessary when the deceased owned out-of-state real estate, but it might also be necessary to transfer ownership of personal property, like cars, boats, or bank accounts, that are titled in the name of the deceased.

WHAT IF THE PROBATE ITSELF IS IN ANOTHER STATE?

Probate occurs in the state where the decedent resided, and probate laws vary from state to state. If a loved one has left a will naming you as executor, but he or she lived in another state, it is important to seek advice from an attorney who is familiar with the laws of the state where probate will take place.

In some states, only a family member is allowed to serve as an out-of-state executor. In other states, an out-of-state executor is required to post a special bond. Posting a bond means putting up a certain amount of money, often in the form of an insurance policy, to ensure that you carry out all of your duties in good faith.

An experienced estate planning attorney can help you determine whether you are qualified to serve as an out-of-state executor, and can help you through the process.

WHAT IF THERE IS NO WILL?

If a loved one dies without a will, then he or she is deemed to have died "intestate." The probate process differs slightly for an intestate estate. Without a will, there is no executor to be appointed. Instead, the court appoints an administrator to act on behalf of the estate. Anyone who wishes to represent the estate can petition to serve as the administrator, and the job often goes to a family member.

Also, the law says that in the absence of a will, there is no way to know exactly what the wishes of the deceased were for the distribution of his or her property. Therefore, once the administrator is appointed, the court determines how the property of the deceased is to be

© AMERICAN ACADEMY OF ESTATE PLANNING ATTORNEYS, INC.

distributed. This determination is made based on state law, which dictates which family members are to get what portion of the estate assets, once all debts and taxes are paid. Generally, if there is a surviving spouse or children, then the bulk of the estate goes to them. However, the law varies based on the exact number of survivors and their relationship to the deceased.

FINDING HELP

As executor or administrator, you'll want to use the guidance of an experienced attorney, especially if this is your first time navigating the probate process. Often, people put provisions in their wills advising that the attorney who drafted the will be used during the probate process. Depending on your situation, this may be an excellent option, but it is not a requirement.

The most important consideration for you, as executor or administrator, is finding an attorney who has the experience to guide you through the process, and with whom you feel comfortable. It is a good idea to talk to several attorneys before settling on the one you'll use.

Find out how long they've been practicing law and how many estates they've helped probate. An attorney who has experience with the probate process and who devotes a large part of his or her practice to estate planning and probate is likely to be well-versed in the rules and ready to help you avoid potential problems. Finding an experienced attorney is especially crucial if there is any concern about a will contest, or in a situation where estate taxes will need to be paid.

It is also important to find an attorney you'll be comfortable working with. Look for someone who is a good listener and is responsive to your questions. You will be working closely with this person, so it is important to engage the services of an attorney whom you like and trust.

ABOUT THE ACADEMY

This report reflects the opinion of the American Academy of Estate Planning Attorneys. 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 Academy Report alone. Review your estate planning goals with a qualified estate planning attorney.

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive Membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services.

The Academy expects Members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects. To ensure this goal is met, the Academy provides over 40 hours of continuing legal education each year. The Academy has also been recognized as a consumer legal source by Money Magazine, Consumer Reports Money Adviser and Suze Orman in her book, 9 Steps to Financial Freedom.

© AMERICAN ACADEMY OF ESTATE PLANNING ATTORNEYS, INC.