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White Paper

Probate

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Table of Contents

Probate.....	3
What is probate?.....	3
Probate court	3
How long does it take to go through probate?.....	4
How much will probate cost?	4
Why go through probate?.....	6
The probate process	6
What items are subject to probate?	9
What if you did not leave a will or the will that you left is invalid?.....	10
Disclosures	10

Probate

What is probate?

Management, settlement, and distribution of the deceased's estate

When you die with a will, your estate goes through a process that manages, settles, and distributes your property according to the terms of your will. This process is governed by state law and is called probate. Probate proceedings fall under the jurisdiction of the probate court (also sometimes called the Surrogate's, Orphans', or Chancery court) of the state in which you are domiciled at the time of your death. The probate court in the state in which you are domiciled at the time of your death oversees probate of your tangible and intangible personal property and any real estate that is located in that state. If you own property located in a state other than the state in which you are domiciled at the time of your death, you may be required to initiate ancillary probate proceedings in the other state.

Items that are subject to probate are known as probate assets. Probate assets generally consist of any property that you own individually at the time of your death and that passes to your beneficiaries according to the terms of your will. Nonprobate assets include all property that passes outside of your will and therefore do not have to go through probate. Examples of non-probate property include property that is owned jointly with right of survivorship (e.g., a jointly held bank account) or property that is owned as tenants by the entirety (e.g., real property owned by a husband and wife.) Other property that passes outside of probate is property which passes to designated beneficiaries by operation of law such as proceeds of life insurance or retirement benefits.

Technical Note: Domicile is a legal term meaning the state where you intend to make your permanent home. It does not refer to a summer home or a temporary residence.

Caution: If you own real property in another state, your executor will need to initiate ancillary probate proceedings and administration in the state where the property is located.

Tip: States generally require an estate to go through the probate process if the estate's assets exceed a threshold amount, which varies from state to state. Estates whose values are under the threshold amount can avoid probate altogether if the executors so elect, or they may have the option of electing an informal or expedited probate procedure.

Probate court

If an estate goes through the probate process, the probate court supervises the following activities:

- Validation of the decedent's will
- Identification and collection of estate assets
- Payment of debts, expenses, and taxes

- Distribution of assets to the beneficiaries
- Accounting to all interested parties

How long does it take to go through probate?

Depending on where your executor probates your estate and the size of your probate estate, the probate process can take as little as three months, or as long as two years or more.

Informal or formal

Some states allow an executor to choose from either formal or informal probate proceedings. If probate is formal, the executor must follow formal probate procedures (usually defined by statute) and is under the direct supervision of the probate court. If an estate is small and there are no complex issues to resolve, the executor of the estate may be permitted to apply for informal probate. Where informal probate is elected, the executor becomes personally responsible for the activities noted above that are supervised by the court in a formal probate proceeding. While procedures vary from state to state, if probate is informal, the executor may not have to appear (or file) in court after proceeding under informal probate rules has been approved.

Tip: Informal probate is often not as complicated and time-consuming as formal probate, nor as costly. Therefore, your executor should consider electing informal probate if that option is available for your estate.

Caution: Even when informal probate is available, courts only allow it if you leave a valid will and the will has not yet been submitted for formal probate. However, if you do not leave a valid will, informal administration of your intestate estate may be available if other requirements are met.

How much will probate cost?

Probate costs usually include court costs (filing fees, etc.), publication costs for legal notices, attorney's fees, executor's fees, bond premiums, and appraisal fees. Court costs and attorney's fees can vary from state to state. The total cost for probating an estate can be anywhere from \$250 on up. Typically, the larger the estate, the greater the probate costs. However, if a smaller estate has complex issues associated with its administration or with distribution of its assets (e.g., if the decedent owned property in several different states), probate can be quite costly.

Tip: Since probate can be a lengthy and costly process, it may be advisable to take advantage of various estate planning techniques that can reduce or eliminate your probate estate.

Court costs

Court costs for submitting a will for probate vary from state to state. Court costs can include filing fees for processing the probate application, fees for issuance of letters testamentary (a document authorizing the executor to act on behalf of the estate), fees for production of certified copies of the will, inventory filing fees, etc.

Attorney fees

Like court costs, attorney fees can vary from state to state. When probating an estate, an attorney may charge a flat fee or a percentage of the probate estate, or may charge by the hour for his or her time. When using the hourly method, the attorney generally charges an agreed-upon rate for the actual number of hours that he or she spends working on administering your estate. If an attorney charges a percentage of the probate estate, his or her fee can range anywhere from 2 to 10 percent or more of the total value of the probate estate.

Tip: Unless state law mandates otherwise, it is probably wise for the executor of a smaller and less complex estate to arrange for attorney fees to be charged based on the hourly method, as the hourly method is usually a more accurate representation of the actual value of the attorney's services.

Executor fees

Executor's fees are often based upon a percentage of the overall estate. They may also be a flat fee unrelated to the size of the estate. Whether a flat fee or a percentage of the estate, executor's fees are often set in the decedent's will. The executor's fees may be waived by the executor, and are often waived when a family member serves as the executor in order to preserve the estate for the beneficiaries of which the executor may be one. Some state laws fix executor fees using a percentage formula, while other states simply permit the executor to charge a reasonable fee. In addition to their fee, executors are also entitled to reimbursement for any out-of-pocket expenses incurred in administering your estate.

Bond premiums

Some states require your executor to make an oath and post a bond to ensure that he or she will faithfully execute his or her duties as executor of your estate. State law determines the amount of the bond (which is generally based on the size of the estate), and stipulates whether the executor must obtain a corporate or personal surety to guarantee the bond.

Appraisal fees

Your executor may have all of your property, both real and personal, appraised, along with any business interests that you own on your death (an appraisal may not be required or desirable for smaller estates and estates that are not going through formal probate proceedings or are not subject to tax). If your

estate is subject to estate or inheritance tax, your executor must verify the value of any real property or business interests that are reported on federal or state tax returns. In addition, an appraisal may be necessary to settle a dispute between beneficiaries regarding the value of certain personal property. Your executor may hire one or more appraisers for this purpose.

Why go through probate?

Probate is a means of obtaining verification from the probate court that the will you left is valid, and for the orderly disposition of your assets according to the terms of your will. Probate also provides a statutory limit on the length of time for filing of claims against the estate and a way to pass title on estate property from the deceased to the beneficiaries. If the potential exists for there to be numerous creditors or disputes among your beneficiaries, probate, although lengthy and costly, may be a wise choice. In addition, some states require that your will be probated before the beneficiaries under your will can exercise certain rights. Among the rights that may be limited are the right of your surviving spouse to waive his or her share under the will and elect a statutory share instead, the right of your surviving spouse to use your residence during his or her remaining life, the right of your surviving spouse to set aside certain property, and the right of your surviving spouse to a family allowance.

The probate process

Some states, but not all, have adopted the Uniform Probate Code or some version of it. However, since the laws that govern probate procedures vary from state to state, it is important to be familiar with your state's probate statutes before submitting a will for probate. You can look up these statutes yourself in any law library (ask the librarian for help if you need it)--or obtain the necessary information from the probate court or register of wills in your state. However, it is advisable to obtain the assistance of an attorney if you are not sure how to proceed.

Choosing the right court

There may be situations where your domicile could arguably be in more than one state (for example, if you live in New York for six months and Florida for six months each year). Some factors that may determine your domicile in these situations are where you live most of the year, where you intend your permanent home to be, where you are registered to vote, where you have your driver's license, and where you file your taxes. If your domicile could arguably be in more than one state, it is important for your executor to consider carefully where probate proceedings are going to be initiated since some states may exempt smaller estates and certain property from the probate process or may impose estate, inheritance, or other taxes to a greater or lesser degree. Your executor should also consider initiating probate proceedings in the state that will most effectively and efficiently dispose of your estate.

Initiation of the process

The probate process begins when someone files your will with a court of competent jurisdiction (usually in the state where you are domiciled at the time of your death). An application or a petition asking the court to admit the will to probate generally accompanies this filing along with an application for the appointment of an executor.

Proving the will is valid

Before it can be admitted to probate, your will must be proved to be a valid document. In order for a will to be considered valid, it must be executed in accordance with the formalities required by your state of domicile. Valid execution can be proved either by inclusion of a self-proving affidavit with the will (a signed statement of a witness declaring that the will was validly executed) or by presentment of evidence at a probate hearing. Although the formalities for valid execution vary from state to state, most states require that the person making the will, also known as the testator, intend the document to serve as his or her will and sign or acknowledge the will in the presence of two or more disinterested witnesses, who then sign the will in the testator's presence.

Appointment of executor

The application for appointment of an executor is generally filed with the will. If the executor meets state law qualifications, the probate court will generally grant the application. By granting the application, the court is authorizing your executor to handle the administration of your estate. If the court denies the application (or if no executor was appointed in your will or if you died leaving no will), the court will appoint someone to act as the administrator of your estate. The court may require your executor to make an oath (and/or post a bond) that indicates that he or she will faithfully execute his or her duties as executor of your estate. Once an application for appointment of an executor has been granted, "letters testamentary" are issued (or letters of administration for the appointment of an administrator) to your executor (or administrator) that give third parties evidence of your executor or administrator's authority to act on behalf of your estate.

Notice to interested parties

A notice that your executor is presenting your will for probate must be given to all parties who may have an interest in your estate. This notice gives the interested parties a chance to contest or object to the probating or the terms of your will, or to file claims against your estate, if applicable. Additionally, by giving notice, the statute of limitations on claims starts to run as well as the time limit for the surviving spouse to make an election against the will. The length and type of notice varies, depending upon state law.

Administration of your estate

Once notice has been given and the requisite time period for interested parties to contest the will or file claims against the estate has passed, your executor can complete administration of your estate.

Administration involves the identification and collection of your probate assets; payment of debts, expenses, and taxes; and the distribution of the remaining assets to your beneficiaries according to the terms of your will.

Tip: The amount of time an interested party has to contest a will, file claims against an estate or make an election against the will varies from state to state.

Tip: The executor of your estate must determine if it is necessary to retain an attorney for assistance in the probate process and administration of your estate. If administration of your estate is going to involve significant tax and distribution issues, it is probably in your beneficiaries' best interests for your executor to hire an attorney.

Collection and management of assets

Your executor is responsible for collecting and managing your assets. Your executor should make an inventory of all assets you owned on the date of your death and should determine the value of all of those assets. These assets include personal property (tangible and intangible), real property, business interests, and contractual rights. If your executor has elected to go through a formal probate process (see discussion above), he or she then files the inventory with the probate court, listing the assets and giving their value as of the date of your death (or alternate valuation date, if applicable). In addition to collecting your assets, your executor has a duty to properly manage your assets, including making sure the assets do not decrease in value (e.g., investing funds rather than placing them in non-interest bearing accounts), insuring the assets (so that your executor is not responsible for any losses), and obtaining a fair price for any of your property that is sold.

Tip: Once your executor files the inventory with the probate court, it becomes a matter of public record. If privacy is an issue, you may want to plan now to avoid probate.

Payment of debts, expenses, and taxes

Once your executor collects and inventories your assets, he or she must pay all debts, expenses, and taxes that you owed upon your death or that are incurred by the estate during the administration process. In determining what debts you owe upon your death, the executor should look for loans, credit card charges, and other bills. Expenses are typically made up of court fees, attorney fees, executor fees, appraisal fees, and other charges incurred after your death. Taxes include death taxes (federal and state), income taxes (federal and state), and state and local personal and real property taxes.

Tip: At the outset of the probate process, your executor may want to open an estate checking and/or savings account where he or she can deposit cash that is part of your estate upon your death or that is received by the executor during the administration of your estate. Estate accounts can make it easier for your executor to track cash while paying debts, expenses, and taxes.

Tip: In some cases, your executor may want to or may be forced to sell your real or personal property to pay debts, expenses, or taxes. Court approval for the sale of real or personal may be necessary, depending upon state law and the terms of your will.

Final accounting

Once your executor collects your assets and pays all debts, expenses, and taxes, he or she must file a final accounting with the court. Notice is generally given to all interested parties in order to afford them an opportunity to review the final accounting and to object to it if they feel there is a problem. An interim accounting may also be filed if the estate administration process is expected to be prolonged, and the executor wants to have certain payment, distributions, or other actions approved by the court prior to the final accounting.

Distribution of the probate estate

Once the court approves of the final accounting, your executor completes the distribution of your estate according to the terms of your will (distribution at certain points before the final accounting is issued may be desirable for income tax reasons). After distribution, the court may require your executor to file a petition of discharge. Once the court approves the petition, the court closes your estate and formally discharges your executor, relieving him or her from any further obligations regarding your estate.

What items are subject to probate?

Items that are subject to probate are called probate assets and make up what is known as the probate estate. Probate assets generally consist of any property you own at your death that passes to your beneficiaries according to the terms of your will.

Example(s): Ken dies, indicating in his will that he wants Sue to have his favorite watch. The watch is a probate asset that will pass to Sue, Ken's beneficiary, according to the terms of his will.

Non-probate property is property that you own at death that passes outside of your will (e.g., by operation of law such as jointly held property or life insurance proceeds). Non-probate assets bypass the probate process.

Example(s): Ken takes out a life insurance policy and designates Sue as the beneficiary. Ken indicates in his will that he wants Liz to have the proceeds of his life insurance policy. The life insurance proceeds are a nonprobate asset. When Ken dies, the life insurance proceeds pass outside of Ken's will and go directly to Sue, not Liz.

Since some states exempt smaller estates and certain types of probate property from the probate process, and since the laws that govern probate vary from state to state, it is important for the executor to check the probate laws in the state of your domicile in order to determine if probate is necessary for your estate.

What if you did not leave a will or the will that you left is invalid?

If you die without a will, also known as dying intestate, or your will is invalid, your property will pass to your legal heirs under the state intestate succession laws. When you die intestate, the court appoints an administrator (rather than an executor) to be in charge of collecting and managing your assets; paying debts, expenses, and taxes; and distributing your remaining assets according to the state intestacy laws. State law usually governs appointment of the administrator. While state laws vary, the administrator of an intestate estate will likely be either your surviving spouse or your next of kin.

Disclosures

This material does not constitute the rendering of investment, legal, tax or insurance advice or services. It is intended for informational use only and is not a substitute for investment, legal, tax, and insurance advice.

State, national and international laws vary, as do individual circumstances; so always consult a qualified investment advisor, attorney, CPA, or insurance agent on all investment, legal, tax, or insurance matters.

The effectiveness of any of the strategies described will depend on your individual situation and on a number of other factors. After reviewing your personal situation, we may recommend that you not use any strategy in this document but instead consider various other strategies available through our practice.

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