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## WHAT IS PROBATE? (AND SHOULD YOU TRY TO AVOID IT?)

### *What Is Probate?*

To probate a will simply means the legal act of proving that the will submitted to the court is the actual (legal) last will and testament of the decedent. After a will has been admitted to probate by the court having jurisdiction over the decedent's estate, such will can be relied upon and, in fact, is legally enforceable with respect to the instructions from the decedent as to how his or her estate is to pass upon his death. The act of proving the will is important so that all parties involved may know what instructions they are to follow regarding the administration of the decedent's estate.

### *What Is Probate Administration?*

As we all know, however, there is much more involved beyond the initial act of admitting the decedent's will to probate. There is a legal process, commonly known as probate administration. Probate administration is a court supervised, systematic and organized process for finalizing the financial affairs of a deceased person. The probate process is governed by state statutes and rules which, for the most part, are well-settled and well-known to attorneys and judges who practice in this area of law. The Florida statutes and rules have been developed over many years and are constantly being updated to provide greater speed, efficiency and protection to ensure that the decedent's wishes are carried out.

The statutes and rules provide protection from liability for the person who is appointed to administer the decedent's probate estate (in Florida this person is referred to as the personal representative). The statutes and rules also protect the beneficiaries by ensuring that they receive their lawful share under the decedent's will, or under the Florida laws of intestacy if the decedent did not leave a will. For example, the Florida statutes and rules governing probate administration provide a systematic, legal procedure for the personal representative to notify the decedent's creditors as to how to file a claim in the court supervising the probate administration and for the orderly payment of creditors' claims that are timely filed. This may seem rather basic, but without a formal means for payment of creditors, a personal representative may fear being held personally liable by creditors if he or she distributes the assets to the beneficiaries before payment of all lawful creditors. This would result in an enormous delay in finalizing the probate administration.

### ***What Is A Personal Representative and What Are His or Her Duties?***

Typically, at the same time that the decedent's will is admitted to probate or at the time the decedent is determined to have died intestate, a personal representative is appointed by the court to administer the decedent's probate estate. The personal representative appointed by the court is usually the person who is nominated in the decedent's last will and testament. Often, this is the decedent's surviving spouse or another family member or, perhaps, even a corporate entity such as a bank trust department. The general duties of a personal representative are to:

- 1) gather and classify all assets of the decedent; determine which assets are subject to probate administration and which assets are not, and determine the value of all assets (probate and non-probate assets) for estate tax purposes;
- 2) inventory, maintain and manage the decedent's assets during probate administration to prevent loss, including the operation of any business interest of the decedent;
- 3) arrange for sufficient liquidity to pay the proper debts of the decedent, funeral expense, taxes (income and estate taxes) and miscellaneous administration expenses;
- 4) determine potential creditors of the decedent, to give those potential creditors proper notice pursuant to Florida law, and to make arrangements to pay the claims of creditors who have filed a timely claim pursuant to Florida law; and
- 5) make distribution of the remaining assets of the estate in accordance with the terms of the decedent's will or pursuant to the Florida laws of intestacy (if the decedent died without a will).

The above is a list of the general duties of the personal representative; however, the actual work needed to be completed by a personal representative can be quite involved depending upon certain factors, such as the size and complexity of the estate, the degree that the beneficiaries get along with each other and cooperate with the personal representative, and the depth of post-death tax planning that is needed or appropriate.

Although the probate administration process is usually simple and straightforward, to a personal representative who is not familiar with the process, it can be a land mine for potential liability. Therefore, it is advisable, and in fact, it is a legal requirement, that the personal representative retain a lawyer licensed to practice law in the State of Florida to assist the personal representative in carrying out his or her duties as personal representative of the decedent's estate. Therefore, not only is it important to designate a responsible and trustworthy person in your will as your personal representative, it is equally important for the personal representative to carefully choose the attorney who will represent the personal representative in the probate administration process.

We recommend that the personal representative hire an attorney who makes the area of probate administration a primary part of his or her practice, and not just as a sideline. Many attorneys

will take on a probate administration matter, even though probate administration may not be his or her specialty. The personal representative should consider hiring an attorney or law firm where one or more of the attorneys are board certified in wills, trusts and estates, because a board certified attorney has gone through rigorous requirements by The Florida Bar, ensuring that the board certified attorney is trained and competent to handle probate matters. Currently, Charles Ian Nash and Rex E. Moule of this law firm are board certified in wills, trusts and estates.

### ***How Much Will It Cost?***

This question deserves a straightforward answer and not the run-around. One of the duties of the personal representative is to conserve the assets of the estate so as to distribute as much as possible to the beneficiaries of the estate. Therefore, the fees charged by the attorney representing the personal representative are important and should be determined at the very beginning of the probate administration. The subject of the fees to be charged by the attorney representing the personal representative in probate administration is outlined in Florida law. What is *presumed* to be reasonable compensation for *ordinary* matters in a *formal* administration is set forth in the following table:

<b>ATTORNEY FEE</b>	<b>VALUE OF PROBATE ESTATE</b>
\$1,500	Value of \$40,000 or less
An additional \$750	Value of more than \$40,000 and not exceeding \$70,000
In additional \$750	Value of more than \$70,000 and not exceeding \$100,000
At the rate of 3%	On the next \$900,000, for estates having a value in excess of \$100,000
At the rate of 2.5%	For all above \$1 million and not exceeding \$3 million
At the rate of 2%	For all above \$3 million and not exceeding \$5 million
At the rate of 1.5%	For all above \$5 million and not exceeding \$10 million
At the rate of 1%	For all above \$10 million

Compensation may also be determined in a different manner than provided in the above table if the attorney and the parties bearing the impact of the compensation to be paid to the attorney so agree.

It must be critically noted that the statutory fee structure is *presumed* to be reasonable and that it is not necessarily reasonable in every probate administration. This presumed fee structure may be too high in some cases such as in a very large estate comprised of cash funds with no significant tax issues or disputes with creditors or disputes among the beneficiaries, and where the service to

be provided by the attorney representing the personal representative is straightforward. The fee structure may also be too low, especially in cases that are complex and involve a great deal of time by the attorney representing the personal representative. It should be further noted that the presumed fee structure outlined above is for *ordinary* services.

The attorney representing the personal representative is allowed further reasonable compensation for any extraordinary service. What is an extraordinary service may vary depending on many factors, including the size of the estate. Extraordinary services may include, but are not limited to:

- 1) Involvement in a will contest, will construction, or proceeding for determination of beneficiaries.
- 2) A contested claim by a creditor of the decedent.
- 3) An elective share proceeding of a surviving spouse.
- 4) Determination of apportionment of estate taxes.
- 5) Any adversarial proceeding or litigation by or against the estate.
- 6) Tax advice on post-mortem tax planning.
- 7) Representation of the personal representative in audit or any proceeding for adjustment, determination or collection of any taxes.
- 8) Preparation or review of the decedent's estate tax return or preparation of other tax returns required to be filed by the personal representative.
- 9) Purchase, sale or lease of real property.
- 10) Legal advice regarding carrying on the decedent's business.

It is important that the personal representative and the attorney representing the personal representative agree at the initial stages of the probate administration process what fees the attorney will charge for ordinary services and, to the extent that extraordinary services will be required, what fees the attorney will charge for those extraordinary services. It should also be determined at the beginning of the probate administration what tax returns will be required and who will be responsible for preparing and filing the required tax returns. If the attorney is going to prepare certain tax returns, it needs to be determined what fees the attorney will charge to prepare those tax returns.

The personal representative should also be aware that there will be other administrative costs in addition to legal fees. They will include, but are not limited to, court filing fees, the cost of publishing the notice of administration in a local newspaper of general circulation, the cost for certified copies of death certificates, the cost of any appraisals to appraise the value of any of the

decedent's property, the cost of cleaning out the decedent's home, and the cost of selling any of the decedent's assets in order to make cash distributions to the beneficiaries.

Under Florida law, the personal representative is also entitled to reasonable compensation for ordinary services. Generally, the personal representative is entitled to a fee of 3% of the probate estate for the first \$1 million in value, and for a lesser percentage as the estate exceeds \$1 million in value. In addition, the personal representative is allowed further compensation as the court may deem just and reasonable for any extraordinary services.

### ***Doesn't Probate Administration Drag On Forever?***

We are often asked this question. In the great majority of cases, the answer is no. The probate administration process itself is generally straightforward, especially if handled competently by the personal representative and the personal representative's attorney. The average probate administration takes approximately 5 to 6 months from beginning to end. Sometimes, however, matters unrelated to probate administration may cause delay. For example, the decedent may have left his or her affairs in such disorder that it requires a great deal of work by the personal representative and his or her attorney to straighten out various matters. Beneficiaries, themselves, can oftentimes cause unnecessary delay. Occasionally, beneficiaries fail to cooperate with the personal representative by not signing necessary receipts and waivers or by questioning every act, no matter how small, of the personal representative. Moreover, beneficiaries may not be happy with their inheritance and may contest the will. Also, typically for very large estates, the procedures involving the preparation, filing and payment of income and estate taxes may cause delay. Sometimes, the probate administration is complete except for the resolution of tax matters.

It should be noted that, during the probate administration process, Florida law has built in a great deal of flexibility to allow the personal representative to quickly take charge and make decisions. Generally, as soon as the personal representative is appointed by the court (this typically takes about two weeks but can be accomplished in *one or two days*, if necessary), the personal representative can begin to close the decedent's accounts and consolidate them into one or more estate accounts. The personal representative can begin to sell assets in order to provide liquidity to pay necessary bills or to make partial distributions to the estate beneficiaries if it is prudent to do so. The decedent's assets and accounts are not "frozen" during the entire probate administration process, but are only inaccessible during that period of time after the decedent's date of death and before the personal representative is appointed by the court. Therefore, the personal representative has a great deal of flexibility to move the probate administration along and to conclude the process as expeditiously as possible.

### ***Should You Attempt To Avoid Probate?***

There are several methods of avoiding probate, such as legally transferring all of your assets to a revocable living trust prior to death, titling your assets jointly with another person with right of survivorship or by use of beneficiary designation, for example, life insurance, retirement plans (401(k), IRAs) and annuity contracts. The question is, are you better off avoiding probate or better off having your assets follow the normal probate administration process?

Transferring all of your assets to a revocable living trust for the sole purpose of avoiding the expenses of probate administration may be foolhardy. Many of the trust administration requirements will be the same whether a decedent's assets are distributed pursuant to a revocable living trust or pursuant to a will by means of probate administration. For example, under a trust or a will, the personal representative or successor trustee must determine the extent of the assets of the decedent, determine the value of those assets, determine who the creditors of the decedent are, arrange for liquidity to pay debts and expenses, prepare and file the necessary tax returns, and make distributions to the beneficiaries under the will or trust. These costs of administration cannot be avoided. In my experience, the fees and costs associated with the administration of a revocable living trust are not necessarily lower than the fees and costs of probate administration. Moreover, when administering a revocable living trust to the exclusion of a probate administration, the creditors claim period is two years, whereas in a typical probate administration, the creditors claim period can be shortened to about four months.

There may be other reasons why you may want to have a revocable living trust as your primary estate planning document, such as providing management of assets during periods of incapacity. However, recent changes to Florida law make the use of durable powers of attorney an effective alternative to a revocable trust in terms of providing for the management of assets during incapacity. These matters should be addressed with your estate planning attorney so that you can determine which estate planning documents would best suit your particular needs.

We hope that by reading this article you gain a greater understanding of the probate administration process in Florida and that some of the concerns and questions you may have regarding probate administration have been alleviated and answered. Probate administration should not be feared and avoided at all costs, in fact, it may be the best means to ensure that your wishes upon your death are carried out in the safest, most efficient and least costly manner.

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