

Probate Estate Planning Strategies

**Wealth and Estate Planning Strategists
Family Office Resources**

The probate process is the legal settlement of an estate at a person's death and is governed by state law. More specifically, probate is the court proceeding whereby the local court appoints a Personal Representative (i.e., an Executor or Administrator) and determines how the decedent's estate should be distributed, either pursuant to a Last Will and Testament validly executed by the deceased person (the "decedent") during their life or pursuant to state intestacy laws (the statutes governing the disposition of probate property if a person died without a Will). A Personal Representative's duties may include: collecting all assets titled in the decedent's individual name; paying the decedent's outstanding debts; filing necessary tax returns, including final income tax returns and potentially federal and/or state estate tax returns; and distributing the remaining assets to the proper beneficiaries. In most states, the Personal Representative must report their activities to the probate court by preparing and filing an inventory of assets, an informational report, and an accounting.

Generally, probate must be commenced in the state where the decedent was residing at the time of death, if the decedent died owning property of any kind in their individual name (including fractional interests in property, such as a tenancy in common). A separate probate proceeding (called "ancillary probate administration") may also need to be conducted in any other state in which the decedent owned real property. However, probate is not necessary to transfer assets that pass via a beneficiary designation (such as life insurance or retirement benefits, such as IRAs), jointly-owned property with rights of survivorship (which passes to the survivor by operation of law), or assets held in trust. These are all considered non-probate assets.

It is important for an individual to create a Will to provide instructions concerning the distribution of their assets. If an individual passes away without a Will (i.e., dies intestate), the decedent's estate will be distributed according to their state's intestacy laws. In an intestate estate, the probate court appoints an Administrator who distributes the estate according to state laws.

The probate process following death often begins with a family member or close friend of the decedent contacting the decedent's attorney, accountant, and any other person with special knowledge of the decedent's assets. The attorney usually handles the preparation of any court forms and may assist with collecting assets. The accountant or attorney may also prepare any necessary tax returns. Nevertheless, the appointed Personal Representative is responsible for ensuring that all items required for the administration of the estate are completed in a timely manner.

The Probate Process

Generally, the following steps are involved in a probate proceeding when a decedent has a valid Will:

1. Application for Probate of the Will

The person nominated in the Will as Executor must file an application with the probate court, together with a certified death certificate and the original Will and any codicils. The application may require basic information about the decedent, including an estimate of the estate value as of date of death, a list of beneficiaries under the Will, and all heirs at law (if different from the beneficiaries under the Will).

The probate court may schedule a hearing to "admit" the Will (meaning, certifying its validity) and formally appoint the Executor. In some jurisdictions, if all parties are in agreement, the hearing may be waived. In other states, a hearing may not be required if all heirs consent to the appointment of the Executor and admission of the Will, or if there is no objection to the admission of the Will, after a notice period.

The probate court will then provide the Executor with fiduciary certificates (often referred to as "Letters Testamentary") to evidence their authority to act on behalf of the estate.

2. Marshalling Assets

Immediately after appointment, the Executor should begin collecting the decedent's probate assets. For example, the Executor may need to contact banks and brokerage firms to gain access and subsequently move the accounts to a fiduciary estate account. Generally, this is done with original death certificates and certified copies of the Letters Testamentary.

Deeds to real property in the decedent's individual name may need to be retitled in the name of the estate although sometimes the deed may be retitled directly in the name of one or more beneficiaries.

3. Inventory and Valuation of Assets

The Executor must also determine the value of all assets owned by the decedent as of the date of death. This may include all real property wherever located, tangible personal property (such as furniture and furnishings, cars and jewelry), bank and brokerage accounts, business interests, and other investment interests. For non-cash assets, a professional appraisal may be needed.

While non-probate assets are not listed in the inventory, those items will need to be valued for purposes of filing U.S. federal and state estate tax returns, if needed.

4. Expenses and Claims

When the Executor is appointed, creditors will have a certain period of time to present claims against the estate. The Executor will likely be required to publish notice of the decedent's death in a local newspaper. The decedent

may have outstanding bills, such as medical bills or credit card balances that need to be addressed. The Executor may also incur post-death expenses, such as a expenses related to a funeral or memorial service. The Executor should keep track of all expenses and claims received and should maintain detailed records regarding payments.

5. Estate Tax Returns

The U.S. federal estate tax return is due nine months after the decedent's date of death, if one is required, but the executor may request an extension of time to file for an additional six months. If U.S. federal estate tax is due, it must be paid no later than nine months after the decedent's date of death and the executor must make an estimated payment of the tax due if the estate tax return is not ready to be filed by that deadline. In very limited circumstances, an extension of time to pay U.S. federal estate tax is available.

If the decedent's estate is insolvent, the executor should consult with their tax advisor regarding the priority of payment of creditors.

6. Final Account and Proposed Distribution

Generally, the Executor will also be required to prepare an account of the receipts and expenses during the probate administration. Generally, with large estates, the account is prepared professionally and includes schedules showing an inventory of the decedent's assets; all income, purchases, and sales since the date of death; all expenses paid; and any distributions made in satisfaction of specific bequests. The account might also show the remaining principal on hand and the proposed distribution of the remaining assets in the probate estate. Once the court settles and approves the Executor's account and allows the proposed distribution, the Executor distributes the remaining estate assets, and the estate administration will be ready to close.

Avoiding Probate Using Revocable Trusts

A revocable trust can help to avoid probate. There are three main parties involved in a revocable trust: the settlor, the trustee, and the beneficiary. The settlor is the person who creates and funds the trust, the trustee manages the day-to-day operations of the trust, and the beneficiary enjoys the benefits of the trust (i.e., income and/or principal). Often during the settlor's life, the settlor will act in all three capacities. On the death of the settlor, in contrast to the probate process described above, the assets held in the settlor's revocable trust are considered to be owned by the trust rather than the deceased settlor. In other words, on the death of the settlor, the revocable trust is considered a separate legal entity for property ownership purposes. Therefore, the trust property avoids probate and the trustee can generally manage and distribute the trust assets pursuant to the terms of the trust without a court proceeding. Note that some states require the successor trustee of the revocable trust to notify the probate court of the existence of the trust. Furthermore, the assets of the revocable trust may be subject to the claims of the decedent's estate.

A settlor may also transfer title to real property owned outside of the settlor's state of residence to a revocable trust and avoid ancillary probate administration in another state.

Another benefit of a revocable trust is that the decedent's assets and the dispositive provisions are usually private, unlike a Will, which is generally lodged or filed with the local probate court as a public record.

The filing requirements, duration, and expenses of the probate process vary across jurisdictions. A revocable trust may provide for a more cost-efficient and quicker distribution of the decedent's property. For example, if the decedent lived in a state with complex probate procedures, such as New York, Florida, California, Connecticut, Rhode Island, or Massachusetts, a revocable trust may expedite the process of transferring title at death, thereby allowing the beneficiaries to benefit from the property sooner.

For all of the reasons stated above, some individuals choose to avoid probate by transferring ownership of their assets to a revocable trust.

Important Disclosure

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