

## Probate Process

When a person dies, it is important to have an organized process to transfer his or her property. The probate process is an organized court method to gather all of the property of the individual, pay all of his or her bills, determine the appropriate beneficiaries to receive the property and make the actual transfer.

The probate process can be quite easy and rapid for small estates or can last for many years with larger or more complicated estates. Most people do not spend much time thinking about probate unless they are potential beneficiaries, then probate is a topic of great interest.

## Probate Players

There are at least four general categories of probate players. First, an executor or personal representative is the manager of the estate. Second, an estate attorney is involved to advise the executor or personal representative on all probate and legal matters.

Third, a probate judge will rule on the validity of any will, review many of the actions of the executor, and approve the final distributions. Finally, heirs will be the beneficiaries of the estate.

## Probate Process

The probate process involves eight separate steps to ensure an orderly transfer of all of the property to the right individuals. Let's assume that Ed Executor and Ellen Attorney are probating the estate of Business Owner.

- 1. Accept the Will:** A person will normally submit the will to the court for probate. Usually, there is one final will that is accepted. However, there are many cases in which individuals wrote their own wills or there was a question about the validity of a given will, resulting in a wills contest. Eventually, the court will determine the validity and meaning of the will.
- 2. Locate Heirs:** The Executor needs to locate all of the heirs. In some cases, the selected recipients may have passed away and property will be distributed to their children or other relatives of the named heirs.
- 3. Determine the Estate Assets and Values:** The Executor is responsible for finding all of the estate assets. The assets can include; real estate, bank accounts, securities accounts and other property. If the estate is taxable (over \$5.34M) federal taxes will need to be paid. The estate will also file for the income tax returns for the decedent & the probate estate. Only when every creditor is paid; all taxes been paid and accounting is filed with the court will the estate be distributed to the heirs.
- 4. Pay Executor and Attorney:** The Executor and Attorney will be paid the statutory fees. The costs for the probate process can be quite substantial and the executor and attorney are always paid. Costs may be as low as 2% of the estate value or may range up to 7% or 8% of estate value. However, if there is an estate contest, costs can consume a large portion of the entire estate.
- 5. Make Debt Payments:** After determining the nature of the property and the approximate value of an estate, the Executor will also advertise for any claims by creditors. The California state probate law period of time is three months and the type of public notice to be given is stated in the probate code. If creditors do not file claims against the estate, they risk losing their ability to collect their debts. All debts and taxes are paid before the final distribution.

**6. Resolve Controversies:** If there are any controversies, such as a claim that the final will is invalid due to undue influence of a party who obtained the will, then the court must determine the rights of all parties under the will and applicable state law. Any controversy adds time and money to the cost of the probate process.

**8. Distribute Assets to Heirs:** Once the court proceedings are over, payment of estate & income taxes if any, court costs, executor fees, and attorney fees, the probate judge will approve the final distribution order and the heirs will receive their distribution.

## **Probate problems**

There are several negative results for which probate has a bad reputation. First, the process is public. Anyone can obtain the will of Jacqueline Kennedy Onassis and read her provisions for children John Jr. and Caroline.

The probate process may be both lengthy and expensive. Both time and money can be easily wasted in the bureaucracy of the process.

Probate is also as good and as bad as the judge who is involved. Judges are people, with the good and bad characteristics of humanity. Some are very dedicated and capable and some are primarily interested in an early exit to the golf course in the afternoon. Depending upon the quality of the judge, the probate process can be easy or quite challenging for the executor and estate attorney.

Finally, the existence of a substantial estate invites relatives to submit claims and is fertile ground for developing probate controversies. If there is any question about the validity of the will, or there are conflicting methods of transfer of the same property (joint tenancy with one person and attempting to transfer the same property through a will to a second person), a will contest and probate battle may occur.

## **Avoiding probate**

There are multiple methods that are used to avoid probate. These can be quite successful, but all methods must be coordinated carefully to be certain that the overall plan works correctly.

**1. Joint Tenancy with Right of Survivorship:** Under property law, the surviving joint tenant owns the real estate.

**2. Designated Beneficiary:** An insurance policy, an IRA, a 401(k) or other qualified plan is transferred to the designated beneficiary. There is a contract with the insurance company or the retirement plan custodian and that person agrees to make the transfer to the individual or organization selected by the owner. Typical forms permit the selection of a primary beneficiary and also a contingent beneficiary.

**3. Pay-on-Death (POD) Accounts:** Most states that follow the Uniform Probate Code may allow a "POD" account. Most savings accounts, checking accounts and certificates of deposit are under state law permitted to be transferred to the "payable-on-death" recipient.

**4. Revocable Living Trust:** Perhaps the most popular method for avoiding probate is a revocable living trust. The grantor is taxable on the assets of the trust, but frequently will transfer a personal residence, securities accounts and other major assets into the trust. The assets in the trust avoid the probate process.

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