**PROBATE EXPLAINED**

**By: William G. Morris, Esq.**

Seems like everyone has heard about probate. Many think probate is a four letter word describing a process that is arduous, painful and time-consuming. Some think probate is a simple process, requiring little more than a trip to the courthouse to get everything done at once. Somewhere in between is the actual probate process.

Probate is the court administration of a decedent’s estate. It is based on law from England under which the sovereign owned everything and only by grace of the sovereign could a person leave something to that person’s descendants. Over time, nobleman gained the right to pass their lease of land from the King on to their oldest son and eventually more property rights. But, the concept that only by grace of the sovereign could one give something after death remained.

Many people want to avoid probate. Statutes and practices evolved which can help. Joint owners can hold title in a survivorship mode. Financial accounts can now be created under which there is a designated beneficiary after death of the owner. Retirement accounts, annuities and life insurance can pass direct to intended beneficiaries. Trusts are also used to avoid probate. Avoiding probate is often a goal, even when a person does not understand what probate entails. So, what is involved with probate?

Probate starts with filing a petition to open probate administration with the court. If a person died with a will, probate will proceed in accordance with the will and is known as testate. If the person died without a will, the proceeding is intestate but follows the same procedure as probate with the will. The difference between testate and intestate probate is when someone dies without a will, assets are distributed in accordance with a statute which states who gets the assets. The statute is the legislature’s determination of how a typical Floridian would want his or her assets distributed, which means the assets go to in order to spouse and children, then parents, brothers and sisters, but not automatically to the State.

A petition for probate has to include name and address of the petitioner, name and address of the decedent, a death certificate, names and addresses of any surviving spouse and the beneficiaries and nature and approximate value of assets to be probated. Notice to interested parties that the petition has been filed is not usually required, unless the petition seeks appointment of a personal representative (known as an executor in most states) who is not entitled appointment in the will or otherwise not entitled to perform under probate statutes.

The Will must be “proven” to be the will of the decedent. How to prove the will depends on whether the will is self-proved in accordance with Florida law (generally means notarized). If not self-proved, an oath of a witness who signed the will “proving” the will must also be filed.

If the judge agrees that all is acceptable, the judge will issue an order admitting the will to probate and appointing the personal representative subject to the personal representative meeting additional requirements. The personal representative must file an oath that the person well faithfully administer the estate, must designate a resident agent (a person who may receive formal notice and can be served in lawsuits) and the resident agent must sign a written acceptance to serve in that position. Depending on the circumstances, the judge may even require a bond.

When all of the foregoing are completed to the satisfaction of the judge, the judge will issue letters of administration. Letters of administration authorize the personal representative to act. Once letters are issued, the personal representative is authorized to act and administer the estate.

The personal representative may be required to give notice to interested parties, depending on the circumstances. The personal representative is required to give notice to all known creditors of the decedent so the creditors can file claims in probate for monies owed by the decedent. The personal representative is also required to publish notice of probate in the newspaper, to reach unknown creditors. Creditors have 3 months from date of publication in the newspaper or 30 days from service of actual notice on the creditor to file claims.

One of the ways probate can be protracted is when claims are filed that the personal representative decides to fight. The personal representative must file an objection to timely filed claims within 4 months of date notice is published in the newspaper. Objection can be based on invalidity of part or all of a claim or because an insurer or other third party should pay the claim and it is not a liability of the decedent for which the estate is now responsible. Any claims are resolved by payment or settlement. Some end up in litigation, which can take years to complete. Such litigation is relatively rare.

The personal representative must file an inventory of estate assets within 60 days after letters of administration are issued. Inventory is a list of assets (and values) which are being administered in the probate estate and does not include assets passing outside of probate. Assets in a living trust do not pass through probate. But, if probate is open and the decedent had a living trust, there are procedures by which the trust can be forced to pay the costs of probate and any claims filed by creditors if probate assets are insufficient.

The personal representative administers the estate much like a small business. Expenses of administration get paid and ultimately the personal representative arranges payment to creditors and distribution of assets to beneficiaries. Statutes provide the personal representative is entitled to a fee equal to approximately 3% of probate assets and the personal representative’s attorney is entitled to a similar fee. The personal representative must file an accounting of monies in and monies out and send a copy of the accounting to all interested parties. An interested party can object to the accounting and require court hearing to determine if items in the accounting are properly administered and paid.

Once the accounting is accepted and all the bills paid, the personal representative can finish distribution of what is left. The personal representative can distribute assets earlier, but at the risk of not having enough funds to pay all the bills. Probate can be closed after all of the beneficiaries confirm receipt of their share and the personal representative confirms administration is concluded. If the judge agrees, probate is closed and the personal representative is discharged.

Many of the required filings in the probate administration can be waived by the interested parties. This is often done with respect to matters such as accountings and notices when only family members are involved. Family does not guarantee friendly. There are cases with only family members that end up in protracted litigation due to the family relationships and proposed distribution of assets

A typical probate is to be completed within one year. In most cases, there is no good reason for probate to continue longer. In most cases, probate is not particularly difficult. The best way to ensure probate falls within “most cases,” is a well drafted will and assistance of an experienced attorney through the probate process.

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