**DO YOU WANT TO AVOID PROBATE?**

**BY: WILLIAM G. MORRIS, ESQ.**

Probate is the court administration of a decedent’s estate. It is a statutory process intended to pay the decedent’s debts and distribute the decedent’s assets. If the decedent had a Will, the process is termed testate. Without a will the process is termed intestate.

Why probate is often a question. Probate is required to pass title to assets which do not pass to someone by contract or other arrangement. That usually means probate is required for assets that are in the decedent’s name alone.

What assets are not subject to probate? Financial accounts or securities set up with pay on death ownership, assets owned jointly with right of survivorship and life insurance or retirement accounts with designated beneficiaries do not go through probate. Those assets pass by contract or law.

Assets in a revocable trust will be distributed through the trust and probate will not be required. Life insurance will also be paid direct to named beneficiaries. But, when all named beneficiaries of a life insurance policy, retirement or other account are not alive when the decedent dies, the asset will be subject to probate because the contract under which someone is to get the money when the decedent dies cannot be completed.

One additional exception to the probate requirement is motor vehicles. Motor vehicles in a Florida decedent’s name that the Will directs pass to a named beneficiary do not have to go through probate if probate will not be required for other assets. Instead, the intended beneficiary can go to DMV, fill out appropriate paperwork and get title.

Some people try to save money by not consulting an attorney for estate planning and, instead, try to set up all their assets so the pass by payable on death or survivorship arrangements. That plan will only work if the beneficiaries outlive them and if they properly set up all of their accounts and assets. If the plan fails, the asset or assets will have to go through probate and be distributed as directed by statute for assets of a person who dies without a Will. That statutory direction is often far different than what the decedent would have wanted.

Whether by intent or mistake in setting up pay on death or survivorship accounts, assets in the decedent’s name will have to go through probate to reach recipients. Fortunately, probate is not so foreboding as many fear.

If the estate is small, Florida has a number of small estate processes that can be completed quickly without any real probate administration. For estates over $75,000 and when other complicating factors may be present, formal administration is required. Formal administration is what most refer to as probate.

The first step in formal administration is filing the Will with the court. Florida Statutes require the original Will be deposited with the Clerk of Courts within 10 days of the custodian receiving notice of the death. That is required even if the custodian thinks probate is not needed. The clerk is to hold the original Will for 20 years. There is no statute of limitations for when probate must be opened.

The actual probate process is started by filing a petition for probate with the court and paying a $400 filing fee. The petition can be filed by any interested party, even a creditor of the decedent who wants probate opened so the creditor can file a claim. The petition must be verified by the petitioner, state the petitioner’s interest, include information about the decedent and the assets subject to probate and request the court appoint a named person as personal representative (called an executor in other states).

The personal representative requested in the petition must generally be the person with priority (appointed by the Will is a good example of priority) and qualify under Florida law (main qualification is either related by blood or marriage to the decedent or is a Florida resident or certain entities may also qualify). The decedent’s death certificate must accompany the petition.

The person to be appointed personal representative must file an oath of office swearing the person will properly perform the duties of personal representative and designate a registered agent. The registered agent is the person upon whom notices and lawsuits can be served and must be a resident of the County in which probate is proceeding or a member of the Florida Bar residing in Florida.

If the judge is satisfied all is in order, the judge will issue letters of administration. In some cases, the judge may require the personal representative post a bond. Letters of administration are the personal representative’s authority to act, gather the decedent’s assets and conduct the business of closing out the decedent’s estate.

The personal representative must notify all known creditors of the decedent that probate is open and that a creditor must file a claim if the creditor wants to get paid. Notice to creditors must also be published in the newspaper. Years ago, publication in the newspaper was all that was required, but the U.S. Supreme Court ruled that was not likely to give notice to anyone and that known creditors have to be given actual notice. Florida statutes were amended to meet that requirement. If a creditor does not file a claim within later of 3 months of actual notice or publication, the claim is barred. Claims are also barred 2 years after the decedent’s death.

If the personal representative does not object to a claim by later of 30 days after it is filed or 4 months from first publication of notice, the claim stands and must be paid. If there are insufficient assets to pay all claims, statutes establish priority of classes to be paid in order of priority. Probate expenses, including the personal representative’s fee, have the highest priority, followed by funeral expenses with the least prioritized class being judgments against the decedent during the decedent’s life.

The personal representative must file an inventory of estate assets within 60 days of issuance of letters of administration. The inventory must include all assets subject to probate, Florida real estate and even out of state real estate. The out of state real estate will also have to go through probate in the state where located, but Florida requires a complete list of assets. Estimated fair market value must be listed for each asset.

The personal representative conducts business of the estate, gathering assets, paying bills to maintain assets, eventually paying claims and ultimately distributing what is left to the beneficiaries. The personal representative has broad authority under Florida Statutes, but must get court permission to sell real estate unless the Will gives that authority. The personal representative will usually sell non-liquid assets so the proceeds can be added to the estate and distributed. The personal representative is also to make sure the decedent’s last income tax return is filed and, in many cases, will also file an income tax return for income to the estate after death of the decedent.

At each step in this process, the personal representative must give notice to interested parties. Interested partis include creditors and beneficiaries. These parties have the right to object and seek court action if they believe the personal representative is not acting properly.

When the personal representative is done, the personal representative must file and send all interested parties a copy of a final accounting. The interested parties may object and require a hearing, but eventually an accounting is approved, the court finds administration complete and the personal representative is discharged.

The rules provide that probate is to be completed in a normal case within one year. If there is litigation concerning creditor claims or beneficiaries, or if administration is complex involving businesses or large valued assets, probate may take longer.

Probate does involve expense. By statute, the personal representative’s presumed reasonable fee is 3% of the probate estate and a similar fee is presumed reasonable for the personal representative’s attorney. There are also filing fee, service expenses and other costs in probate. Probate can take a year or more. For those reasons, and sometimes in an effort to maintain privacy, more and more people are using revocable trusts to avoid probate. Now that you know how probate works, perhaps you should consider a trust too.

***William G. Morris is the principal of William G. Morris, P.A. William G. Morris and his firm have represented clients in Collier County for over 30 years. His practice includes litigation and divorce, business law, estate planning, associations and real estate. The information in this column is general in nature and not intended as legal advice.***