

UNDERSTANDING THE PROBATE PROCESS

What Is Probate?

One purpose of the Probate Court is to handle the transfer of property from the estate of a deceased individual to those entitled to inherit such property. If the deceased left a will, probate includes the legal process of establishing the validity of the will. Individuals who leave wills are said to have died “testate,” while individuals without wills are said to have died “intestate.” A separate set of laws governs each scenario, but in either case, the estate will be administered through a Probate Court.

The word “probate” is often used interchangeably with the word “administer.” “Probating an estate” typically refers to the legal process by which a personal representative attends to the affairs of the decedent, collects and administers the probate assets, applies assets to expenses of administration, taxes, and debts, and then distributes assets.

What Is the “Probate Estate”?

The probate estate includes all of a decedent’s property that does not transfer automatically to another person as a matter of law. Items that transfer outside of probate are referred to as “nonprobate assets.” For example, insurance proceeds from a policy owned by the deceased transfer as a matter of law to the named beneficiary, and therefore are not part of the probate estate. Other examples of nonprobate assets include the right to make withdrawals from an IRA and property owned as joint tenants, such as jointly-owned bank accounts. To decide whether probate is necessary for a particular estate, the individual’s assets must be identified and valued. If the probate estate has a total value (value of probate assets minus any liens and encumbrances) of \$20,000 or less and does not include any real property, then probate is not necessary.

Should I Try to Avoid Probate?

In some states the probate process is time-consuming, complex, and expensive. Fortunately, that is not the case in Maine. In 1981, Maine adopted the Uniform Probate Code. As a result, the process of administering most decedents’ estates in Maine is generally inexpensive, efficient, and uncomplicated, and in most cases it is not necessary to plan to avoid probate. There are, however, some specific circumstances which may make it preferable to avoid probate.

First, when an estate is administered through the Probate Court, it becomes a matter of public record. That means that the will is made available to the public and anyone can see what property was owned, who the beneficiaries of the estate are, and how the estate was administered. While this is not a problem in many cases, there are situations in which this would be undesirable, and an individual may prefer an estate plan that avoids probate.

Second, some estates may require probate in more than one state, which is often complex and costly. This occurs when an individual dies owning real property in more than one state because probate will be required in each state where real property is located.

On the other hand, there are reasons why the probate process is beneficial and, in certain situations, should not be avoided. The probate process provides protection for the decedent, the beneficiaries, and the personal representative of the estate. In Maine, the probate process can be formal or informal. A “typical” estate will use the informal process, which is faster and less expensive than formal probate. The informal process is available when there is no controversy as to whether the will being offered for probate is valid, there are no creditor issues to resolve, and there is no challenge regarding the administration of the estate.

If the goal is to avoid probate altogether, proper estate planning can achieve that goal. One strategy for avoiding probate is to avoid having assets categorized as probate assets. If enough assets are categorized as nonprobate assets, that will ensure that the value of the probate estate remains below \$20,000, making probate unnecessary. Some methods to help achieve this include jointly titling assets, fully funding a revocable trust, and naming pay-on-death beneficiaries for bank accounts.

How Does the Probate Process Work?

If, after careful consideration, it is decided that the probate process will be utilized, the first step is to open the estate. This is done by filing an Application for Probate of Will and Appointment of Personal Representative with the Probate Court. The original will and the death certificate for the decedent must be included with the Application. In addition, a Certificate of Value and Acceptance of Appointment as Personal Representative must be filed.

Once the Probate Court has received the required documentation, the court will appoint a personal representative for the estate. It will then issue Letters of Authority which authorize the personal representative to act. Within thirty days after receiving the Letters of Authority, the personal representative must provide notice of his or her appointment to the beneficiaries and heirs of the estate. The notice must include the name and address of the personal representative, indicate that the individual receiving the notice has or may have an interest in the estate being administered, and identify the court in which the estate is being administered. In addition, the notice must inform the recipient that anyone with an interest in the estate has a right to file a Demand for Bond, which is a request that the personal representative be required to pay a certain sum of money before being able to act in his or her capacity as personal representative of the estate. This is one of the protections that the probate process provides for beneficiaries of an estate.

The personal representative is also responsible for notifying known creditors of the estate that the estate is being probated. The Register of Probate will arrange for publication of the notice to attempt to reach unknown creditors. Creditors that wish to make a claim against the estate have a four-month period in which to do so.

The next step in the process is for the personal representative to prepare a Probate Inventory. The Inventory must identify all of the assets owned by the decedent at the time of death. It does not need to be filed with the court, but it must be provided to all interested persons within three months after the personal representative is appointed.

There are a number of other administrative duties that are the responsibility of the personal representative. For example, the personal representative must file income and estate tax returns, pay expenses and debts of the estate, and make distributions to the beneficiaries under the decedent's will or to the decedent's heirs if he or she died intestate. Once all of the personal representative's tasks are complete, the personal representative must close the estate. The personal representative must submit a sworn statement and a Petition for Order of Complete Settlement. Once the court grants that petition, the estate is closed and the personal representative is relieved of his or her duties.

For more information regarding the role of the personal representative in the probate process, please refer to this firm's article entitled "Duties and Responsibilities of a Personal Representative."

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