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PROBATE - WHAT SHOULD I KNOW ABOUT IT?

What is probate?

Probate is the term for the court-supervised procedure where the affairs of a deceased person are handled. When a person dies all property owned by him or her at death which does not pass directly to others through right of survivorship, or through a trust established prior to death, or life insurance payable to a named beneficiary, is subject to the legal proceeding called "probate." The only exceptions are the small estate provisions described later in this pamphlet.

In Rhode Island each town or city has its own probate court with its own probate judges, who are appointed by the town or city council (except for the Town of New Shoreham where the town council acts as judge). The location for probate is generally determined by the city or town of residence of the decedent. While probate law is state law, the courts themselves are municipal courts, and the procedures may vary slightly from one to another.

"Probating a will" means proving to the probate court that the will was executed by the deceased with all the necessary legal formalities.

Why is probate necessary?

The purposes of probating an estate are:

1. To collect the probate property and assets of the deceased;
2. To protect and preserve the property of the deceased;
3. To pay all debts, claims, and taxes owed by the estate; and
4. To determine who is entitled to share the estate and to distribute the property accordingly.

What is involved?

A will usually names a personal representative referred to as an executor to manage the estate's assets. If there is no will, then the court will appoint a personal representative called an administrator.

The executor, usually with the guidance and assistance of a lawyer, is personally responsible for the proper handling and settlement of the estate.

The executor is usually required to:

1. Take possession of inventory and preserve the probate assets;
2. Apply for support allowance for any surviving wife and family of deceased, if needed;
3. Collect all income, such as rents, interest, dividends, and make demand for and collect all debts, claims and notes due including the commencement of litigation when necessary;
4. Determine the names, ages, residences and degrees of relationship of all heirs at law and next of kin;
5. Complete any pending lawsuits in which the deceased had an interest and represent the estate in any will contests;
6. Obey and perform all proper orders of the probate court;
7. Determine, prepare returns for, and pay all state and federal inheritance, estate and income taxes;
8. Pay creditors and, when necessary, sell property to raise funds to pay such claims as well as taxes and expenses of administration, but deny and defend against, if necessary, any invalid claims against the estate;
9. Transfer title of certain personal property, such as stocks and bonds, to beneficiaries;

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10. Distribute the remaining assets of the estate to the proper persons.

11. Give an account of the above-mentioned activities to the court.

These steps and proceedings require preparing and filing legal documents, tax returns, attending hearings in court, transferring all assets, and finally, closing the probate proceedings.

The important thing to remember is that if the steps are taken properly, the probate court establishes an orderly, centrally-located, legal record and protects the interests of all persons connected with probating the estate under the supervision of a court.

What is the role of the court?

All probate proceedings are subject to the jurisdiction of the court. The day-to-day work of the executor, however, such as paying bills, preparing tax returns and paying taxes, is generally carried out without intervention by the court. If disputes arise the court will hear testimony at a hearing and decide how to settle the disputes.

How long does probate take?

An estate must be opened for at least six months, because Rhode Island law gives creditors that period of time to file their claims with an estate. The filing of state and possibly federal death tax returns are required and are due no later than nine months after the date of death. Sometimes assets are partially distributed prior to closing the estate, but final distribution is generally not made before the end of the six-month period in which creditors may file their claims.

Closing the estate, however, may take considerably longer because of tax complexities or the need to sell property in order to pay the estate's obligations or distribute funds to heirs and others, or litigation.

What taxes are involved?

Both the federal government and state government may levy taxes against an estate depending upon the total value of all assets included in the taxable estate. (The taxable estate is not the same as the probate estate, as the former includes both probate and non-probate assets.) Both taxes are based on the net value of the assets in the taxable estate, and each tax is a graduated tax which is levied on the net estate after allowing for certain deductions and exemptions.

Based upon income and expense generated from the probate estate assets, a federal and state fiduciary income tax might be owed. This tax is very similar to the personal income tax.

The obligation to prepare and file tax returns and pay the appropriate tax liability may exist even if the deceased left no probate estate. Non-probate assets such as property owned with right of survivorship and life insurance, as well as certain types of transfers by the deceased prior to death, are subject to taxation by the state and federal governments. An executor should exercise extreme care in preparing the necessary returns and computing the taxes due. **What are the fees and costs?**

The fee of the personal representative must be reasonable and is based on the type of work, its complexity and the risks undertaken. The lawyer fees should be reasonable with regard to the fair value of the services actually rendered by the lawyer to the executor.

What about small estates?

An estate consisting of personal property having a fair market value of \$10,000 or less can use a simplified proceeding. Usually, this decision to use the "small estate" provision is made by the lawyer and the personal representative at the time of the initial conference.

Widow's and children's allowance

Rhode Island law permits a widow's and children's allowance for support during probate upon petition to the court. Discretionary powers are further granted to the court, even to sell real estate if personal property has been exhausted.

What is "Right of Survivorship?"

Property with right of survivorship is a form of co-ownership where two or more persons own the property together. If one party dies, the ownership of the property normally passes automatically to the surviving owner(s). This t of ownership should be used cautiously since the mere transfer into joint names may cause gift tax consequences at the time of the transfer, and there may be undue and unnecessary estate tax problems at the death of either one of the surviving owners.

How important is a will?

Experience has proven the wisdom of those who have made a carefully-considered will. By doing so, they have ensured that their property will go where they wish and that those who will be faced with the settlement of the estate can do the job as quickly and with the least amount of emotional turmoil as possible.

One who does not make a will is said to die "intestate," and his or her probate property will be distributed according to the intestate succession law of Rhode Island, which is an inflexible statutory formula governing the disposition of one's property.

What should be done first?

If someone close to you has died, it is advisable not to disturb any of the property of the deceased unless it is necessary to protect it from being lost or destroyed. Shortly after the death, an attorney should be contacted to discuss the matter with those close to the deceased. In general, the surviving husband or wife should make the initial contact if he or she resided with the decedent. In other situations it is recommended that the closest relatives contact the attorney.

The attorney will provide advice, determine whether probate is required, and explain the procedures involved.

If you are in possession of a will of a deceased person, you must either file it with the appropriate court or deliver it to the person named in the will as executor, as under Rhode Island law the will is to be filed within 30 days after death.

If a will is found by the person named as executor, he or she should protect the will and promptly give it to the attorney who will assist in its probate so that it may be timely filed.

A person who neglects to file the will may be cited by the probate court and ultimately held at the Adult Correctional Institution until the will is filed.

Attending to the details of a probate proceeding may be a complex, time-consuming task, and it may be necessary for relatives or close friends to face this task in a time of grief and trauma. An attorney can help share this burden by shouldering the many legal procedures involved.

NOTE

This piece is produced as a public service by the Rhode Island Bar Association and intended to provide background information. This is not a substitute for legal advice and representation by a licensed attorney of the Rhode Island Bar.