

WHAT IS PROBATE?

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Probate is the legal process of administering the estate of a deceased individual (the “decedent”). Administration is handled by the Probate Court in the county where the decedent maintained a primary place of residence at the time of death. If the deceased individual prepared a Last Will and Testament, this document would be filed with the Probate Court when the estate is opened. The Last Will and Testament is a guideline for the Probate Court. The Last Will and Testament typically identifies the beneficiaries, the Personal Representative and in some cases the guardian of a minor child.

Through this Probate Court process a Personal Representative (formerly called an executor) is appointed to oversee the management and ultimate distribution of assets in the decedent’s estate. For example, the Personal Representative must sort through all the assets and make sure the assets are secure to avoid any loss or waste; the Personal Representative is responsible for paying any valid debts and expenses of the estate; and the Personal Representative is responsible for overseeing distribution of the assets. If the decedent died without a Last Will and Testament, a probate estate can be opened, however, since no one has been designated to be the Personal Representative the court may require a hearing to determine who has priority to serve.

When is Probate required?

Probate is required when an individual dies and leaves assets in his or her individual name. For example, an individually owned home, bank or investment account is a common probate asset. Not all individually owned assets have to be probated. Some individually owned assets, such as retirement accounts and insurance policies allow you to designate a beneficiary and are not treated as individually owned assets at death. Assets with a designated beneficiary are typically not subject to probate unless the owner fails to designate a beneficiary or if the owner designates the estate as the beneficiary.

Assets owned jointly with another or assets owned by a revocable Living Trust are not considered individual assets and are not subject to probate. When an asset is not subject to probate, that asset can pass to the new owner without court involvement.

Who should I designate as my Personal Representative?

Generally, an individual will name an adult family member such as a child or sibling as the Personal Representative. Keep in mind when naming a Personal Representative that he or she has several duties to carry out. The Personal Representative is required to carefully manage the assets prior to distribution. This management can include overseeing all investments, managing rental property, overseeing business assets or the sale of a business, preserving personal property and preserving the condition of the home. The Personal Representative is subject to what is commonly referred to as the “Prudent Investor Rule”. The Prudent Investor Rule requires that the Personal Representative manage the investments and assets in a manner that a prudent investor would, taking into account the purposes, terms and distribution requirements expressed in the Last Will and Testament.

The Personal Representative in most situations will retain the services of various professionals to assist in the administration process. Such professionals would include an estate planning attorney to assist in the filing of the necessary probate forms, an accountant or CPA to assist with the filing of income tax or estate tax returns and a financial advisor to assist with the management of investments prior to distribution.

How long does Probate take?

On an average, the probate process takes about nine months to a year due to the probate court time lines that must be followed. For example, once a probate estate is opened and the Personal Representative is appointed, notice of the estate being opened and appointment of the Personal Representative must be published in the newspaper. From the date of this publication, unknown creditors are given four months to file a claim with the Personal Representative identifying any unpaid debts. The amount of time it takes to probate an estate can also be affected by a variety of unknown factors. Such factors include whether or not there are minor children, whether or not there is real estate to be sold, whether or not the beneficiaries get along and whether or not the deceased's affairs were in order before death.

Any time a matter ends up in Probate Court, it typically means that the person's affairs were not in order and now the family is faced with cleaning up any lifetime disorganization or messes.