

PROBATE

DISCLAIMER

This article is intended for informational purposes, only. It does not constitute legal advice. Nor is it a substitute for legal advice.

WHAT IS IT?

Probate is a proceeding in court (county court in Nebraska) to settle the estate of a person who has died (the decedent). The decedent's estate is made up of their property, debts and obligations. What does it mean to *settle* the estate? It is to identify what is in the estate, to value it, to pay the decedent's debts, including certain taxes, and to distribute the property.

How is the property distributed? In general, in one of two ways: as directed by a Will, or as directed by law. If the decedent died with a valid Will, they are said to have died *testate* and the estate is distributed according to the wishes of the decedent as stated in that Will. (An essential aspect of probate, therefore, is to prove the validity of a Will: Was it actually signed by the decedent? Was the decedent mentally competent at the time? Did the Will reflect the decedent's wishes as to disposition of the property that he or she owned at the time of death?) A person who dies without a Will is said to have died *intestate*. In an intestacy probate, the decedent's property is distributed according to state law.

A probate proceeding in court may be either *formal* or *informal*. Informal proceedings are more common, less complicated, less expensive, less time-consuming and generally sufficient to the task; they involve fewer filings, fewer notice requirements and less supervision by the court. Formal proceedings, on the other hand, are litigation. They typically occur when there are disputes over the validity of different Wills, or where an expectation of disagreement, or the existence of competing claims, or contests as to the appointment of a personal representative require more court involvement and supervision. Any interested party can petition the court for a formal proceeding, even if an informal proceeding has already been commenced.

HOW DOES IT WORK?

First, it has to be started. Someone, typically the personal representative named in the Will, or, in case of an intestacy, the spouse or other heirs, files an application with the clerk of the court, referred to in this context as the Registrar. The application is for an informal probate or for appointment of a personal representative. The Registrar signs a document which says that the Will, if any, has been "admitted to probate" and that, as requested, the person named in the application has been appointed as the Personal Representative ("PR"). The Registrar signs a notice to be published in a "newspaper having general circulation in the county" once a week for three consecutive weeks. The notice states that the Will, if any, has been admitted to probate, that the personal representative has been appointed, and that creditors have 60 days from the date of the first publication of the notice to file their claims with the Court. If a claim is not timely filed, it is forever barred.

Second, the PR administers the estate, which involves management, payment of taxes and claims and distribution of assets. The PR prepares an inventory of the assets owned by the decedent. This inventory includes all property in which the decedent had an interest at the time of death, or which the decedent gave away within the three years preceding death. This includes property that was jointly owned, or that transferred at the time of death through a beneficiary designation, such as payment-on-death bank accounts, or IRAs. The inventory does not include insurance death benefits if those benefits are payable to anyone other than the decedent's estate. The inventory states a value for each item of property, and the PR must decide if it is necessary to obtain an appraisal for any of the property, such as jewelry, art, real estate, shares in a closely-held company or other business interests for which there is not a ready market. It is often not necessary to obtain an appraisal, but that does not mean it is not a good idea. (See, for example, the *Nebraska Inheritance Tax* article, published as part of this series.) The county attorney reviews the inventory and decides whether or not it is complete, and whether or not the values are acceptable. Many county attorneys will accept a valuation for real estate based on the county assessor's property tax valuation, typically exclusive of statutory discounts in value for agricultural land. (See *Nebraska Inheritance Tax*.) Very seldom is a court hearing required to determine value, but it can happen. In large estates in which the decedent's property is worth more than the exclusion amount for Federal estate taxes (approximately \$5.34 million per person in 2014), the PR will have to prepare a Form 706 federal estate tax return, which involves a different process from probate and may take more than a year to complete. See article on *Federal Transfer Taxes & The Unified Credit*.)

In addition to preparation of the Inventory and determination of the Inheritance Tax, the PR manages the estate property (to the extent necessary), reviews any claims filed in the estate, and accepts (pays) or rejects those claims.

Once valuations are agreed upon with the county attorney, the PR files a petition with the Court for determination of the amount of Nebraska Inheritance Tax.¹ The Court enters an order, and the PR either pays the tax out of estate funds, or collects it from the persons against whom it is levied. The PR also pays funeral expenses, attorney fees, creditors' claims, and other expenses of the estate such as newspaper publication fees and court costs. The PR then distributes the remaining estate property, according to the Will, or the rules of intestacy. Real estate is distributed through a personal representative deed. The PR files with the court a Schedule of Distribution showing what has been distributed, and an accounting of any income and disbursements that occurred during the probate. The PR also files an Informal Closing Statement to inform the court that administration of the estate is complete. If no one contests what the PR has done within a year after the closing statement, the Court enters an order relieving the PR of any further responsibility.

INTESTACY DISTRIBUTIONS

In intestacy, the law, and not a Will, determines who receives what part of the decedent's estate. In general, the estate will go to the decedent's spouse, children (or grandchildren)

¹ Most states do not impose an inheritance tax, Nebraska being one of five.

and parents. If there is no spouse, and no children or parents, the property will go to sisters and brothers, then to nieces and nephews, then to uncles and aunts, and so on, in a branching out of relationships known as degrees of kinship.

In Nebraska, the law provides that the surviving spouse receives all of the estate, if there are no *issue* (issue means lineal descendents, i.e. children, grandchildren, great grandchildren, etc.) and if the decedent's parents have died. If there are issue, or if a parent of the decedent is still living, then the surviving spouse receives the first \$100,000 of the estate and half of the balance. If there are issue who are born out of a different marriage, then the surviving spouse simply receives half of the estate.

NOT EVERY DEATH REQUIRES A PROBATE

The probate process works to accomplish the transfer of ownership of the decedent's property from his or her name into the names of those people who are entitled to it - the beneficiaries, heirs and legatees. That transfer occurs through the probate process. There are other methods of transferring ownership of property after death that do not require probate, such as trusts, joint tenancy, life estate deeds, IRAs, beneficiary designations such as payment-on-death bank accounts or transfer on death real estate deeds. For example, assume John and Mary own a farm jointly with right of survivorship. John dies before Mary. Mary automatically becomes the sole owner of the farm upon John's death, with no need for the farm to pass through probate. John's interest in the farm is not part of his probate estate. Similarly, if the decedent filled out forms that specify who is to receive certain assets upon his or her death, often known as beneficiary designations, that property will not become part of the probate estate. Insurance policies that name the beneficiary are not part of the probate estate (unless the estate is named as the beneficiary) nor are "payable on death" bank accounts. IRAs are typically not part of the probate estate in that they are often governed by beneficiary designations. These assets transfer not through probate but through contract or under state law (as with jointly owned property).

In addition, if a person dies owning in his or her name property that is not worth more than \$50,000, then under Nebraska law there is no need for a probate to accomplish the transfer of those assets. Rather, there is a special "small estates" procedure for collecting and distributing such property. It involves the use of affidavits and not the courts.

Some people plan their entire estates in part in order to avoid probate. Such plans make use of trusts, titling and beneficiary designations to transfer ownership of property at the time of death without the need for probate. However, there may be good reasons and not-so-good reasons for avoiding probate. It is also important to bear in mind that the avoidance of probate does not mean the avoidance of taxes: just because there is no probate estate does not mean there is no taxable estate.

WHY PROBATE?

Probate does some things that no other method of transferring a decedent's property can do. It provides resolution, a kind of legal finality that reflects the end of a life. The world is put on notice of a probate and has a specified period of time to bring its claims,

which are otherwise barred. Probate also importantly establishes title to real estate. In some circumstances, it can be difficult to obtain clear and marketable title to real estate in the absence of a probate. It provides a forum – a place and a time – to take care of the business of the decedent’s life, under rules that reflect hundreds of years of human experience. Finally, the principal purpose of probate is to accomplish the wishes of the person who has died, and sometimes it is best to have a court – and an orderly process – to ensure that outcome.

Another useful provision is that you can make a list of items of tangible personal property, separate from the will, stating who is to get those items. That list can be changed, without going back to the lawyer to change the Will. Don’t try doing that unless you have a Will which provides for it. It typically doesn’t work with a living trust.

PROBATE IS NOT A FOUR LETTER WORD

The Uniform Probate Code simplified many of the antiquated, time-consuming and costly provisions of common law probate. In the past, for example, it was often necessary in all probates for the PR to obtain approval of the court to do almost anything. This tied up the courts, lengthened the entire process and increased costs for everyone.

Court costs for probate are actually usually nominal despite popular belief. Attorney fees for an estate are to be directly related to the work performed by an attorney rather than to the size of the estate. Fees are negotiable: the personal representative may negotiate a fee for a fair rate and, in all cases, the court always reserve the right to review fees charged by an attorney if there are questions about services rendered. Personal representatives are also entitled to fees, and those fees are also subject to review by the court.

In Nebraska, it is necessary to do much of the work that is involved in a probate even if there is no probate. That is because Nebraska imposes an inheritance tax, and the procedures for determining the inheritance tax require much of the same work that a personal representative undertakes in administering a probate estate. (See *Nebraska Inheritance Tax* article.)

Probate does not as a matter of necessity require a lot of time to complete. An informal probate may be closed five months after appointment of the personal representative. Most modest estates can be settled within that five-month period, or sooner, if the PR and the attorney work efficiently, and if the beneficiaries (the persons who are receiving property from the estate) cooperate. If there is fighting among the beneficiaries, settlement of the estate can take much longer to complete.

Joe Hawbaker
Hawbaker Law Office
Omaha, Nebraska
jmhawbaker@gmail.com