

LawFacts

What you should know about.....



Probate

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What is probate?

Probate is a legal proceeding to administer certain kinds of property (called *probate property*) owned by someone who has died (the *decedent*), and to see that claims, expenses and taxes are properly paid, and that the remaining estate is distributed to those entitled to receive it under the decedent's will or Ohio law. Probate property is all property titled in the decedent's name alone. It is distributed only under the decedent's will or, if the decedent died without a will (intestate), according to Ohio law. A probate proceeding takes place in the probate court of the county where the deceased property owner lived. If the deceased also owned real estate in another state, additional proceedings may be necessary in that state.

What property is *not* included in probate?

Property that is *not* probate property (called *nonprobate property*), and therefore is not part of the probate proceeding, includes: property held by the decedent and another as *joint tenants with right of survivorship*; property held in a trust; accounts that are *payable on death* (POD) or *will transfer on death* (TOD) to a named beneficiary; and insurance or retirement benefits that are payable to a named beneficiary. Nonprobate property passes directly to a named beneficiary, survivor or successor in interest, independent of any probate proceeding.

Property that must be included in probate and property that is subject to estate taxes are two different matters. Both probate property and nonprobate property may be subject to federal or Ohio estate taxes.

Why is probate necessary?

Probate is necessary to give the executor or administrator legal authority to deal with the decedent's probate assets. The executor or administrator has the authority and duty to take control of and safeguard the assets of the decedent's estate. Probate then provides a process for the payment of outstanding debts, taxes and the expenses of administration, and for the distribution of the remainder of the estate to the beneficiaries and heirs.

What does probate involve?

Probating an estate requires the appointment of a person to conduct the administration of the estate. If there is a will, this person usually is named in the will and is called an *executor*. If there is no will or no person is named in the will, this person is appointed

by the probate court and is called an *administrator*. The executor or administrator may be an individual, a bank or a trust company.

The executor or administrator takes care of the following tasks:

- caring for all property of the decedent;
- receiving payments due the estate, including interest, dividends and other income;
- collecting debts, claims and notes due the decedent;
- determining the names, ages, addresses and degree of relationship of all heirs;
- determining the names, ages and addresses of all beneficiaries, if there is a will;
- investigating the validity of all claims against the estate and paying all outstanding obligations including federal, state and local estate and income taxes;
- planning for federal and state taxes and preparing and filing estate tax returns when required;
- carrying out the instructions of the probate court pertaining to the estate and distributing the assets of the estate to the heirs.

The probate court judge and support staff supervise the work of the executor or administrator. These actions require the preparation and filing of legal documents, the provision of notices, hearings in court, an appraisal of the assets of the estate, an inventory of the assets, completion of final income tax returns and possibly gift and estate tax returns, an accounting of funds, final transfer of all assets to beneficiaries, termination of the probate proceeding, and discharge of the executor or administrator by the probate court. Because of the complexity of these procedures, the assistance of an attorney usually is recommended.

If the total value of all property in the decedent's individual name is \$35,000 or less, the estate can be relieved from some of these administrative requirements. Where the decedent's spouse is entitled to receive all of the estate's assets, the amount that can be relieved from formal administration is increased to \$100,000.

How much does probate cost?

The costs assessed by the probate court are based on a schedule of charges established by law for each type of document filed in the court. Costs typically are about \$200. Attorney fees charged for handling matters of the estate must, in most cases, be approved by the court. Typically, attorney fees are based on an hourly rate for the actual services performed by the attorney, or the attorney fees may be charged in accordance with a recommended fee schedule established by the probate court. The executor or administrator is entitled to receive a fee set by Ohio law, based on a percentage of the value of probate property and income, as well as the value of nonprobate property includable for Ohio estate tax purposes (excluding joint and

survivorship property). An executor or administrator may request additional fees for extraordinary services. Executor and administrator fees are taxable and frequently waived.

How long does probate take?

Claims against the estate may be made up to six months from the date of death. A small estate that does not require the filing of an Ohio estate tax return and has no creditor issues often can be settled within six months of the appointment of the executor or administrator. However, if an Ohio or a federal estate tax return is required, the administration of the estate can last more than a year. (Estate taxes are not due until nine months after the decedent's death.) If there is an audit of an estate tax return, the administration can take up to an additional year or more, and an executor or administrator cannot safely distribute all of the estate assets until released from personal liability for estate taxes upon completion of the audit. An extraordinary administration involving a contested will or complicated tax litigation may take several years to complete. However, in many cases, distributions of most or all estate assets do not necessarily have to wait until all probate matters have been completed.

Do I need a will?

A properly drawn will assures you that, upon your death, your probate property will be distributed as you intended. It is important that you review your will periodically with your attorney in order to keep it up to date. A will is also the mechanism for choosing the executor and commonly provides for the nomination of a guardian where there are minor children. A will also can dispense with the requirement of a surety bond, which an administrator might otherwise have to pay.

Wills should be timely filed in the probate court upon death. The law provides penalties for the withholding or destruction of a will.

If you do not make a will, your probate property will be distributed according to the Ohio Statute of Descent and Distribution.

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