

The Probate Process in Florida

This is a brief explanation of the process. It is for information only, and is not to be construed as legal advice. Please consult an experienced probate attorney for specifics relating to your situation.

What is Probate?

Probate is the legal process of administering the property of a decedent according to the instructions in the decedent's last will and testament. The primary concerns of the probate court are: (i) determining the rightful heirs to property (whether such heirs or designated in a will or by laws of intestacy); (ii) making sure the financial obligations of the decedent are paid; and (iii) transferring legal title of the decedent's property to the heirs. The probate proceedings are administered through the probate courts which are a division of circuit courts in each of Florida's counties.

The person who represents the decedent in a Florida probate proceeding is called a ***personal representative***. A personal representative must be represented by an attorney under Florida Rules of Court. The personal representative is a ***fiduciary*** (a person who has been selected for a position of special faith, trust, and reliance) and has a duty toward the decedent's heirs and creditors.

A personal representative that fails in this duty may be sued by any person injured by such failure including heirs and creditors. To limit liability, the personal representative should consult their attorney before exercising any powers over estate assets.

Types of Probate

In Florida, there are two main probate proceedings: ***formal probate*** and ***summary probate***. Determining which to file depends on the amount and nature of property in the decedent's estate.

A formal probate is generally filed when the total estate value exceeds \$75,000 or in a small estate where there are other issues that require the court's action or intervention (such as estate debts which exceed the value of estate assets).

If the total estate value is \$75,000 or less (excluding real property) or the decedent died two or more years prior to filing, a summary probate may be filed. Summary probate is analogous to a “small claims” case in civil matters.

The Probate Estate

During probate, the personal representative (under court review) administers all of the decedent's property considered part of the *probate estate*. The decedent's probate estate includes all of the decedent's personal property, real property other than homestead, and legal rights of action against third parties (existing or potential lawsuits). All of the decedent's individually-owned property within the above categories is included in the probate estate and is subject to probate administration through the probate court.

There are also several exemptions or exclusions of property from the probate estate.

- ***Homestead***: The first, and most important exemption, is a decedent's primary residence (or homestead).
- ***Life Insurance, Annuities, and Retirement Accounts***: Property which is transferred under the terms of contracts between the decedent and third parties is excluded. The contract exemption includes many well-known financial products such as life insurance policies, annuities, and qualified retirement plans, all of which are paid on death to designated beneficiaries outside of probate administration under the terms of the written contracts.
- ***Jointly-Owned Property***: An important probate exemption is property owned by the decedent jointly with another person with rights of survivorship. Property owned by two or more individuals with rights of survivorship passes automatically to the surviving joint owner(s) after the death of one or more joint owner. A common example is joint bank accounts between a decedent and spouse (or child). Upon the decedent's death, all money in the joint account(s) is automatically owned by the surviving joint owner.
- ***Pay-On-Death Accounts***: Florida Statute 655.82 establishes pay-on-death accounts for banking institutions (checking, savings, and certificates of deposit), and Florida Statute 711 establishes a uniform transfer-on-death security registration for assets (security registrations) held in brokerage accounts or other security accounts. Property held in a pay-on-death account passes outside of probate to the designated beneficiary. A ***pay-on-death*** account is owned solely by the account holder during the owner's lifetime. Upon the owner's death, all of the

money in the account passes to the designated beneficiary. During the owner's lifetime, the designated beneficiary has no rights to the assets in the account.

Property not subject to probate in Florida may be subject to a probate administration in another state where the property is located. Likewise, a resident of another state who individually owns real property in Florida may have a primary probate proceeding in the decedent's home state and an *ancillary proceeding* in Florida. This means that an individual who dies owning property interests in several states could create more than one probate administration which would give rise to an expensive and frustrating experience for the family and the personal representative.

Probate Estate v. Taxable (or Gross) Estate

The probate estate is sometimes confused with the concept of the decedent's *gross estate* or *taxable estate*. A person's gross estate includes those assets subject to estate taxation. The gross and taxable estate encompasses more property than the probate estate including all property in which the decedent had an interest or over which he had control. For example, unlike the probate estate, the taxable estate includes the decedent's interests in property owned jointly, financial products involving contracts with third parties (life insurance, etc.), IRAs or 401K plans, and all other property over which the decedent exercised any control or power.

What Does a Personal Representative Do During Probate?

During probate administration, the personal representative has possession and control of all of the assets in the probate estate. The personal representative's primary duty is to protect and preserve probate assets and invest probate assets in a prudent and cautious manner.

The Probate Process

Beginning the Process: The process of probate, or administration of the estate, begins by filing the original will with the probate court and the preparation and filing of a petition for administration. The petition requests the court to open a probate over the decedent's assets, accept the last will and testament (if any), and appoint a personal representative. The judge signs letters of administration, which officially appoints the personal representative and evidence the personal

representative's legal authority over the estate. After the Letters are issued, known beneficiaries and creditors receive notice of the filing of the probate action.

Estate Liabilities: A primary function of probate is to give the decedent's creditors the opportunity to be paid from estate assets. Typical creditors in a probate proceeding are the mortgages, medical care expenses, credit cards, and personal loans. A notice to potential creditors is published in a local newspaper (the ***legal notice***). A Notice of Administration or Notice to Creditors is sent to any known party who may have a claim against the decedent and/or the estate.

During the early stages of administration, any creditor having a claim against the estate is required to file a claim with the probate court. The court will send a copy of all claims to the personal representative's attorney. At the end of the claim period (30 to 90 days depending on method of notification), the personal representative reviews the claims to determine validity. The personal representative may object to any claim believed to be incorrect or invalid. Objections are either resolved by mutual agreement, or if settlement is not possible, then such disputes are resolved by the probate judge. The personal representative must arrange for and make payment of all valid claims provided there are adequate non-exempt assets available in the probate estate.

Estate Assets: Another part of probate administration involves identifying and securing estate assets. The personal representative should arrange for adequate insurance coverage of tangible personal property or improved real property of the probate estate. A list of all assets in the probate estate and their values must be timely filed with the court in the form of an ***inventory***. The personal representative should compile a list of assets as soon as possible so an estate inventory can be prepared by the attorney and filed with the probate court.

Tax Requirements: Another part of the estate proceedings is determining which tax returns the estate is required to file. Most personal representatives will have to arrange for the filing of a personal income tax return for the decedent (for the last year of life), an income tax return for the estate if the estate has more than \$600 in income during the tax year, and an estate tax return required by law to be filed if the total taxable estate exceed a certain valuation. The personal representative's attorney or CPA will determine which tax returns, if any, are required to be filed. Just because the law requires that a tax return be filed does not necessarily mean that any tax is due.

Asset Management: The personal representative has a fiduciary responsibility to properly manage estate assets throughout the probate proceeding. Asset management includes investment of cash in bank accounts, government bonds, or other prudent forms of investment. The personal representative must also make sure the estate pays ongoing bills including mortgages on any probate real estate. An important consideration is liquidity management. If cash available to the estate is not sufficient, the personal representative is required to sell assets or borrow money on behalf of the estate to meet cash requirements as they arise. These cash requirements include legal and accounting fees and taxes.

Distribution to Beneficiaries: Once the personal representative or the court determines that all costs of administration and valid creditors' claims have been paid, the next step is distribution of the probate assets to the beneficiaries named in the will. First, the personal representative distributes estate assets to satisfy any specific bequests in the will. A specific bequest is an instruction in the will to distribute a specific asset, such as real estate, a fixed amount of cash, or personal property to one or more persons or a charity. In some cases the personal representative will sell assets with prior court approval to pay expenses or to make bequests to the heirs.

Often estate beneficiaries will pressure the personal representative to prematurely distribute assets of the estate. As a fiduciary, the personal representative may be held personally responsible for early distributions when the personal representative learns later that the money distributed is needed to pay estate expenses, federal taxes, or required distributions. The personal representative should never distribute money to an heir without first contacting their attorney.

Closing the Probate Case. As the probate nears its end the attorney for the personal representative will take necessary steps to close the probate case in the probate court. In order to close the estate the law requires the personal representative to prepare, with professional help, a formal accounting. The accounting includes all legally significant activities which have occurred in the estate, evidence that creditors' claims and taxes have been paid, and a statement that the remaining estate property has been distributed in proper shares to the person(s) entitled to that property. A proposed accounting is made available to all the beneficiaries, who will then have 30 days to object.

In most cases (and where all creditors' claims have been paid), a formal accounting can be waived by the unanimous consent of the beneficiaries. Many beneficiaries waive a formal accounting because the accounting is an expensive part of estate administration and reduces the amount available for distribution.

The personal representative presents either the formal accounting or waiver(s) to the probate court. The court reviews the file, and if all requirements have been met, the judge will sign an order discharging the personal representative. This order effectively closes the probate case.

Continuing Tax Obligations. In addition to closing court proceedings the personal representative must file income tax returns which the estate is obligated to file for the year in which final settlement occurs. When the estate is closed, the estate may have had taxable income for that year or otherwise be responsible for the payment of taxes. The personal representative must retain sufficient funds to pay any taxes which may be due. If these taxes are not paid, the law permits the IRS, and in some situations, the State of Florida, to collect the taxes from the personal representative's personal assets.

Being designated and appointed as the personal representative of an estate is a serious matter.

***If you have been nominated as the personal representative for a family member or friend,
you should consult an attorney with experience in probate matters.***

***Please feel free to contact our office for a list of local attorneys, here in Charlotte County,
who specialize in probate cases.***