

Probate: With Care You Can Save Time, Money and Grief

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What is probate? How does it work? Why have it? The answers to these questions can result in a savings in time, money, and grief for your family.

What is Probate?

Probating an estate is the legal procedure used to (1) determine that a person is dead, (2) gather together all of the property of the deceased person, (3) pay all of his or her valid debts, including final taxes, and (4) distribute legal title of what is left to the person's heirs or will beneficiaries.

The two groups most interested in the probate proceedings, therefore, will be the heirs and the creditors. Probate has developed as a forum where all conflicting claims of these groups can be resolved in an equitable manner. Probate comes from the Latin word meaning "proof." Originally probate referred only to wills, but now it means the process of settling an estate.

Titles Transferred

Probate forms an important link in our legal system. Without court administration, there would be no official record of whether the deceased left a valid will, who the heirs are, or the property interests of each heir. Also, in our system, title to real estate would be clouded without this official record. Prospective buyers would hold off until the title was cleared.

A probated will can be shown in any court in the United States as a basis of rights to property. An unprobated will has no legal standing.

Without provision for legally limiting the time for paying claims, creditors could continue to assert them against the property, heirs, or even later purchasers of the property. Also, if death taxes are not computed and paid, they become a lien on the property and accumulate interest.

Without certain prescribed legal procedures (independent or unsupervised probate) or court supervision and approval of an estate's closing and distribution, only

chaos would exist. Objections, claims, and clouded titles could plague the heirs for years.

The judge presiding over the probate court is an elected official. None of the probate judges' salaries are derived from court fees related to the estate cases over which they preside.

"Probate court is not limited to just estate cases," said Saginaw County Probate Court Judge Glenn E. Jordan. In one way, probate court could also be called family court. It handles problems running the gamut from juvenile delinquency and neglect, to name changes, adoptions, the appointment of guardians, admitting the mentally ill for treatment, and drain condemnation cases. Only about one-third of Judge Jordan's cases deal with estates.

Methods to Transfer an Estate

Distribution of property at death usually takes place four ways—through contracts, title transfers prior to death, joint tenancy, and probate procedures. In practice all four methods may be used to transfer an estate, or one method may be used to transfer part of the estate.

Part of each estate will probably be distributed through contractual arrangements with others. An example would be a life insurance contract. This part of the estate passes directly to the named beneficiary. If no beneficiary is named in a life insurance policy, or the beneficiary has previously died, the proceeds become part of the probate estate of the insured and are distributed according to the will, or if there is no will, according to state law.

Annuities and death benefits from a retirement program could be other contractual arrangements where part of the estate is transferred directly to named beneficiaries. It is important to keep the designation of beneficiaries and alternate beneficiaries up-to-date so those whom you intend to receive the proceeds of life insurance and retirement plans will receive this property.

The transfer of property title prior to death reduces the amount of property in the estate to be transferred at death. Transfer during lifetime can take two general forms—complete severance of ownership rights in property, or transferring title ownership but retaining rights

¹Helpful suggestions and comments were obtained from Saginaw County Probate Judge Glenn E. Jordan in the development of this fact sheet.

during lifetime. A lifetime gift or sale of property results in the owners transferring property rights to others. However, a sale of realty is actually a transfer of one type of property for another. For example, land may be sold and the proceeds invested in stocks, bonds, business, savings accounts at the bank, or savings and loan association. An outright gift or a lifetime transfer through gift has gift tax implications and a sale has income tax implications, so check the tax rules before a transfer is made. A gift made within two years of death is presumed to be in contemplation of death and is taxed for the Michigan inheritance tax unless proven otherwise.

The transfer of title ownership, but retaining rights in the property during lifetime, can be accomplished in several ways. The most common are a living trust where title is transferred to a trust fund with a trust agreement directing retained rights and eventual distribution of those rights to the beneficiaries, and a life estate where title is transferred by deed to others with the previous owners having life interests or rights in the property. Life estates are generally created by deed, a will, or living trust.

The third way property can be transferred at death is through joint ownership with right of survivorship of the property with one or more persons. The main advantage of joint tenancy with right of survivorship is that ownership of the property vests immediately in the other owner(s) upon the death of a joint tenant. However, this is not true in the case of joint ownership as tenants in common. Joint ownership with right of survivorship (tenancy by the entirety) is the most common way married people jointly own their property.

All property owned outright by a decedent which is not transferred automatically as a matter of law on death is part of the probate estate and transfers according to the terms of the will, or state laws if there is no will.

Probate

Probate, therefore, applies to property owned solely by the deceased or his/her share of property owned as a tenant in common with others.

There are two types of probate: court supervised probate and independent probate. Independent probate excludes certain provisions of the probate proceedings and may reduce the time and cost of probate. The minimum time for supervised probate is two to four months; unsupervised probate is five months. Whether time and cost can be reduced with independent probate depends upon the estate situation. A request must be made to probate court for the estate to follow independent probate. Independent probate requires that certain legal procedures be followed, but without court supervision. Consult your attorney for the advantages and disadvantages

of court supervised probate or independent probate for your situation.

An estate can be opened when an interested party offers for probate the will of the deceased to the appropriate probate court. This could be the spouse, one of the decedent's children, next of kin, or the personal representative nominated in the will. If there is no will an heir may petition for the appointment of a personal representative, or, after 30 days, a creditor may petition.

Whoever has the will is legally responsible for forwarding it to the court for filing within 30 days after death of a testator (one who makes a will). If a party in interest doesn't offer the will for probate after 30 days, a creditor may petition the court that the will be admitted to probate.

After this initial move, the court sets a day for the will to be offered for probate. Notice of this hearing may be published in the local newspaper so that all concerned parties will know that the will is to be offered, or if no will, a personal representative will be appointed. At this initial hearing, several things can happen: the will may be admitted, heirs at law may be determined, a personal representative can be appointed, and bond set. A date will also be set for filing claims of creditors with the court and personal representative.

If, after a person dies, all parties in interest agree, an estate can be opened "on waiver of notice of hearing and consent" without the necessity of setting a hearing date and serving notice on interested parties. Also, if these same parties in interest agree on a fiduciary and sign a waiver of notice of hearing and consent to his appointment, this could all be accomplished as soon as the necessary papers were drawn and presented to the court.

If the decedent dies intestate (without a will), the opening procedures are quite similar. A widow, next of kin, or legal representative of either can petition the court to appoint a personal representative for the estate. If the heirs have not acted within 30 days from the death of the property owner, a creditor can petition the court to probate the estate.

Personal Representative

Almost anyone can be chosen as personal representative as long as he or she is of sound mind and at least 18 years old. Usually the judge abides by the wishes of the deceased as expressed in the will or, if there is no will, appoints an heir or someone agreed upon by the beneficiaries. The closest next of kin has a statutory priority to be named or to designate whom should be appointed.

There are only about four cases where the court won't go along with the fiduciary nominated in the will," said Saginaw County Probate Judge Glenn E. Jordan. "These are if the nominee declines, is mentally ill or

senile, turns out to have an interest adverse to the estate, or is not a trust company licensed in Michigan.”

Whom should be nominated in your will as a personal representative? One of the first things to consider is age. It would be rather foolish to nominate a contemporary or someone older than you. The law of averages indicates the person may not survive you and be mentally alert enough for the job.

A personal representative should have a sound business head and be competent and trustworthy. It would help if the person had knowledge of your enterprise if a business is operated since he/she will need to oversee its operation during the period the estate is in probate.

Often a family member or widow is named personal representative. He or she should be familiar with the property and family needs. But, there are advantages to choosing a professional representative. Many banks and trust companies in Michigan communities provide such services.

Their biggest single advantage is that handling estates is their job and they know how to transfer property with the least effort and in the shortest period of time. Most banks and trust companies have large staffs with experts in many areas of estate management and transfer.

This is especially important in the area of taxes. There are many different possible taxes which may have to be paid by an estate. Each has its own special deadline and requirements for filing. Missing any one of these could result in heavy penalties and interest.

Another major advantage of hiring a professional representative is that the person is a disinterested party. As a result he/she can be impartial and less influenced by family disagreements than would be a family member.

“Who you pick for a personal representative depends on how complicated your estate is,” said Judge Jordan. “If it is a modest estate, or merely a bank account—no complications—a family member and a good attorney should be able to do a good job. But if the estate is complicated, you should weigh the values of a professional.”

If a property owner feels it is important to have someone involved in settling the estate that knows the family and the family situation, it is possible to appoint a co-representative.

Duties of the Personal Representative

Once a representative has been appointed by the court, the person may file a bond to guarantee performance or file an acceptance of trust submitting to the court’s jurisdiction. By making the proper provision in his will, a testator can avoid the necessity of the bond. This bond may cost hundreds of dollars, depending on

the size of the estate, but it guarantees the heir or beneficiary will receive his or her inheritance if estate assets are dissipated or misappropriated.

The representative has 60 days (90 days if independent probate) from the time the letters of authority are issued in which to file an inventory of all the assets of the estate, although in complicated cases this time limit can be extended. This can be a difficult procedure because of the disorganized condition of many estates.

The representative is required to list all assets of the estate in the inventory and their fair market value as of the date of death. This list is used in computing the necessary taxes. Non-probate assets may be subject to state inheritance taxes under certain circumstances and probably are subject to federal estate taxes under most circumstances.

“It is my opinion that a lot of property is lost to estates because the personal representative and family members don’t know where to look for the assets,” said Judge Jordan. “The least a person can do is to keep an accurate, up-to-date inventory.” This personal inventory should include information on the location of all valuable papers, records and inventories of the business, records of employment and investments, the location of checking and savings accounts and safety deposit box, a list of all assets and money owed, and the names of persons close to the family and business.

Claims by Creditors

When a personal representative is appointed, he or she must publish in a local newspaper a date by which all claims against the estate must be filed with the court and personal representative. The date for filing those claims is set by law. This must be between two and four months after the date of death.

Claims of creditors are filed with the court and the personal representative. If the personal representative does not file objections to a properly filed claim within 20 days of the published date, the claim is deemed to be valid and allowed. If a dispute arises, the creditor is entitled to its day in court.

Once the claim period against the estate has been closed, tardy claims may be filed within 18 months, or after that by leave of the court. There is a penalty for filing a tardy claim. All claims must be filed before the estate is closed.

If the estate is solvent, the creditors are then paid. If the debts are greater than the assets, claims are paid in a specific order until the assets run out.

The expenses of estate administration and funeral expenses are paid first. Second comes the spouse’s or children’s allowance. Under Michigan law the surviving spouse and/or minor children are allowed a homestead allowance of \$10,000, up to \$3,500 of household and

personal effects, a reasonable family allowance for one year and use of dwelling of the decedent for one year.

Once the spouse's allowance has been set, the claims allowed against the estate are paid and all inheritance and estate taxes are paid.

It is interesting to note that it is impossible to close an estate being probated until clearance is obtained from the federal and state tax people. One of the main reasons some people try to avoid probate is the idea that they will be able to get around state and federal taxes. This is generally not true. Taxes may be due against the estate even though the property does not have to be probated.

The personal representative must pay the allowed claims from cash that is part of the estate. Then, if needed, property of the estate will be sold in order of priority to settle the claims.

After the claims are closed and paid, and at least annually, the personal representative files an accounting with the court, showing income to the estate, amounts paid out, and the amount left. The court then distributes the remainder to the beneficiaries according to the will if there is one, or to the heirs according to statute if there is no will.

Generally the actual property is distributed if this is possible. If it isn't, the property is sold and the money received is distributed.

"It is the obligation of the probate court to do exactly what the deceased person would have done with the property had he/she been present to express their wishes," said Judge Jordan. "A properly executed will is the surest way to tell the probate judge what those wishes are."

Property distribution is not the only important aspect of a will according to Judge Jordan. Guardianship decisions also fall on the probate court if there is a common disaster to both parents or on the death of a surviving parent and no provisions are made in a will for care of minor children.

"Parents should make this choice," said Jordan, "not some judge who doesn't have any idea how the parents would have desired their children to be reared."

If there is no will, the state laws of descent and distribution are followed.

Property Distribution Without a Will

In the absence of sound plans worked out by the deceased and reflected in a will; property will be distributed at death according to a rigid formula of law contained in the revised probate code. They apply only when there is no will and are arbitrary and inflexible. A different distribution may be made only if all interested parties agree.

The state of Michigan has made these laws to meet the ends of impartial justice. They supposedly reflect how

the Legislature thinks the "average" property owner would like to have his property distributed among his heirs. However, because these rules are arbitrary and inflexible, seldom will the wishes of the deceased be carried out.

The law specifies different ways of distributing the estate, depending on what heirs survive the deceased.

Married with children—Property distribution for a married person with child, children, or descendants is divided between the surviving spouse (who is also the mother of all the children) who receives the first \$60,000 plus one-half the remaining balance of the property, and the children who receive one-half the property divided equally. If there is a child or children of a prior marriage, spouse and such children share equally.

Married without children and without parents—All property to the surviving spouse.

Married without children, but with at least one parent surviving—The surviving spouse receives the first \$60,000 plus one-half the remaining balance of the property and the parent or parents receive one-half the property.

Widow or widower with children—All property to children divided equally. Grandchildren take their deceased parents' share.

Unmarried—In cases of an unmarried person, or widow or widower without children or descendants, the distribution is as follows: If the parents survive, all to the parents or survivor. If no parents survive, all property goes to brothers and sisters, divided equally. Nieces and nephews take their deceased parents' share. If no parents, brothers, or sisters survive, the property is divided $\frac{1}{2}$ to the nearest kin of maternal grandparents and $\frac{1}{2}$ to the nearest kin of paternal grandparents. If no kin, all to the state.

Costs

Two of the main areas that lurk in the back of many people's minds about probate are the cost and the time involved. Actual court costs of probate are not excessive. Judge Jordan estimates that no more than \$100 in actual court costs are involved in settling most estates.

The total costs of probate vary with the value and complexity of the estate proceedings. In addition to the court costs, reasonable fees are allowed for the personal representative and attorney. If the court finds that work of an extraordinary nature was involved, it has the power to direct larger payments. They generally average 5 to 10 percent of the value of the probate estate.

In practically all cases the personal representative must employ an attorney to represent the estate in probate court. How much the attorney will be involved in administering the estate will depend on the complexity

of the estate and the agreement between the attorney and the personal representative.

Additional costs may also be incurred in handling the estate, such as appraisal fees and selling expenses if assets must be sold.

Time

“The probate process will be as involved as were the affairs of the person during his lifetime,” said Saginaw County Judge Jordan. “If it is a ‘clean,’ simple estate—there are no disputes—the process shouldn’t take more than nine months to a year. The major reason for taking that long is to allow creditors time to file their claims against the estate and the filing of tax returns.”

Every dispute adds months and possibly years to the time required to settle the estate. Disputes are settled by the judge, or, if the parties elect, a jury trial can result.

Other problems can delay closing the estate, such as finding missing assets, determining the whereabouts of heirs, settling disputed titles, or determining a claim for wrongful deaths.

The last example can result in even more drastic delays because such trials must be handled in the crowded Circuit Courts.

“An inheritance is a gift,” said Judge Jordan. “The real problem comes because so many people look on it as a right. We can’t avoid all the human problems, but from a legal sense we can try to find an equitable solution. No one wins an estate fight, as the old saying goes, except the lawyers.

What Can You Do?

We asked Judge Jordan for his opinion on what property owners could do to reduce the time, cost, and problems involved in probating estates. Below are some of his suggestions.

1. Make a will. A will is essential to make sure your wishes are followed in the distribution of your property. To avoid problems, make sure the will is drawn up by a lawyer. In the will indicate your choice for personal representation and also who you would desire to act as guardian of your children in case of a disaster involving both you and your spouse.

Review your will as your family and financial conditions change, or when there is a major revision in tax laws.

2. Make an inventory of all your assets, debts, valuable papers, and business affairs as outlined earlier.

3. Review the inventory annually at tax time, and update.

4. Keep all loans to your children arms-length transactions. Have them sign a note for the money and later get receipts for their payments. It is even better if this can be done through an impartial third party. Lack of an adequate record of these loans and payments can result in misunderstandings, confusion, hard feelings and even double payments once one of the parties to the agreement dies.

5. If you want the property or business to pass intact to your heirs you must arrange for enough cash on hand to settle the debts to creditors.

6. One of the most important factors is to provide an emergency fund for the surviving spouse and children. One way is to have a joint checking account so there will be readily available cash. Also, life insurance policies can be used to build part of this fund. However, in some instances the payment from life insurance policies can be held up for a month or more. Families should consider an emergency fund that would cover general living expenses for at least three months.

At first glance, probate proceedings may appear to be overly complex and lengthy. However, to adequately protect the interests of the deceased, beneficiaries, creditors, and the state, they are a necessity.

Probably one of the most important things to remember about probate is the statement by Judge Jordan. “The probate process will be as involved as were the affairs of the person during his lifetime.” If you leave a lot of business affairs at loose ends and are casual with your property, your heirs may reap a harvest of frustration, grief, and an unnecessarily reduced estate size when your property goes through probate.

This publication has been updated from information originally prepared by the authors for use in *Michigan Farmer* magazine.

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Issued in furtherance of cooperative extension work in agriculture and home economics, acts of May 8, and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Gordon E. Guyer, Director, Cooperative Extension Service, Michigan State University, E. Lansing, MI 48824.

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