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## Probate

### 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*), to see that claims, expenses and taxes are properly paid, and to see that the remaining estate is distributed to those entitled to receive it under the terms of the decedent's will or under Ohio law. Probate property consists of all property titled in the decedent's name and not transferable on death. It is distributed according to the terms of 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 in which the decedent lived. If the decedent 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 the decedent and another person held 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, without probate proceedings.

Probate property *and* nonprobate property may be subject to federal estate taxes.

### Why is probate necessary?

Probate is necessary to give the executor or administrator the legal authority to control, safeguard and distribute the assets of the decedent's estate. Probate also 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 that a person be appointed to conduct the administration of the estate. If there is a will, this person is usually 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 manages the following tasks:

- caring for the decedent's property;
- 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;
- planning for all relevant estate and income tax returns when required and making the required payments;
- 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. This work may require the preparation and filing of legal documents, providing of notices, attendance at court hearings, securing of an estate asset appraisal, filing of an asset inventory, 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, it is wise to get an attorney's assistance.

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 that the law has established for each type of document filed in the court. Costs typically are about \$200. In most cases, the court must approve attorney fees charged for handling estate matters. Typically, attorney fees are based on an hourly rate for the actual services the attorney performs, or fees may be charged according to the probate court's recommended fee schedule. 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 (excluding joint and survivorship property). An executor, administrator or an attorney 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 a federal 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 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 after the audit has been completed. An extraordinary administration involving a contested will or complicated tax litigation may take several years to complete. In many cases, however, 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, for which an executor or administrator might otherwise have to pay.

Wills should be filed in the probate court as soon as possible after a person's death. The law provides penalties for withholding or destroying 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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