

# **What You Should Know About The Probate Process In Florida**

## **INTRODUCTION**

While the probate process may seem daunting, it is essential to retain an experienced attorney to handle the process properly. The laws regarding the handling of a decedent's estate are complex, and vary significantly from state to state. An experienced attorney will not only have the benefit of the initial education and testing requirements for admission to the state bar, but will have handled many estates with a variety of circumstances, allowing them to spot and efficiently address potential problems. Together with continuing education to stay current on changes in the law, an experienced attorney can avoid problems that the average person would never foresee. Even estates that seem simple require education and experience.

## **PETITION FOR ADMINISTRATION**

To formally open the estate, a Petition for Administration is required. This provides the court with the information needed to open the estate.

## **WAIVER OF PRIORITY, CONSENT TO APPOINTMENT**

This pleading allows the heirs to consent to the personal representative's appointment without hearings or delay, and to agree that the will filed with the court is the last valid will and testament. Without these waivers, heirs are entitled to receive notice by certified mail.

## **DEATH CERTIFICATE**

Florida statutes require that the court receive proof of death, which is ordinarily in the form of a certified death certificate. One must be filed in the probate court file and another in the real estate records for any county where real property was owned.

## **OATH OF WITNESS TO WILL**

A will and each codicil must be proven before being admitted to probate. A will is self-proving under Florida law if the person making the will and each witness signs the will and an additional affidavit confirming that they all signed in each other's presence. If the will or a codicil is not self-proving, it must be proven by an oath of one of the witnesses to the will. The oath can be taken at the Clerk's office when the estate is opened. The witness will sign the oath before a clerk at the probate department.

## **OATH OF PERSONAL REPRESENTATIVE**

The Personal Representative's oath confirms that the personal representative is qualified to serve as personal representative (over eighteen years of age, a relative of the decedent or a Florida resident, and no felony convictions). The Personal Representative further promises to administer the estate according to Florida Law. The form also designates the estate's attorney as the resident agent for service of process in the event that a suit is filed against the estate.

## **BOND AND BOND APPLICATION**

In Lake County, the probate judges routinely allow for a waiver of the bond requirement, if all persons entitled to raise an objection agree to the waiver.

## **ORDER ADMITTING THE WILL TO PROBATE**

After the Judge reviews the will, the Petition for Administration, the death certificate (and the oath, if applicable), he or she will enter the Order Admitting the Will to Probate. This gives judicial approval to the will and authorizes the Personal Representative to administer the estate according to the terms of the will.

## **LETTERS OF ADMINISTRATION**

This document provides official proof that the Personal Representative is entitled to act for the estate, including the ability to gather any assets and settle creditor claims. We usually request five certified copies after the Judge signs. These will be needed to transfer bank accounts, stocks and other assets. One copy is recorded in the public records. Additional copies should be recorded in other counties where the decedent owned real property.

## **GATHERING AND PROTECTING ASSETS**

Once appointed, the personal representative can begin gathering and protecting assets. Insurance premiums should be paid for the home and any automobile. Great care should be taken concerning the use of the home and any automobile. Automobiles should not be driven while the title remains in the name of the decedent. An accident with the automobile or in the home could expose the estate to litigation that could tie the estate up for years. Any expenses paid to protect the assets should be discussed with your attorney to insure that they can be paid by the estate.

## **NOTICE TO CREDITORS**

Florida law requires that the Personal Representative mail a notice to known creditors, and publish a notice in the newspaper for unknown creditors. Creditors must then file a claim within three months of the date the notice is published, but no less than thirty days if they receive a copy by mail. This process helps determine which creditors should be

paid, and who should be paid first. The attorney for the estate will need a list of names and addresses of known creditors. The estate's attorney and staff will write or speak with any of the creditors as needed. For any creditors who file a claim, the personal representative must obtain a release in the proper form for filing with the court before the estate can be closed.

### **MEDICAID RECOVERY**

To comply with the Federal requirements, the State of Florida has procedures to recover Medicaid benefits paid for a decedent's medical care, including nursing home care. The Notice to Creditors must be served upon Florida Health Management Systems, pursuant to the Florida Medicaid recovery program. Unless the decedent received Medicaid benefits after age 55, a Medicaid recovery claim will not be filed. The estate must still serve a notice by certified mail, and file proof of service with the court.

### **NOTICE OF ADMINISTRATION**

Each beneficiary of the estate, including the surviving spouse, and anyone affected by the will is also entitled to a copy of the Notice of Administration. The service of this notice can be waived in writing by any of the beneficiaries or interested persons.

### **INVENTORY**

Within sixty days of your appointment as personal representative, the estate must file an inventory that lists probate assets. This will only include assets that require a court order to pass to the heirs. For the personal effects, a good estimate should be made, and in many cases, an appraisal obtained. The "date of death value" is the figure that should be used for each item on the inventory. A copy of the completed inventory must be served on the Florida Department of Revenue and each of the heirs.

### **AFFIDAVIT OF NO ESTATE TAX DUE**

For decedents passing away in 2008, there is no Federal Estate Tax Return filing required if the value of all assets in which they had an interest does not exceed \$2.0 million. Florida does not require an estate tax return unless a Federal return is due. The Florida taxes are equal to the maximum exemption allowed on the Federal return for state taxes. In effect, a Florida resident pays no more estate taxes than a resident in a state without estate tax. The court must have proof of payment of any taxes due, or proof (via affidavit) that a return is not required.

### **TAXES**

The Personal Representative should file the Income Tax Return (1040) for the year of death. We suggest that clients contact the tax preparer used for previous years of the decedent's returns. They usually have a good idea of what to look for in preparing the return, and can advise if no return is required. The Estate will not be required to file an

income tax return (Form 1041) unless the income earned by the Estate is more than \$600.00 during a year that the estate is pending. Merideth Nagel, P.A. will provide no tax advice, and no assistance in filing any tax return if due. You must seek advice regarding these matters from a qualified Certified Public Accountant or tax attorney.

## **CLOSING THE ESTATE**

Once all valid creditor claims have been paid, the estate can be paid. When all of the estate assets have been distributed, and all creditors paid, the estate attorney will prepare a Petition for Discharge and waivers for all beneficiaries to sign.

## **DISTRIBUTING ASSETS**

The distribution of assets involves many considerations, such as the number of heirs, the types of assets, the creditors who must be paid, and the possibility of disputes as to the validity or interpretation of the will. It is best that all heirs and beneficiaries not count on a distribution at any time prior to the closing of the estate. We understand the inconvenience and the emotional impact this causes. Our goal is always to help the personal representative administer the estate as quickly and efficiently as possible; however, the law imposes significant legal obligations upon the personal representative, so the process must be handled properly. This is often difficult for the beneficiaries to understand.

## **HOMESTEAD**

The Florida Constitution contains protections for the surviving family members of a decedent who owned real property in the decedent's name alone. If the will, or the law for estates without wills, results in a family member inheriting the decedent's primary residence, the home passes to the beneficiary without being subject to the decedent's creditor claims. This protection can have tremendous value. However, the ownership passes at the moment of death, and therefore, the beneficiaries are the owners immediately. As such, the personal representative should not use estate assets to pay for the maintenance of the home. If expenses such as insurance, mortgage payments and utilities are paid, arrangements should be made by the person or persons inheriting the home to pay these from their own funds. The home can be sold early in the probate process, but the net proceeds from the sale may need to be held in escrow until an "Order Determining Homestead" can be obtained. This order cannot be obtained until after the three month creditor claim period expires and confirms that the property was in fact the decedent's Homestead as defined in the Probate laws. The Constitutional protections depend upon many factors, including whether or not the decedent was survived by a spouse or minor child. Therefore, an attorney will need to review the facts in each case to evaluate the application of the homestead protection.

## **ATTORNEY'S FEES AND EXPENSES**

Our fees and expenses are discussed in the “Retainer Agreement” entered into between the Personal Representative and Merideth Nagel, P.A.

## **PERSONAL REPRESENTATIVE FEES AND EXPENSES**

The statutes provide that the personal representative is entitled to Three Percent (3%) of the Probate Inventory Value as a fee for his or her services. Remember that not everything goes through probate, and therefore, the Inventory is often much lower than the actual value of all property owned by the decedent. While reasonable expenses can be reimbursed by the estate, keep in mind that the heirs will have the opportunity to object to items they do not see as reasonable.

## **PERSONAL REPRESENTATIVES' DUTIES**

We have prepared a separate document for your review that discusses in detail the various duties, obligations, and liabilities of the personal representative. Please review that document carefully and contact us with any questions or concerns.

## **COMMUNICATING WITH US**

You may reach us by phone during business hours. Because we are often meeting with clients during business hours, we have staff available to take messages, as well as voice mail. If you do not hear back from our office within 24 hours, please let us know. Ms. Nagel relies heavily on the assistance of her experienced staff, including her paralegals. The contact information for the probate department is as follows:

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