

# Stiller Law Offices

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Client Article-Probate

## ***The Wonderful World of Probate***

### **What is It and How Did I Get Here**

Nothing is more important to you than your family. What is your vision for them after you are gone? You have the power to reduce the cost, risk and stress that they will suffer if you have a well-designed estate plan. A Last Will and Testament is often the main element in your estate plan. As such, it is an invitation to your family to enjoy all the wonders of the probate system.

If you have no Will, your family, too, will be invited into the world of probate. Probate often gets a bad name, usually because it is perceived as a time-consuming and sometimes expensive process. That's what many people believe, especially if they've been through the process. You owe it to yourself and your family to learn more about this world of probate.

If you have been named in a Will to serve as the Executor, or if you have been appointed as an Administrator, knowledge of the process is essential to enable you to carry out your duties effectively. This article is meant to educate you on the reality regarding the probate process so that you can decide for yourself if you want to invite your family to experience it and to help you navigate it once you have been invited.

When a loved one passes away, there is often much to

do in order to honor the decedent's wishes. Probate

### *You Should Know*



Probate assets are those assets that you own solely in your own name. They do not include assets that are owned jointly with another person or assets that are subject to a contractual arrangement such as Payable or Transfer on Death or those with a Beneficiary designation.

is a process administered by a Probate Court to transfer property from a deceased person to his creditors, heirs or other beneficiaries. If a family member dies and the Will states the son is to inherit the house, probate is the process that allows the transfer to take place. The same is typically true for other assets owned solely by the decedent. Probate also applies if the decedent died without having a Will but while owning assets in his or her own name.

First, we will review a bit about Wills and then we will discuss the probate process, as it applies to both persons who die with a Will and to persons who die without a valid Will.

## ALL ABOUT WILLS

It is important to understand what a Will does and does not do. A Will addresses three primary issues after your death:

- Who gets your "estate" (Beneficiaries);
- Who administers your estate (Executor); and
- Who cares for your minor children (Guardian).

Your Will controls only assets titled in your sole name or in

tenancy in common (those that do not have survivorship rights). This is your "estate". Assets held in a trust, in joint tenancy with rights of survivorship and assets subject to a valid beneficiary designation (e.g. life insurance, retirement benefits) do not pass under the terms of your Will.

Unlike living trusts, which can be used to manage your assets during your lifetime, a Will has no legal effect during your lifetime. Additionally, unlike living trusts, Wills require the court procedure called probate after your death in order to carry out its terms.

It is advisable for nearly everybody who owns property to have a Will. If you do not have a Will, both Ohio and Pennsylvania have made one for you (in Ohio's "Statute of Descent and Distribution" and Pennsylvania's "Rules of Succession"). These laws dictate who would receive your estate if you die without a Will. We'll cover more about Ohio's law later on.

Additionally, anyone with a minor or adult dependent child should have a Will to

declare your wishes for who will become Guardian of your children. Without a Will, your family will be left not knowing your desires and, all too often, fighting over them in court. Not only can you designate who you want to serve, you may also wish to emphasize who you don't want to serve or place conditions on the appointment of a Guardian.

Wills have limitations. There are certain things that a Will can do and others things that a Will cannot do. The following is a brief summary of what a Will can and cannot do.

A properly drafted and executed Will can:

- Specify how to dispose of property in your name through the probate process.
- Designate your preference for who should be appointed as Guardian of any minor children.
- Designate who you want to manage your probate estate.
- Request waiver of the required surety bond.

A Will **cannot**:

- Dispose of property titled in joint tenancy or property subject to a valid beneficiary designation.
- Help your estate avoid probate court.
- Provide for management of your assets during disability or incapacity.
- Keep the affairs of your estate private.
- Effectively disinherit a surviving spouse.

Even for "simple" Wills with outright distribution, it is advisable to have a qualified attorney draft and oversee the execution of your Will. Unlike some other documents, courts strictly construe the language and execution of Wills, and, if proper terminology and procedure is not used in drafting and executing the Will, your wishes may not be

carried out as you intend.

## THE WORLD OF PROBATE

So what is this thing called probate? Probate is a legal proceeding to administer 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 who are entitled to receive it. Those who will receive it are either the Beneficiaries named in the decedent's Will, or the heirs entitled to receive it under the applicable law if the decedent had no Will. A probate proceeding takes place in the probate court of the county and state where the deceased property owner lived.

Although Ohio law applies generally to estate administration for Ohio decedents, each county has its own local probate rules as well and so estate administration in Cuyahoga County may have some

variation from estate administration in Montgomery County. If the decedent also owned real estate in another county or state, additional proceedings may be necessary in that county or state.

Probate is necessary to give the Executor or Administrator legal authority to deal with the decedent's probate assets. Sometimes clients believe that they have authority to act as an Executor because they have been named in a Will, however, they have no legal authority to act until the original Will is filed in the probate court and the court formally appoints them to serve. The Executor or Administrator then 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.

Probating an estate requires the formal appointment of a person to conduct the

Estate administration through a probate court is a process for the fiduciary and the attorney. The attorney will be able to teach you about the legal solutions available to address issues that arise. Then you can work together to resolve those issues.

At Stiller Law Offices we are accessible and are always available to listen to you and to advise you about options for resolution of your estate administration issues.

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 to be the Executor, or the person(s) named in the Will refuse or cannot act, then the probate court will appoint someone to administer the estate. This person appointed by the probate court is called an "Administrator." The Executor or Administrator may be an individual, a bank or a trust company. The Executor or Administrator is also called the estate fiduciary and, as a fiduciary, owes a duty to act in the best interests of the estate beneficiaries.

## **PROBATE OVERVIEW**

The Executor or Administrator takes care of the following general 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.

## **Court Supervision**

The probate court supervises the work of the Executor or Administrator. These actions of the fiduciary may require the preparation and filing of numerous 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 fiduciary by

the probate court. Because of the complexity of these procedures, the assistance of an attorney usually is needed.

In Ohio, 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. If 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. Similar small estate procedures exist in Pennsylvania.

## **Probate Costs**

Various fees and expenses apply to a probate administration and these costs are often cited as a reason to avoid probate. There are costs assessed by the probate court, which are based on a schedule of charges established by law for each type of document filed in the court. Court costs usually are about \$200-\$300 for a typical administration, depending on the county. The Executor or Administrator is entitled to be paid a fee for his or her services, which is set by Ohio law based on a percentage of the value of the estate assets

being administered. Again, similar laws exist in Pennsylvania that apply to estates of Pennsylvania decedents. This article will primarily address the administration of estates of Ohio decedents. Finally, other professional fees generally must be paid such as attorney fees, accounting fees and appraisal fees for services provided to the fiduciary for the estate.

### **Specific Duties of an Executor/Administrator**

Remember, if a person dies with a Will, the powers granted to the Executor in the Will empower the Executor to perform tasks without the permission of the Court while an Administrator must request permission of the Court to perform tasks such as to transfer tangible personal property (like furniture or household goods), to transfer motor vehicles or to sell real estate. Most duties of an Administrator are similar to those of the Executor of a Will.

The duties of an Administrator and an Executor are:

**1. Inventory and Appraisal.** The Administrator must identify and determine the fair market value of all financial assets and property that were owned by the decedent at the time of death. The Administrator must file an inventory listing all of the decedent's probate assets and their date-of-death values with the probate court within three months of the Administrator's appointment, unless an extension is granted.

Most estates include what are known as non-probate assets, which generally do not have to be included in the inventory filed with the court. Non-probate assets are assets that legally pass from a decedent to a named beneficiary or to a co-owner at the time of death, without having to go through the probate court. Non-probate assets include insurance policies payable to a named beneficiary, IRA's and pensions that are payable on death to a beneficiary, and assets such as a home, car or bank account that the decedent owned jointly with rights of survivorship with another person. In many cases, the bulk of a decedent's assets may be non-probate

assets. The Administrator must identify non-probate assets for tax purposes, but these assets are not otherwise included in the estate for which the Administrator is responsible. When this article refers to collecting or distributing a decedent's assets, it refers only to those assets that are subject to probate.

If the value of an asset is "readily ascertainable" (for example, shares of stock in a publicly traded company or the balance in a bank account), then no professional appraisal is required; however, items such as jewelry, art objects, antiques, real estate and any other possessions whose value cannot be readily established must be appraised by a qualified person. Real estate can often use the county auditor's value without need for a formal appraisal but because each county in Ohio has its own local probate rules, the Executor must follow the rules of the applicable county regarding asset values.

**2. Collecting assets.** The Administrator must collect all assets of the decedent. This is very important (especially to prospective heirs) because it is

these assets that will be distributed to the heirs after debts and taxes have been paid. Complications can arise in this process if assets legally owned by a decedent are in the possession of someone else at the time of death, or if property belonging to the decedent has been concealed or misappropriated by a third party. Sometimes collecting assets may require the Administrator to follow through on a lawsuit in which the decedent was involved at the time of death, or to file a lawsuit to complete a legal claim the decedent had not fully asserted while alive. For example, if the decedent was killed in an accident, it may be necessary to file a lawsuit to recover damages for wrongful death.

**3. Payment of debts and expenses.** Creditors (people to whom the decedent, or his or her estate, owe money) have six months from the date of death to present their claims against the estate. In most cases, any claim not submitted within six months is barred forever. Claims must be in writing and sent directly to the Administrator or mailed to the decedent's address, and must be received

by the Administrator within six months. In addition to ordinary bills the decedent owed at the time of death, other debts and expenses typically include expenses to keep up property, local, state and federal taxes, hospital and funeral expenses, and the expenses of the estate administration including probate court costs, bond premiums and fees charged by appraisers, attorneys and the Administrator.

Even after accepting a claim as valid, the Administrator must be certain there will be sufficient assets to pay all claims, including those not yet presented. Certain debts have priority. Generally, costs and expenses of administering the estate, funeral expenses and taxes must be paid first. If there are sufficient cash assets in the estate to pay debts, they will be paid out of cash. If there is not enough cash, then estate property will be sold (personal property first and then real estate if necessary) to raise the cash needed. If the total assets in an estate are not sufficient to pay all of the valid debts, claimants must be paid according to a priority schedule established by law.

**4. Final Account.** Within six months after his or her appointment, every Administrator of an estate is expected to complete the estate administration and is required to file a report called a Final and Distributive Account with the probate court. In certain circumstances, such as when an Ohio or federal estate tax return is due, a partial account is due 13 months after appointment and once a year thereafter. This account must include an itemized statement of all receipts, disbursements and distributions made by the Administrator during the reporting period. When the Administrator files the Final and Distributive Account with the court, the Administrator is released from his or her duties.

**5. Distribution of assets.** When all debts, taxes, costs and expenses of the estate have been paid, the Administrator must distribute the balance of the estate to the decedent's beneficiaries as provided in the Will or to the heirs according to a strict formula spelled out in Ohio's Statute of Descent and Distribution. Because an Administrator may be held personally liable for an error

or excess distribution to an heir that cannot later be recovered, legal advice should be obtained before making a final disposition of estate assets. Sometimes an Administrator will make a partial distribution of certain assets before all claims have been received. In such cases, it is prudent to advise persons receiving early partial distributions that they may be required to return money or property to the estate if it is needed to satisfy valid claims.

## **INTESTACY**

Dying intestate simply means that a person died without a Will spelling out how his or her property is to be distributed.

As we covered above, when someone dies intestate, the probate court will appoint an Administrator of the estate. Like the Executor or Administrator of the Will, the appointed estate Administrator will work with the court to see that the decedent's financial affairs are resolved and the remainder of his or her estate is distributed according to law. Although similar to the process of administering an estate of a decedent who died with a

Will, there are some differences. Generally there are more costs involved in probating the estate of an intestate person because there is no Will to grant powers to the fiduciary and the court must instead be asked for the authority to perform all duties. In addition, there are the costs of a fiduciary bond, which are generally assessed at twice the value of the probate assets, excluding real estate. The bond is to cover potential losses that the estate might suffer through error or mishandling of assets during the administration process and its cost is paid from the decedent's estate. Bond costs are generally waived in a Will.

When appointing an Administrator of an intestate estate, Ohio law requires that the court appoint an Administrator based on a certain order of priority. First priority goes to the surviving spouse of the decedent, and if there is no spouse, or if the spouse declines, the court will appoint one of the next of kin of the decedent who is an Ohio resident. If there is no surviving spouse or next of kin resident of the state, or if the court finds such persons to be unsuitable, some other

suitable person will be appointed as Administrator. This is often an attorney practicing in the applicable county.

Before the court issues official letters of appointment naming an Administrator, the appointed person must sign an acceptance statement that spells out his or her duties and acknowledges that the court can fine or remove an Administrator for failure to perform those duties faithfully.

## **Statute of Descent and Distribution**

Ohio's Statute of Descent and Distribution, also known as the intestacy statute, is the law that spells out how the probate assets in an intestate estate will be distributed to the decedent's heirs after all claims, expenses and taxes have been paid. Generally, the statute favors those heirs most closely related to the decedent.

Following is a partial summary of some basic guidelines in Ohio's Statute of Descent and Distribution:

- If a decedent is survived by a spouse and no surviving children or descendants of

deceased children, the entire estate goes to the spouse.

- If a decedent is survived by a spouse and one or more children or their descendants, and all the children who survive or have lineal descendants are also the children of the surviving spouse, the entire estate goes to the surviving spouse.

- If a decedent is survived by a spouse and one child or the child's descendants and the surviving spouse is not the natural or adoptive parent of the child, the spouse receives the first \$20,000 from the estate plus one-half the remainder and the balance of the remainder passes to the child or the child's descendants.

- If a decedent is survived by a spouse and more than one child or their descendants, the spouse will receive the first \$60,000 if the spouse is the natural or adoptive parent of one, but not all of the children, or the first \$20,000 if the spouse is not the natural or adoptive parent of any of the children. The spouse will receive one-third of the balance of the estate and the children will receive two-thirds of the balance of the

estate. Descendants of a deceased child divide that child's share.

- If there is no surviving spouse, but surviving children or their descendants, each of the children receives an equal share of the estate.

Descendants of a deceased child divide that child's share.

- If the decedent has no surviving spouse or children and no descendants of deceased children, the estate goes to his or her surviving parent(s) or, if both parents have died, in equal shares to brothers and sisters or their descendants.

## PROS/CONS OF PROBATE

We have covered the common criticism regarding the cost of probate. Considering what is accomplished by the probate system, however, in passing a decedent's property to the rightful persons, reasonable costs should be expected. Other common criticisms are that the process takes too long. See below in the **Common Questions** section some of the reasons that probate can take longer than a fiduciary or a beneficiary might like. People also dislike the fact that probate is a public matter and

that anyone can see what assets a decedent has left and to whom.

If the decedent left a Will, chances are good that the attorney that he or she consulted to prepare the document advised him or her of these potential negatives. If the decedent did not consult an attorney when preparing the Will, or had no Will, then these potential negatives were likely not even considered by the decedent or were accepted by him as necessary evils.

If you have been through the probate process, you may wonder what possible positives the process has to offer beyond the eventual distribution of assets to beneficiaries. Consider an estate with contentious beneficiaries. The probate process offers court supervision and transparency regarding receipts and disbursements, which often goes a long way in avoiding conflict and litigation.

Sometimes decedents are enticed or advised to avoid probate by using probate "shortcuts" like payable on death or other beneficiary designations or joint ownership of property. The

typical decedent rarely consults with his attorney before using these shortcuts to determine how they will affect the decedent's estate plan. While this probate avoidance accomplishes the goal of getting assets where the decedent wants them to go, it fails to address the need to pay the decedent's debts like funeral expenses, medical bills, mortgages, credit card bills, etc. Without a pool of estate assets to pay these costs, disputes can arise among the beneficiaries or between the beneficiaries and the creditors, which may take litigation to resolve. The probate process provides for the payment of the decedent's debts in an orderly manner.

In addition, consider the decedent who leaves a Will that says he wants The Ohio State University to receive the first \$10,000 from his estate and his family is then to receive the rest of the estate. If that decedent then is enticed to use these "shortcuts" to name his family as beneficiary of the assets, unaware of the ramifications, there is no pool of probate assets to honor his intended first bequest to his alma mater. The probate process provides

for the payment to the intended beneficiaries, in the order the decedent expected them to be paid.

## **COMMON QUESTIONS**

If you have never been through the probate process, you likely have questions. Following are some of the more common questions we receive about estates and related matters.

### **WHAT MAKES A GOOD EXECUTOR?**

People often ask this question when they are drafting their Will. One of the keys to being an effective Executor or Administrator is to be highly organized. In the administration of a decedent's estate, it is essential to keep complete, accurate records and to carry out all procedures required by the probate court in an orderly manner. Also, keeping a positive relationship with the heirs is helpful. This is especially true when the Administrator is one of several surviving relatives of the decedent. An Administrator is likely to encounter fewer problems and complications if he or she keeps all the decedent's heirs

informed of what is going on and treats them as equals. Because it can be a demanding job, choosing an Executor who has the time, as well as the skills, to devote to the job is also important.

### **HOW LONG SHOULD PROBATE TAKE?**

A small estate that does not require the filing of an estate tax return or inheritance tax return and has no creditor or other issues can often be settled within six months of the appointment of the Executor or Administrator. However, if an Ohio or a federal estate tax return or a Pennsylvania inheritance tax return is required, the administration of the estate can last more than a year because estate and inheritance taxes are not due until nine months after the decedent's death. If there is an audit of an estate or inheritance tax return, the administration can take 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. An extraordinary administration involving a contested Will or complicated

tax litigation may take several years to complete. Some estates have significant tax issues and other “post-mortem” planning opportunities that must be addressed.

Because claims against the estate may be made up to six months from the date of death, it is prudent to preserve the assets until all claims are known. However, in many cases, distributions of most or all estate assets do not necessarily have to wait until all probate matters have been completed.

Timely action is a priority for both Executors and Beneficiaries. Each state has rules regarding how long the probate administration process should take. But each estate is unique and differences in beneficiary structure, family harmony, and asset transfer requirements can affect the time required to complete an estate administration.

### **DO LIVING TRUSTS NEED TO BE ADMINISTERED UPON THE DEATH OF THE TRUST MAKER?**

Yes. Although the Probate Court is generally not

involved, and administration costs tend to be lower than in estate administrations, trusts created during a person’s lifetime must also be administered at the time of death in order to transfer the assets as the decedent intended. The trust instrument itself sets forth the rules that the new trustee must follow when handling the decedent’s assets for the benefit of his or her trust beneficiaries. Various additional documents must be prepared, asset management continues, and many duties must be borne by the trustee to carry out the wishes of the trust maker.

### **WHAT SERVICES DO ATTORNEYS PROVIDE FOR ESTATE AND/OR TRUST ADMINISTRATION?**

Serving as an Executor, Administrator or Trustee involves serious legal responsibilities, and can expose you to financial liability if claims and assets are not properly handled. If you are appointed to serve as a fiduciary, do not rely on casual advice from friends and family members regarding your duties to the court and the decedent’s heirs.

A lawyer can provide you with pertinent legal advice and professional judgment regarding the complicated laws involved to help you avoid pitfalls and make the proper decisions. Attorneys assist the named fiduciary with all of the work necessary to timely and efficiently complete the probate process and/or trust administration. This includes preparation of all required paperwork, including the federal and/or Ohio estate tax returns and Pennsylvania inheritance tax returns. Attorneys will often assist with asset transfers and distributions, trust allocations, and advice regarding additional trustee duties.

### **HOW DO ATTORNEYS CHARGE FOR SERVICES?**

Attorney fees charged for handling matters of the estate must, in most cases, be approved by the court and typically are based on a flat fee, percentage or hourly rate as agreed by the Executor and beneficiaries. Some counties have a schedule of allowable attorney fees that are based on the total value of the decedent’s assets, both the probate and the non-probate assets. Please note that legal

fees are deductible for estate tax purposes.

### **WHAT OTHER MATTERS DO ESTATE ATTORNEYS HANDLE?**

In addition to estate and trust administration, attorneys also assist clients with various other probate court supervised matters such as guardianships and testamentary or wrongful death trust administration. For example, if you name a minor child as a beneficiary of your Will or of your life insurance or retirement account, a Guardianship will be needed for the minor child because a minor cannot legally own assets in his or her own name. Additional fees are required for guardianships, both additional probate fees and additional attorney fees. The guardianship will last until the minor reaches the age of 18 when the assets will then be distributed to him or her.

The same rule applies to administration of a testamentary trust created under the decedent's Will – there will be additional probate and attorney fees for the ongoing administration of the testamentary trust for its duration as provided in the terms of the Will.

Sometimes there is unavoidable friction or conflict among or between fiduciaries, beneficiaries, and other persons, such as creditors. These conflicts are not considered part of a "normal" or routine estate administration and separate attorney fees will apply for any lawsuits involving the estate and its assets.

At other times, even though all necessary parties are in agreement, the court must grant its approval of a certain action, such as a change in the terms of an irrevocable trust. Attorneys can assist in the filing of these court actions as well as in the creation of

private agreements among the parties that are not subject to probate court approval.

### **LAST WORDS**

Losing a loved one is never easy, but finding an experienced, compassionate attorney to assist and advise you in an estate administration matter can make the process as efficient as possible. The world of probate is not unlike this world – it has good and bad, advantages and disadvantages. If you have already been invited in, consult with an experienced attorney for advice and assistance.

When you leave this world, you have the power to decide if your family will be invited into the probate world. Consult with an experienced attorney for advice regarding your options.

*Contact us for more information about the topics discussed in this article. This information is provided as a service to our clients and is not intended to be and does not constitute legal advice.*

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