

New Dimensions in Estate & Trust Planning

*An Article to Benefit Clients & Friends
of*

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Trust & Estate Planning ♦ Probate & Estate Administration ♦ Business Formation & Planning

THE TRUTH ABOUT PROBATE

Role of a Personal Representative in Estate Administration

Introduction

The actual definition of the word “Probate” is “to prove the will”. However, the term “probate” has become regularly used to describe an entire system of transferring assets from a decedent to his/her beneficiaries. Each state has its own peculiar probate process particular unto itself. This article will discuss many aspects of the probate process and the role of the individual charged with the responsibility of administering the decedent’s estate in the Commonwealth of Virginia.

Who’s in Charge?

During conferences with clients about the probate process, one of the first questions usually asked is, “Who’s in charge of my probate estate after I die”? Well, “it depends”. If the estate is intestate (without a valid will), then the responsible party is called the

“Administrator”. If there is a will appointing a responsible party, that person is called an “Executor” or, if female, “Executrix”. The title of the person is important, as it puts the world on notice as to what type of an estate is being administered and the authority under which the responsible party was appointed to administer the estate. We will refer to this person generically as the “Personal Representative”. Almost anyone can qualify as a personal representative. However, certain requirements must be satisfied, such as:

1. The person must be 18 years old or older;
2. If surety on the personal representative’s bond is required, the individual must be able to obtain that surety; and
3. If the personal representative is a non-resident of Virginia, he/she will be required to file with the clerk a written consent to service of process and give bond with

surety, unless a Virginia resident qualifies as co-personal representative at the same time or surety is waived because the value of the estate's assets do not exceed \$50,000 in value.

In addition, if the estate is intestate (without a valid will), the court or clerk must be satisfied that the person is suitable and competent to perform the duties of a personal representative.

If you have a will, you have most likely named a personal representative in that will. This individual may be a spouse, child, family member, close friend or corporation authorized to act in this capacity under Virginia law, or any combination of these acting as co-executors. The choice of your personal representative in your will is an extremely important decision. You should give this choice careful thought and counsel should always be sought. Where a decedent dies without a will, Virginia law will govern who can become the personal representative and when they can achieve such appointment. For instance:

1. During the first 30 days after the death, the clerk may qualify a beneficiary as personal representative if waivers to qualify are provided by all other beneficiaries;
2. After the initial 30-day period, the clerk may grant appointment to the first beneficiary who petitions for qualification, without waivers from the other beneficiaries;
3. After 60 days have elapsed since the death, a creditor or any other person may be appointed as personal representative of the estate.

What are the Responsibilities of the Personal Representative?

In general, it is the responsibility of the personal representative to validate the will with the court, to marshal and inventory the assets of the estate, pay the debts of the decedent and

distribute assets to the beneficiaries of the estate by changing title from the decedent to the beneficiaries. However, do not be lured into believing that this is a simple or uncomplicated process because of this summary description.

The personal representative is the "Fiduciary" of the estate. The "fiduciary duty" is the greatest duty imposed by law. It is the same level of duty and care a medical doctor owes to his patient and an attorney owes to his client. The following is a partial checklist of actions that should be considered/taken by a personal representative of an estate in order to comply with the fiduciary duty required of that office:

1. Inform the family of your personal representative status. Assist them, as needed, with: funeral arrangements, cemetery marker, newspaper announcement, special wishes for memorial service, notifying friends and relatives, working with advisors, etc. Before you begin, be sure to locate the decedent's will and any letter of memorial instructions.
2. Provide the family with adequate time for grieving. There is typically no need to rush into your personal representative duties until the environment has settled. Notify the attorney who prepared the will, or obtain counsel from an experienced estate administration attorney.
3. Carefully read and understand the decedent's will so you will know: (1) who are the named beneficiaries; (2) what they are to receive and when they are to receive their bequests; (3) who, if any, are your co-personal representatives; and (4) what your activities/ duties, and powers are per will instructions.
4. Engage an experienced estate administration attorney to assist you with interpreting the will; complete all required legal and probate filings, marshal, inventory and value the assets of the estate, deal with beneficiaries and distribute the estate assets

to the proper beneficiaries after final accounting with the Probate Court. In Virginia, the Commissioner of Accounts is responsible for overseeing the probate process.

5. PLEASE NOTE: DO NOT change titles to any assets or make life insurance death claims, or rollover an IRA or other tax-deferred account/annuity until you have verified the tax options and consequences with an experienced estate administration attorney or a qualified CPA, public account or enrolled agent. There are important post-death tax planning options available that may be LOST if you act without legal or accounting counsel.
6. Secure and inventory property, especially home, other real estate and valuable tangible personal property. Make sure you have the keys, make arrangements to keep the utilities on, keep all insurance in force, pay mortgage payments on the home, etc. Start a list of all assets, ownership, and beneficiary designations and determine all debts/liabilities of the deceased.
7. Order at least 12-15 certified death certificates.
8. Record the will and qualify as personal representative of the estate. It is recommended that you first meet with counsel before you qualify.
9. Establish an estate checking account (preferably interest bearing). Be **sure** that the bank will provide you with **all original cancelled** checks or photocopies of the same. Cancelled checks are required for approval of your final accounting with the Commissioner of Accounts.
10. Notify the decedent's other professional advisors that you are now the personal representative of the estate and give them the name and contact information of your estate administration counsel, if one is engaged. Remind them not to change titles or execute IRA transfers until they receive written instructions from you or your counsel.
11. Forward all of the decedent's mail to your address.
12. Obtain claim information from any insurance company, retirement plans, military affiliations and professional associates that will be providing a death benefit. HOWEVER, DO NOT file any claim paperwork until you have consulted with your counsel to determine appropriate tax options.
13. Collect all income due the deceased; keep a ledger of income received. You will be required to account for each and every penny that comes into, and leaves, the estate. Keep all check stubs, deposit slips and receipts along with explanatory notes for the same. **NEVER** commingle estate assets with your personal assets.
14. If the estate is solvent, pay all debts, contractual obligations, bills due and taxes. Keep an account of all statements and all receipts. If the estate is insolvent, you must seek counsel on the order of debts to be paid. Paying non-qualified creditors out of order may subject you to personal liability.
15. Make estate assets productive during the administration process. Always exercise prudence, reasonable care and skill when investing estate assets. If you lack the requisite skill or experience, use a professional financial advisor.
16. Keep the beneficiaries reasonably updated to the progress of the administration of the estate throughout the process.
17. Engage a CPA, public accountant, enrolled agent or estate administration attorney for preparation of the decedent's final income tax returns. If applicable, the estate tax return, due nine months from date of death, should be completed by an estate administration attorney since this a legal document.
18. Follow the terms of the will and the instructions of the Commissioner of Accounts to distribute the assets of the estate and close the estate.

How Long Does Probate Take?

A typical probate estate administration will last, on average, between nine months to two years. In our Firm's experience, the shortest probate is about six months.

Who is the Commissioner of Accounts?

In Virginia, the Commissioner of Accounts is the public official who is charged with the responsibility of assisting the Circuit Court in reviewing and overseeing the administration of decedents' estates. The Commissioner of Accounts is appointed by the Circuit Court and, typically, is also a privately practicing attorney in the community.

What Probate Filings are Required?

Again, "it depends" on the complexity of the estate. However, a typical probate estate will require the following filings:

1. Probate Information Form
2. Memorandum of Facts
3. Original Will and Proof of Death
4. List of Heirs
5. Probate Tax Return (Fees and Probate Taxes are Calculated from this Document)
6. Inventory
7. Notice of Probate
8. Affidavit of Compliance
9. Accounting(s)
10. Debts and Demands Hearing
11. Show Cause Order Against Distribution
12. Proof of Bond and Surety (when required)
13. Out of State Probates for Real Estate

Is Legal Counsel Needed in Probate Administration?

Not always. However, in many instances it is wise for the personal representative to engage counsel. A personal representative may incur personal liability for his/her actions and/or inactions even in an estate that seems relatively simple and straight forward at first blush. In order to protect the personal representative, legal counsel should be sought before the administration process is initiated.

Closing Thoughts

Fulfilling the role of a personal representative is one of the most important assignments you can complete for a deceased loved one. Indeed, it is a great responsibility to act in such a fiduciary capacity. With proper assistance and advice, you will do an excellent job and earn the personal satisfaction of knowing that you competently administered the decedent's estate, fulfilling the position of trust and accountability to which you were appointed.

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