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SPECIAL REPORT: What is Probate?

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Probate is the process by which a deceased person's property, known as the "estate," is passed to his or her heirs and legatees (people named in the will). In Virginia, the entire process is supervised by the Circuit Court and usually takes about a year; however, substantial distributions from the estate can be made in the interim. Avoiding probate is possible through the use of a revocable living trust. It is noteworthy that avoiding probate is not the same thing as avoiding a creditor. People sometimes make that mistake. A creditor is likely to be able to access assets whether they pass through the probate system or through a revocable trust. An irrevocable trust, however, may be able to avoid a creditor, depending on the language of the instrument.

WHAT PROPERTY IS SUBJECT TO THE PROBATE PROCESS?

The probate estate includes all property held in the decedent's name. Certain kinds of property, such as property owned jointly by the deceased and another person, real property, life insurance, retirement plan assets, and property held in trust, are not part of the probate estate and are not subject to the probate process. In Virginia, unless the will directs the executor to sell the decedent's real property, the real property passes directly to the beneficiaries named in the will and is not part of the probate estate. Jointly-owned bank accounts pass automatically to the surviving owners upon the death of one of the owners without going through probate. Retirement plan assets pass to the designated beneficiary without going through probate. The nonprobate property, however, is part of the decedent's taxable estate (see below).

HOW IS THE PROBATE PROCESS STARTED?

First, the original will and death certificate are filed with the Clerk of the Circuit Court by an interested party. Unless the will has a self-proving affidavit attached, the decedent's signature on the will must be proven by having one of the witnesses to the will appear and testify under oath. After the decedent's signature is proven, the executor named in the will is appointed by the court. Unless surety is waived in the will, the executor must have an insurance company post surety for his promise to faithfully execute the terms of the will. The clerk will also prepare a list of the decedent's heirs at law (i.e. the people who would have taken the estate if there had been no will). Within 30 days after the executor has been appointed, he must mail a notice to each of the decedent's heirs at law (usually the surviving spouse, children, and children of any deceased children) and to those persons named as beneficiaries in the will.

WHAT IS THE PROBATE TAX?

Upon probate of the will, the clerk will collect a probate tax. The tax is imposed on the value of all intangible property wherever located and the value of the real and tangible property located in Virginia. The following are examples of property not included in the valuation of the estate for purposes of the probate tax:

- Property passing by the exercise of a power of appointment.
- Property held jointly with right of survivorship.
- Insurance proceeds, unless payable to the estate.
- Property that passes by inter vivos trust.
- Bonds payable on death to a named beneficiary.

The probate tax rate is \$1.33 per \$1,000 of value of probate property.

WHAT DOES THE EXECUTOR DO?

The executor is responsible for collecting the probate property and for paying all debts of the estate. Within 4 months of his appointment, the executor must file with the Commissioner of Accounts an itemized list, known as an "inventory," of the probate property, including the value of each item. In 2009, if the value of the decedent's taxable estate exceeded \$3,500,000, the executor had to file an estate tax return within nine months of the date of death. This is true even if no estate tax is owed. In 2010, there was no federal estate tax, but in 2011 federal estate tax was reinstated with a \$1,000,000 exemption level.

ABOUT THIS HANDOUT

This guide is provided as a courtesy to help you recognize potential estate planning issues. It is not intended as a substitute for legal advice. It is distributed with the understanding that if you need legal advice, you will seek the services of a competent elder law attorney. While every precaution has been taken to make this explanation accurate, we assume no responsibility for errors or omissions, or for damages resulting from the use of the information in this explanation.



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