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PROBATE

1. WHAT IS PROBATE?

Probate generally is a court-supervised process for identifying and gathering the decedent's assets, paying taxes, claims and expenses of administration, and distributing assets to beneficiaries. The Florida Probate Code is found in Chapters 731 through 735 of the Florida Statutes.

There are two types of probate administration under Florida law: formal administration and summary administration. This pamphlet will primarily discuss formal administration.

There is also a non-court supervised administration proceeding called "Disposition of Personal Property Without Administration." This type of administration only applies in limited circumstances.

2. WHAT ARE PROBATE ASSETS?

Probate administration only applies to probate assets. Probate assets are those assets that the decedent owned in his or her sole name at death, or that were owned by the decedent and one or more co-owners and lacked a provision for automatic succession of ownership at death.

For example:

- A bank account or investment account in the sole name of a decedent is a probate asset, but a bank account or investment account owned by the decedent and payable on death (POD) or transferable on death (TOD) to another, or held jointly with rights of survivorship (JTWROS) with another, is not a probate asset;

- A life insurance policy, annuity contract or individual retirement account that is payable to a specific beneficiary is not a probate asset, but a life insurance policy, annuity contract or individual retirement account payable to the decedent's estate is a probate asset;

- Real estate titled in the sole name of the decedent, or in the name of the decedent and another person as tenants in common, is a probate asset (unless it is homestead), but real estate titled in the name of the decedent and one or more other persons as joint tenants with rights of survivorship or as

tenants by the entirety is not a probate asset;

- Property owned by husband and wife as tenants by the entirety is not a probate asset on the death of the first spouse to die, but goes automatically to the surviving spouse.

This list is not exclusive, but is intended to be illustrative.

3. WHY IS PROBATE NECESSARY?

Probate is necessary to pass ownership of the decedent's probate assets to the decedent's beneficiaries. If the decedent left a valid will, unless the will is admitted to probate in the Court, it will be ineffective to pass title to the decedent's beneficiaries. If the decedent had no will, probate is necessary to pass ownership to the decedent's assets to those persons who are to receive them under Florida law.

Probate is also necessary to wind up the decedent's financial affairs after his or her death. Administration of the decedent's estate ensures that the decedent's creditors are paid if certain procedures are correctly followed.

4. WHAT IS A WILL?

A will is a writing, signed by the decedent and witnesses, that meets the requirements of Florida law. In his or her will, the decedent can name the beneficiaries whom the decedent wants to receive the decedent's probate assets. The decedent can also designate a personal representative (Florida's term for an executor) of his or her choosing to administer the estate.

If the decedent's will disposes of all of the decedent's probate assets and designates a personal representative, the will controls over the default provisions of Florida law. If the decedent did not have a valid will, or if the will fails in some respect, the identities of the persons who will receive the decedent's probate assets, and who will be selected as the personal representative of the decedent's probate estate, will be as provided by Florida law.

5. WHAT HAPPENS TO PROBATE ASSETS IF THERE IS NO WILL?

If someone dies without a valid will, he or she is "intestate." Even if the decedent dies intestate, his or her assets are almost never turned over to the State of Florida. The State will take the decedent's assets only if the decedent had no heirs. The decedent's "heirs" are the persons who are related to the decedent and described in the Florida statute governing distribution of the decedent's probate assets if he or she died intestate.

If the decedent died intestate, the decedent's probate assets will be distributed to the decedent's heirs in the following order of priority:

- If the decedent was survived by his or spouse but left no living lineal descendants, the surviving spouse receives all of the decedent's estate.

- If the decedent was survived by his or her spouse and left one or more lineal descendants (all of whom are the descendants of both the decedent and his or her spouse), the surviving spouse receives the first \$60,000 of the probate estate plus one-half of the rest of the probate estate, and the decedent's lineal descendants share the remaining half.

- If the decedent was survived by his or her spouse and left one or more lineal descendants (at least one of whom is not also a lineal descendant of the surviving spouse), the surviving spouse receives one-half of the probate assets, and the decedent's lineal descendants share the remaining half.

- If the decedent was not married at his or her death but was survived by one or more of his or her lineal descendants, those descendants will receive all of the decedent's estate. If there is more than one lineal descendant, the decedent's estate will be divided among them in the manner prescribed by Florida law. The division will occur at the generational level of the decedent's children. So, for example, if one of the decedent's children did not survive the decedent, and if the deceased child was survived by lineal descendants, the share of the decedent's estate which would have been distributed to the deceased child will instead be distributed among the lineal descendants of the decedent's deceased child.

- If the decedent was not married at his or her death and had no lineal descendants, the decedent's probate assets will pass to the decedent's surviving parents, if they are living, otherwise to the decedent's brothers and sisters.

- Florida's intestate laws will pass the decedent's probate estate to other, more remote heirs if the decedent is not survived by any of the close relatives described above.

The distribution of the decedent's estate under Florida's intestate laws, as discussed above, is subject to certain exceptions for homestead property, exempt personal property, and a statutory allowance to the surviving spouse and any lineal descendants or ascendants whom the decedent supported. Assets subject to these exceptions will pass in a manner different from that described in the intestate laws. For example, if the decedent's homestead was titled in the decedent's name alone, and if the decedent was survived by a spouse and lineal descendants, the surviving spouse will have the use of the homestead for his or her lifetime only, with the decedent's lineal descendants to receive the decedent's homestead only after the surviving spouse dies.

6. WHO IS INVOLVED IN THE PROBATE PROCESS?

Depending upon the facts of the situation, any of the following may have a role to play in the probate administration of the decedent's estate:

- *The Clerk of the Circuit Court in the county in which the decedent was domiciled at the time of the decedent's death;

- *The Circuit Court (acting through a Circuit Court Judge);

- *The person or institution serving as the decedent's personal representative (or executor);

- *The attorney engaged by the personal representative to provide him or her with legal advice throughout the probate process;

- *Those filing claims in the probate proceeding relative to debts incurred by the decedent during his or her lifetime, such as credit card issuers and health care providers; and

- *The Internal Revenue Service (IRS), as to any federal income taxes that the decedent may owe,

any income taxes that the decedent's estate may owe, and, sometimes as to federal gift, estate or generation-skipping transfer tax matters.

7. WHERE ARE PROBATE PAPERS FILED?

The decedent's will, if any, and certain other documents required in order to begin the probate proceeding, are filed with the Clerk of the Circuit Court, usually for the county in which the decedent lived. A filing fee must be paid to the Clerk. The Clerk then assigns a file number, and maintains an ongoing record of all papers filed with the Clerk for the administration of the decedent's estate.

In the interest of protecting the privacy of the decedent's beneficiaries, any documents that contain financial information pertaining to the decedent's estate are not available for public inspection.

8. WHO SUPERVISES PROBATE ADMINISTRATION?

A Circuit Court Judge presides over probate proceedings.

The Judge will rule on the validity of the decedent's will, or if the decedent died intestate, the Judge will consider evidence to confirm the identities of the decedent's heirs as those who will receive the decedent's probate estate.

If the decedent had a will that nominated a personal representative, the Judge will also decide whether the person nominated is qualified to serve in that position. If the nominated personal representative meets the statutory qualifications, the Court will issue "Letters of Administration," also referred to simply as "letters". These "letters" are important evidence of the personal representative's authority to administer the decedent's estate.

If any questions or disputes arise during the course of administering the decedent's estate, the Judge will hold a hearing as necessary to resolve the matter in question. The Judge's decision will be set forth in a written direction called an "Order."

9. WHAT IS A PERSONAL REPRESENTATIVE, AND WHAT DOES THE PERSONAL REPRESENTATIVE DO?

The personal representative is the person, bank or trust company appointed by the Court to be in charge of the administration of the decedent's estate. In Florida, the term "personal representative" is used instead of such terms as "executor, executrix, administrator and administratrix."

The personal representative has a legal duty to administer the estate pursuant to Florida law. The personal representative must:

- Identify, gather, value and safeguard the decedent's probate assets;
- Publish a "Notice to Creditors" in a local newspaper in order to give notice to potential claimants to file claims in the manner required by law;
- Serve a "Notice of Administration" to provide information about the estate administration and notice of the procedures required to be followed by those having any objection to the administration of the decedent's estate;

- Conduct a diligent search to locate "known or reasonably ascertainable" creditors, and notify? these creditors of the time by which their claims must be filed;

- Object to improper claims, and defend suits brought on such claims;

- Pay valid claims;

- File tax returns and pay any taxes properly due;

- Employ professionals to assist in the administration of the estate; for example, attorneys, certified public accountants, appraisers and investment advisors;

- Pay expenses of administering the estate;

- Pay statutory amounts to the decedent's surviving spouse or family;

- Distribute assets to beneficiaries; and

- Close the estate.

10. WHO CAN BE A PERSONAL REPRESENTATIVE?

The personal representative can be an individual, or a bank or trust company, subject to certain restrictions.

To qualify to serve as a personal representative, an individual must be either a Florida resident or, regardless of residence, a spouse, sibling, parent, child, or other close relative of the decedent. An individual who is not a legal resident of Florida, and who is not closely related to the decedent, cannot serve as a personal representative.

A trust company incorporated under the laws of Florida, or a bank or savings and loan authorized and qualified to exercise fiduciary powers in Florida, can serve as personal representative.

11. WHO WILL THE COURT APPOINT TO SERVE AS PERSONAL REPRESENTATIVE?

If the decedent had a valid will, the Court will appoint the person named by the decedent in his or her will to serve as personal representative, as long as named person or bank or trust company is legally qualified to serve.

If the decedent did not have a valid will, the surviving spouse has the first right to be appointed by the Judge to serve as personal representative. If the decedent was not married at his or her death, or if the decedent's surviving spouse declines to serve, the person selected by a majority in interest of the decedent's heirs will have the second right to be appointed as personal representative. If the heirs cannot agree among themselves, the Court will appoint a personal representative after a hearing is held for that purpose.

12. WHY DOES THE PERSONAL REPRESENTATIVE NEED AN ATTORNEY?

A personal representative should always engage a qualified attorney to assist in the administration of

the decedent's estate. Many legal issues arise, even in the simplest estate administration, and most of these issues will be novel and unfamiliar to non-attorneys.

The attorney for the personal representative advises the personal representative on their rights and duties under the law, and represents the personal representative in estate proceedings. The attorney for the personal representative is not the attorney for any of the beneficiaries of the decedent's estate. However, if the personal representative mis-manages the decedent's estate, the personal representative may be liable to the beneficiaries for any harm they may suffer.

A provision in a will mandating that a particular attorney or firm be employed as attorney for the personal representative is not binding. Instead, the personal representative may engage the attorney of his or her choosing.

13. WHAT ARE THE ESTATE'S OBLIGATIONS TO ESTATE CREDITORS?

The primary purpose of probate is to ensure that the decedent's debts are paid in an orderly fashion. The personal representative must use diligent efforts to give actual notice of the probate proceeding to "known or reasonably ascertainable" creditors. This gives the creditors an opportunity to file claims in the decedent's estate, if any. Creditors who receive notice of the probate administration generally have three months to file a claim with the Clerk of the Circuit Court. The personal representative, or any other interested persons, may file an objection to the statement of claim. If an objection is filed, the creditor must file a separate independent lawsuit to pursue the claim. A claimant who files a claim in the probate proceeding must be treated fairly as a person interested in the estate until the claim has been paid, or until the claim is determined to be invalid.

The legitimate debts of the decedent, specifically including proper claims, taxes and expenses of the administration of the decedent's estate, must be paid before making distributions to the estate beneficiaries. The Court will require the personal representative to file a report to advise of any claims filed in the estate, and will not permit the estate to be closed unless those claims have been paid or otherwise disposed of.

14. HOW IS THE INTERNAL REVENUE SERVICE ("IRS") INVOLVED?

The decedent's death has two significant tax consequences: It ends the decedent's last tax year for purposes of filing the decedent's federal income tax return, and it establishes a new tax entity, the "estate."

The personal representative may be required to file one or more of the following returns, depending upon the circumstances:

- The decedent's final Form 1040, Federal Income Tax Return, reporting the decedent's income for the year of the decedent's death.
- One or more Forms 1041, Federal Income Tax Returns for the Estate, reporting the estate's taxable income.
- Form 709, Federal Gift Tax Return(s), reporting gifts made by the decedent prior to death.
- Form 706, Federal Estate Tax Return, reporting the decedent's gross estate, depending upon

the value of the gross estate.

The personal representative may also be required to file other returns not specifically mentioned here.

The personal representative has the responsibility to pay amounts owed by the decedent or the estate to the IRS. Taxes are normally paid from assets in the decedent's estate, and not by the personal representative from his or her own assets; however, under certain circumstances, the personal representative may be personally liable for those taxes if they are not properly paid.

The estate will not have any tax filing or payment obligations to the State of Florida; however, if the decedent owed Florida intangibles taxes for any year prior to the repeal of the intangibles tax as of January 1, 2007, the personal representative must pay those taxes to the Florida Department of Revenue.

15. WHAT ARE THE RIGHTS OF THE DECEDENT'S SURVIVING FAMILY?

The decedent's surviving spouse and children may be entitled to receive assets from the decedent's estate, even if the decedent's will gives them nothing. Florida law protects the decedent's surviving spouse and certain surviving children from total disinheritance.

For example, a surviving spouse may have rights in the decedent's homestead real property. A surviving spouse may also have the right to come forward to claim an "elective share" from the decedent's estate. The elective share is, generally speaking, 30% of all of the decedent's assets, including any assets that are non-probate assets. A surviving spouse and/or the decedent's children may also have the right to a family allowance to provide them with funds prior to final distribution of the estate assets, and rights in exempt property that will be paid to them instead of to creditors in satisfaction of claims against the estate. It is important to note that a spouse may waive his or her rights to an elective share, family allowance and/or exempt property in a valid pre- or post-marital agreement.

In addition, if the decedent married, or had children, after the date of the decedent's last will, and if the decedent neglected to provide for the new spouse or children, an omitted family member may nevertheless be entitled to a share of the decedent's estate.

The existence and enforcement of these statutory rights requires knowledge about the applicable laws and procedures and is best handled by an attorney.

16. WHAT RIGHTS DO OTHER POTENTIAL BENEFICIARIES HAVE IN THE DECEDENT'S PROBATE ESTATE?

Except as provided in the immediately preceding section, a Florida resident has the right to entirely disinherit anyone. It is not necessary to give the disinherited beneficiary a nominal gift of, for example, \$1.00.

18. HOW LONG DOES PROBATE TAKE?

It depends on the facts of each situation; some probate administrations take longer than others. For example, the personal representative may need to sell real estate prior to settling the estate, or to resolve a disputed claim filed by a creditor, or a lawsuit filed to challenge the validity of the will. Any of these circumstances, if present, would tend to lengthen the process of administration. Even the simplest of

estates must be open for at least the three-month creditor claim period; it is reasonable to expect that a simple estate will take about five or six months to properly handle.

If the estate does not have to file a federal estate tax return, the final accounting and other documents necessary to close the estate are first due within 12 months after the Court issues Letters of Administration to the personal representative. This period can be extended if necessary.

If the estate is required to file a federal estate tax return, the return is initially due nine months after the date of the decedent's death, however, the time for filing the return can be extended for another six months. If a federal estate tax return is required, the final accounting and other documents to close the probate administration are due within 12 months from the date the estate tax return, as extended, is due. This date can also be extended if necessary.

18. HOW ARE THE PERSONAL REPRESENTATIVE'S COMPENSATION AND PROFESSIONAL FEES DETERMINED?

The personal representative, the attorney, and other professionals whose services may be required in administering the estate (such as appraisers and accountants), are entitled by law to reasonable compensation.

The personal representative's compensation is usually determined in one of five ways: (1) as set forth in the will; (2) as set forth in a contract between the personal representative and the decedent; (3) as agreed among the personal representative and the persons who will bear the impact of the personal representative's compensation; (4) the amount presumed to be reasonable as calculated under Florida law, if the amount is not objected to by any of the beneficiaries; or (5) as determined by the Judge.

The fee for the attorney for the personal representative is usually determined in one of three ways: (1) as agreed among the attorney, the personal representative and the persons who bear the impact of the fee, (2) the amount presumed to be reasonable calculated under Florida law, if the amount is not objected to by any of the beneficiaries, or (3) as determined by the Judge.

19. WHAT ALTERNATIVES TO FORMAL ADMINISTRATION ARE AVAILABLE?

Florida law provides for several alternate abbreviated procedures other than the formal administration process.

"Summary Administration" is generally available only if the value of the estate subject to probate in Florida (less property which is exempt from the claims of creditors; for example, homestead real property in many circumstances) is not more than \$75,000, and if the decedent's debts are paid, or the creditors do not object. Those who receive the estate assets in a summary administration generally remain liable for claims against the decedent for two years after the date of death. Summary administration is also available if the decedent has been dead for more than two years and there has been no prior administration.

Another alternative to the formal administration process is "Disposition Without Administration." This is available only if estate assets consist solely of property classified as exempt from the claims of the decedent's creditors by applicable law and non-exempt personal property, the value of which does not exceed the total of (1) up to \$6,000 in funeral expenses; and (2) the amount of all reasonable and necessary medical and hospital expenses incurred in the last 60 days of the decedent's final illness, if

any.

20. WHAT IF THERE IS A REVOCABLE TRUST?

If the decedent had established what is commonly referred to as a “Revocable Trust,” a “Living Trust” or a “Revocable Living Trust,” in certain circumstances, the trustee may be required to pay expenses of administration of the decedent's estate, enforceable claims of the decedent's creditors and any federal estate taxes payable from the trust assets.

The trustee of such a trust is always required to file a "Notice of Trust" with the Clerk of the Court in the county in which the decedent resided at the time of the decedent's death. The notice of trust gives information concerning the identity of the decedent as the grantor or settlor of the trust, and the current trustee of the trust. The purpose of the notice of trust is to make the decedent's creditors aware of the existence of the trust and of their rights to enforce their claims against the trust assets.

All of the tasks which must be performed by a personal representative in connection with the administration of a probate estate must also be performed by the trustee of a revocable trust, though the trustee generally will not need to file the same documents with the Clerk of the Court. Furthermore, if a probate proceeding is not commenced, the assets comprising the decedent's revocable trust are subject to a two-year creditor's claim period, rather than the three-month non-claim available to a personal representative.

The assets in the decedent's revocable trust are a part of his or her gross estate for purposes of determining federal estate tax liability.