

THE INTERPLAY OF WILLS AND PROBATE

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(This is a longer version of an article that appeared in the Lewiston Sun Journal)

There is a lot of confusion about the workings of wills and the probate process. A common misconception is that if you have a will, your estate won't have to be probated, when in fact, a will is the legal instrument to guide the probate process. One's last will and testament is a legal document that directs to whom one's property will pass and designates a person to take care of seeing this process through; however, probate provides the venue to carry out this process.

In Maine, probate occurs in the Maine probate courts. Every county in Maine has one. The will, in and of itself has no legal effect until the testator (the person who made it) dies, and the personal representative files it along with some forms with the proper probate court. Once done, the probate court issues Letters of Personal Representative to the person designated as such in the will, which officially appoints the personal representative as the person with authority to administer the estate. Even though the Personal Representative was named in the will, he or she has no legal authority until this has occurred.

This all typically happens through a process called informal probate. This means that there is no judge involved and no one even has to set foot in the probate court. If the will and the forms are in order, the clerk of the probate court will issue the Letters of Authority to the Personal Representative by mail. This process generally takes just a week or two. With the Letters of Authority, the Personal Representative can then go about the business of opening up an estate checking account, closing the accounts of the decedent, selling property, consolidating the estate assets in the estate account and paying the creditors of the estate.

After the Personal Representative has been appointed by the court, a four month creditor period will start during which any creditor of the estate must make their claim known. If they don't do so within that timeframe, the Personal Representative is under no legal obligation to pay it. Once the creditor period has passed, and after all legal obligations are taken care of, including filing any necessary income tax or estate tax returns, the Personal Representative is free to distribute the estate assets to the beneficiaries named in the will.

We are fortunate that Maine has adopted the Uniform Probate Code which greatly streamlined the probate process. In some other states, probate is much more complicated and expensive. Consequently, one often hears that setting up a trust to avoid probate is an essential part of estate planning. Trusts are often useful tools, but typically it is much more expensive to have a trust prepared than a will, and then there is the issue of making sure that all of one's property is properly conveyed to the trust. In the end, unless one has a taxable estate (over \$2 million), or complicated family issues, (e.g. blended families or disabled children), a simple will is generally all one needs in Maine to ensure the orderly distribution of one's estate after death. It is important to understand, however, that the will only works in conjunction with probate.

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