

THE PROBATE PROCESS

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Contrary to some popular self-help books and the marketing pitches of trust mills, probate in Maine is not an onerous process. This is due in large part to the adoption of the Uniform Probate Code in Maine, which greatly streamlined the probate process. This article explains what is involved in probate and attempts to dispel some myths in that regard.

What is probate? Probate is the process by which property owned by an individual who has died will pass to that individual's heirs. One source of confusion lies in the fact that not all property need go through probate. Jointly owned property is generally not probated, but passes automatically by right of survivorship. This is true of jointly owned real estate, not to be confused with property held jointly by tenants in common. Real estate held by tenants in common will need to be probated when one of the tenants in common dies in order to pass that person's ownership interest to his heirs. By contrast, real estate held by joint tenants passes by right of survivorship to the surviving joint tenant/s. In most cases, married couples own their real estate as joint tenants. Similarly, joint bank accounts will pass by right of survivorship to the surviving account holder. Also, property with a beneficiary designation does not have to be probated. This would include things like individual retirement accounts (IRAs), annuities and life insurance. All that needs to be done to effectuate the payment of such funds to the beneficiary is filling out the proper claims forms. Thus, many surviving spouses do not have to probate the estate of their deceased spouse at all, because the property of the couple was either jointly owned or had a named beneficiary. In short, probate is only necessary to pass title to property that was in the decedent's name only and had no beneficiary designation.

What happens when one dies without a will? A common misconception is that if one dies leaving no will, his property will pass to the state. Although it is certainly preferable to have a will, if one dies without a will (intestate), his property will pass to his closest family members. The only instance in which the state takes property of a decedent is in the rare case when one dies with no will and no living relatives. The state's laws of intestacy found in the Maine Probate Code determine which relatives take from a decedent dying intestate. If there is a surviving spouse and the decedent had no children or surviving parents, the spouse gets all. If the decedent has parents who survive him, then his spouse gets the first \$50,000 and the spouse and parents of the decedent split the rest, 50/50. If the decedent had children with the surviving spouse, the surviving spouse gets the first \$50,000 and the remainder is split 50/50 between the surviving spouse and the children. If the decedent has children from someone other than the surviving spouse, then everything is divided 50/50 between the surviving spouse and the decedent's children. These formulations are actually contrary to the typical "sweetheart will" in which one spouse leaves everything to the other spouse and underscore the importance of having a will.

Who will oversee the probate of my estate? An important component of a will is naming a personal representative - the person designated with the task of overseeing the probate of the estate. The personal representative's duties include paying claims against the estate and ultimately distributing the assets to the heirs. If one does not have a will, anyone can petition to be appointed as personal representative, but if there is a contest, the Probate Code dictates whom

must be given priority. Here again, this list follows a logical order according to the closeness of relationship to the decedent.

How long does it take to probate a will? One can petition to have the will of a decedent probated and be officially appointed personal representative of the estate very soon after the death. The petition for probate of the will, (or in cases in which there is no will, probate of the intestate estate) can be filed almost immediately. The personal representative will not be appointed until after notices are sent out to the heirs of the estate, but this is usually done within weeks of filing the petition. Once the appointment is made, the personal representative has complete control over all assets in the estate. There is a four month period during which any creditor of the decedent is allowed to bring a claim against the estate, and it is the responsibility of the personal representative to see that all legitimate claims are paid to the extent that there are enough funds in the estate. Bills may be paid and partial distributions may be made to heirs pending this period, keeping in mind that enough should be retained to cover any legitimate claims that might arise during this period. Once the creditor claim period has expired, an inventory has been prepared and a plan of distribution has been sent to the heirs, the estate may be fully distributed and closed. Thus, it is possible that an estate can be fully distributed and closed in Maine within less than a year from date of death.

Isn't probate expensive? There are some expenses entailed in probating an estate, but these are nominal. The Probate Court charges a fee which is based on the estimated value of the estate. This runs from as little as \$15 for an estate under \$10,000 up a ceiling of \$750 for estates of more than \$2,000,000. There are some other incidental court fees for publishing notices and making copies. In the past, the attorney representing the personal representative was allowed to charge three percent of the estate as his fee. With the adoption of the Uniform Probate Code, this is no longer allowed, and an attorney may only bill for the time actually spent. This will vary according to the size and complexity of the estate. Ironically, the fees involved in probating an estate can be considerably less than the fees involved establishing and properly funding a trust set up with the goal of avoiding probate.

In sum, the probate process has been greatly streamlined and simplified with the adoption of the Uniform Probate Code in Maine. Although there can be instances in which avoiding probate is a good idea, setting up trusts to do so is often not cost effective when compared with the costs associated probate. In any event, it remains very important to have a will to ensure that one's wealth will pass according to one's wishes and to ensure that the proper person is put in charge of the process.