

# To The Point

## Probate



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## Introduction

During a time when families are dealing with the emotional trauma of losing a loved one, facing the prospect of winding up the worldly affairs of that loved one can be overwhelming. The purpose of this pamphlet is to outline, in “plain English,” the procedures that should be followed when dealing with probate.

It has been our experience that the nature and issues involved in each probate estate are as unique as each individual. Therefore, the understanding of the general concepts contained in this brochure is just the beginning.

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## Probate Defined

Simply put, probate is the process by which the government ensures that the creditors of the decedent are paid, and also authorizes the Personal Representative to do whatever is necessary to transfer property from the decedent to the decedent's beneficiaries in accordance with the decedent's Last Will and Testament or in accordance with applicable law. The Orphans' Court, in conjunction with the Register of Wills, in each county oversees this process.

When a person (or "decedent") dies, someone must take responsibility for winding up the decedent's worldly affairs. That person is the "Personal Representative." This person is also commonly known as the "executor." The total of all of the decedent's property is called the decedent's "estate," and this property must be identified and appraised. The debts of the decedent (including taxes) are paid out of the estate, and distributions are then made to the decedent's beneficiaries. Probate provides an orderly, court-supervised process for achieving these goals.

Please note that even if there is no probate property, there is a legal requirement to file the original of a Will and certified copy of the death certificate with the Register of Wills in the decedent's county of residence in a timely manner. In addition, an Information Report must be completed and filed with the Register of Wills to report the decedent's non-probate property. The concept of "probate" and "nonprobate" property is discussed under the Probate vs. Non-Probate section of this pamphlet.







## The Probate Process

The probate process begins when an estate is opened with the Register of Wills in the decedent's county of residence. There are three main types of probate estates in Maryland, a "regular estate," a "small estate," and an estate under "modified administration." A small estate proceeding, which is discussed in more detail later in this pamphlet, is proper for probate estate valued at \$50,000 or less (or \$100,000 or less if the sole beneficiary of the estate is the surviving spouse). A regular estate proceeding is proper for probate estates with assets exceeding those thresholds. In limited situations, a regular estate may be administered through "modified administration," a process that is further defined later in this brochure.

To open a regular probate estate, a Petition for Probate, together with the original copy of the decedent's Will (and any Codicils,

which are amendments to the Will) and the original death certificate are filed with the appropriate Register of Wills. The Petition for a regular probate estate includes what is called a "Schedule A," which is a rough estimate of the value of the estate. The Register of Wills then appoints the person nominated in the decedent's Will as the Personal Representative, and issues "Letters of Administration," which authorize the Personal Representative to act in the decedent's place in all matters. If a person dies without a Will, the Register of Wills will still appoint a Personal Representative on a priority basis established by law.

A bond must also be filed. A bond provides a guarantee that the Personal Representative will perform his duties faithfully, in accordance with the Will and the law. If the Will states that the requirement of a bond has been waived, a "nominal bond" often must still be filed; this is a guarantee

to the State that inheritance or estate taxes will be paid when due, and provides some protection to creditors. In all other cases, including estates where there is no Will, a bond in the amount established by the Register of Wills will have to be filed by the Personal Representative. Any expense related to procuring a bond is paid from the estate's assets.

In addition, a List of Interested Persons must be filed that identifies all of the legal heirs of the estate, including their addresses, regardless of whether they were named in the Will. Finally, a Notice to Creditors must be filed with the Petition for Probate. This Notice will be sent by the Register of Wills to a local newspaper to be run once a week for three consecutive weeks.

Note that the cost of the nominal bond and for advertising the Notice to Creditors will be paid by the Personal Representative at the

time the estate is opened. The actual cost will vary from county to county, sometimes substantially.

Within 90 days after the estate has been opened, the Personal Representative is required to file an Inventory with the Register of Wills. This is a detailed listing of all of the probate property that was owned solely by the decedent at the time of the decedent's death. (Probate property will be further described later.)

Not only does all of the probate property have to be identified, but the value of that property will have to be stated. Usually this is done by having the property appraised by a qualified appraiser, although there are some types of property that can be appraised by the Personal Representative (e.g., publicly-traded stocks and bank accounts).

Also within 90 days of opening the estate, the Personal Representative must file an



Information Report with the Register of Wills. The Information Report is used to report the “date-of-death” value of non-probate property that passes to beneficiaries who are subject to the Maryland Inheritance Tax. In addition, property of the decedent that was transferred to a taxable beneficiary within two years before the date of death and the value of that property must also be reported on the Information Report. Maryland law presumes that property transferred within two years of death is a transfer made in contemplation of death, and thus, the value of that transferred property must also be taxed.

There is a common misperception that while an estate is being probated, there can be no distributions to the beneficiaries, even in cases of need. That is not the case, even though, in most cases, distributions are kept to a minimum for administration purposes. A Personal Representative may not make a distribution if by doing so, legitimate expenses and taxes cannot be paid. In addition, a Personal Representative must follow the provisions of the Will (or, if there is no Will, the distribution provisions contained in the law) in making any distributions. If there is any doubt about whether a distribution should be made prior to the closing of the estate, the Personal Representative may ask the Orphans’ Court for the authority to make any such distribution.

Once nine months have passed from the time the estate is opened, an accounting must be filed that shows all of the income



and expenses of the estate, and any sales of estate assets, from the date of death of the decedent. In most cases, the estate can be closed at this time, which means that 20 days after the accounting is approved by the Orphans’ Court, final distributions can be made to the beneficiaries. Where there may be outstanding matters that preclude the closing of the estate at the time that the first accounting is filed, the Personal Representative continues to administer the estate until all those outstanding issues are resolved, providing periodic accountings as required by law (i.e. every 6 months). Typically, however, it takes approximately 9 to 12 months to take an estate completely through probate.





## *Small Estates*

If the probate estate is valued at \$50,000 or less (or \$100,000 or less if the sole beneficiary of the estate is the surviving spouse), the much simpler “small estate” probate process may be used.

The administration of a small estate, like a regular estate, is initiated by filing a (i) Petition for Probate, (ii) the original Will (and Codicils, if any), (iii) a List of Interested Persons, and (iv) a death certificate with the appropriate Register of Wills.

The Petition for a small probate estate also includes a Schedule B. This is an inventory of all assets titled in the decedent’s individual name with the date-of-death values for each of those assets. In addition, documentation to support the date-of-death values reported on Schedule B must be filed as part of the Petition, along with a list of all of the decedent’s known creditors and copies of any funeral bills. Finally, the Information Report must also be filed within three months from the filing of the Petition for Probate.

With a small estate, the maximum probate fee is \$150 (or \$300 if the surviving spouse is the sole beneficiary of the estate), but may be less, depending on the value of the probate assets. In addition, the Personal Representative is not entitled to receive commissions and, depending on the size of the small estate, a bond and Notice to Creditors may not be required. However, there are some situations where a Notice to Creditors may have to be filed and a bond posted. If so, the estate cannot be closed until after the six-month notice period has elapsed.

After all of the required information and forms are submitted to the Register of Wills, the Personal Representative is appointed and the creditors are paid so that the estate can be closed and distributions can be made to the beneficiaries. With a small estate, the Personal Representative is not required to submit an accounting of the estate assets to the Register of Wills.



## *Modified Administration*

The concept of “modified administration” was created to respond to concerns that the probate process was just too complicated when only spouses and children were involved as beneficiaries. A streamlined set of procedures requiring less supervisions by the Register of Wills was formulated to make the probate process simpler in these limited situations.

Modified administration can be elected in solvent probate estates where the beneficiaries are limited to individuals or entities exempt from the Maryland Inheritance Tax or trusts established for individuals exempt from the Maryland Inheritance Tax. In order to make this election, the Personal Representative must file an Election for Modified Administration within three months after the regular probate estate is opened, and all of the

beneficiaries must file a Consent to Election for Modified Administration.

Under modified administration, the formal inventory and final accounting are not required unless requested by one of the interested persons. If no request is made, the Personal Representative must file a Final Report Under Modified Administration, which includes much of the same information that is required to be included on the inventory and accounting in a regular estate; however, income of the estate does not need to be reported. This Final Report is typically due within 10 months from the date the estate is opened. If additional time is needed, the deadline can be extended up to 180 days total (in 90 day increments) if a Consent for Extension of Time signed by the Personal Representative and all interested persons is filed in advance of the filing deadline.



With modified administration, all distributions must be made within 12 months of opening the estate and the estate should be closed no later than 13 months after opening, if no extensions are filed. Because only limited extensions are allowed for filing the Final Report, and because of the potential for being required to convert a modified administration to a regular estate administration, this form of probate administration is reserved for very limited situations where there is little possibility of a dispute among the beneficiaries and where there is little likelihood that administration will be delayed because of the inability to sell an asset of the estate, such as a home or business.



## *Maintaining Records*

The successful completion of the probate process in a timely manner is contingent upon the Personal Representative keeping complete and accurate records during this process. In order to ensure that everything is properly reported to the Register of Wills or to the Internal Revenue Service, the following suggestions should be followed:

### **1. Establish an Estate Checking Account.**

After the death of the decedent, the Personal Representative may receive checks from the decedent's employer, from investments that were owned by the decedent, from tax refunds, and from a host of other sources. These checks should be deposited into a checking account that is opened in the name of the estate. Before any check is deposited, however, a photocopy of that check should be made so that if there is ever a question about the deposit, it can be answered easily and quickly. Note that before an estate checking account can be opened, the Personal Representative must obtain a taxpayer identification number for the estate from the IRS by filing a form SS-4. The Personal Representative will also need Letters of Administration and a certified copy of the death certificate.

**2. Keep All Receipts.** Whenever a bill is paid by the Personal Representative, a copy of that bill should be kept with the estate's records. It should be noted on the copy when the bill was paid and the check number from the estate checking account



that was used to pay the bill. Sometimes, a family member will pay for certain estate expenses (i.e. funeral or memorial service) before the estate is officially opened. Those expenses should be reimbursed by the estate once the Personal Representative has control of the estate assets. If a person is reimbursed from the estate checking account for expenses paid on behalf of the estate, a detailed record of that reimbursement should be made at the time of the reimbursement, including copies of any bills paid by that person.

### **3. Convert Accounts to Estate Accounts.**

The decedent's bank accounts and investment accounts should be changed from the decedent's name to the estate's name. If the decedent maintained numerous accounts, it is recommended that the Personal Representative consolidate these accounts.

**4. Funeral Expenses.** Because funeral expenses are a priority item to be paid by the estate, and because these expenses are often scrutinized by the Register of Wills, the receipts associated with the decedent's funeral should be maintained in a separate file.



## 4. Miscellaneous Probate Considerations

- **Inheritance Taxes.** The Maryland Inheritance Tax is a 10% tax on distributions received by certain individuals upon the death of a Maryland resident. Assets passing to a spouse, child, stepchild, grandchild, step-grandchild, other descendant, spouse of a descendant, parent, grandparent or sibling are exempt from this tax; however, assets passing to anyone else would be subject to this tax and must be reported to the Register of Wills in the Information Report and/or the formal accounting. If the assets passed directly to a non-exempt beneficiary outside of probate (i.e. as the beneficiary of a retirement account or a revocable trust), the value of those assets must be reported in the Information Report. If the assets will be distributed to a non-exempt beneficiary

as part of the decedent's probate estate, the value of those assets will be reported in the formal accounting due within 9 months from the date the estate is opened. Please note that most Wills contain provisions that the estate will pay any Inheritance Tax that may come due; however, in situations when a person dies without a Will or with a Will that does not contain that provision, the beneficiary will be liable for any such tax.

- **Funeral Expenses.** It is the Personal Representative's responsibility to pay for any funeral expenses from the assets of the estate. If the decedent's Will specifically authorizes the Personal Representative to pay funeral expenses without court supervision, and if the estate is solvent, no court order is required. Otherwise, such expenses will be limited to \$15,000, without express prior authority from the Orphans' Court. Likewise, expenses





related to a memorial service or other such gathering can be paid from the estate if the Will authorizes such payment.

- **Out-of-State Property.** If the decedent owned real property in another state, that property will have to go through the probate process in that state in what is called an “ancillary probate proceeding.” It is an ancillary probate proceeding because the primary probate of the decedent’s estate is performed in the state of the decedent’s domicile at the time of death. Each state has its own probate process, so it may be necessary to retain an attorney in that state to handle the probate on behalf of the Personal Representative. The hassle involved in administering multiple estates is one reason that many people are using revocable living trusts to hold title to real property owned in other states, and therefore avoid the probate process entirely. Real property held in a revocable trust eliminates the need for an ancillary probate proceeding for that property because property is distributed by the trustee in accordance with the terms of the trust. Of course, applicable state inheritance taxes still have to be paid.

- **Out-of-State Personal Representative.** If the person named to serve as the Personal Representative of an estate in a decedent’s Will does not live in Maryland, they must appoint someone in Maryland as the resident agent to accept service on behalf of the estate in order to be appointed as the Personal Representative. This is required so that the



Orphans’ Court retains jurisdiction over the Personal Representative. This is done when the estate is first opened by filing the Appointment of Resident Agent form; typically, the attorney for the Personal Representative serves as Resident Agent. Similarly, if a non-resident wishes to be appointed as the Personal Representative of an intestate estate, a resident agent must be appointed.

## 5. Will Contests

What happens if a beneficiary believes that a Will was signed under duress or through undue influence, or if the beneficiary believes that the signer of the Will was not competent when the Will was signed? Or, what happens when a disgruntled family member wants to contest the terms of a Will? Or, what happens if a Will was not properly executed or does not meet all of the formal legal requirements? The answer is that a beneficiary may initiate a caveat proceeding before the Orphans' Court. In this proceeding, the Orphans' Court is asked to determine the validity of a Will, or to interpret the terms of the Will.

Caveat proceedings are meant to protect the rights of the decedent. For example, there was a case before Maryland's Court of Appeals involving an elderly gentleman who, in the last days of his life, executed

a Will naming a live-in helper as his sole beneficiary, totally excluding his family. The gentleman needed a helper because he was partially blind and paralyzed, and was unable to read, write, or manage his financial affairs. After working with the gentleman for only one month, the helper retained an attorney to draft a Will, and did not allow the gentleman to meet with the attorney. The Orphans' Court, after reviewing the circumstances, set aside the Will on the basis that the helper exercised undue influence over the decedent. The system worked in this case.

Just like any other case before a court, caveat proceedings are lawsuits where the person questioning the validity of a Will brings a petition against the estate. Sometimes, these lawsuits can take many years to resolve, at great expense to the estate. This is why it is so important to have sound legal advice





when a person is contemplating making a significant change in beneficiaries in a new Will or Codicil.

## 6. Probate vs. Non-Probate Property

Generally, any property owned in the decedent's individual name at death is probate property. This includes bank accounts, stock certificates, investment accounts, real estate, personal property, savings bonds, and any other property that was solely owned by the decedent at the time of death for which there was no beneficiary designation.

Non-probate property is property that passes by virtue of a beneficiary designation or by operation of law. Some examples of non-probate property include:

- **Jointly-Owned Property.** Property, such as property owned as “tenants by the entirety” with a spouse, or as joint tenants with rights of survivorship (“JTWROS”) with a spouse or a non-spouse, becomes the property of the surviving owner automatically upon the other owner's death.
- **Beneficial Interest Property.** Property in which someone has a “beneficial interest” is property that passes as the result of a beneficiary clause to a named beneficiary other than the estate. This generally includes life insurance proceeds, annuities, and pension and retirement funds. It would also include bank accounts that employ a “payable on death” provision or an investment account that employs a “transfer on death” provision. Of course, if the estate is named as beneficiary or if no beneficiary is named, then the property



passes to the estate and is subject to the probate process.

- **Trust Property.** Property held in trust for the decedent's benefit is trust property. This property, because it is not in the decedent's name, is not included in the decedent's probate estate. There are many types of trusts that are used as estate planning tools today, such as bypass (or credit shelter) trusts, marital trusts, revocable living trusts, life insurance trusts, and irrevocable trusts established to benefit children or grandchildren.
- **Life Estates.** Real property can be transferred by one person to another but still allow the original owner to retain the use of the real property for the rest



of his or her life. This retained interest is called a life estate. The original owner may retain the right to sell or mortgage the property or give up that power, which is more common when a life estate transfer is used for Medicaid planning. In either case, upon the death of the life tenant, the life estate terminates, and the person to whom the property was transferred (the “remainderman”) has full ownership and use of the real property. This is a very useful probate avoidance technique depending on the intent of the owner of the property and the nature of the property.

## 7. Dying Without a Will

What happens if someone dies without a Will? If a person dies without a Will, that person is said to have died “intestate.” This creates three immediate implications. First, since the decedent did not identify a Personal Representative, the Orphans’ Court will have to do so, in accordance with Maryland law. Usually this will be a surviving family member. Second, a bond is posted for the amount of the estate or for such amount as established by the Register of Wills. Finally, the assets of the estate must be distributed in accordance with the intestate laws of Maryland.

Dying without a Will does not mean that the estate will pass to the State, for it almost certainly will not; but, it does mean that the estate will most likely not be distributed in accordance with the true wishes of the decedent. For example, if a decedent leaves





a surviving spouse and adult children, the spouse will receive, in addition to any family allowance, one-half of the estate, and the adult children will split the other half of the estate. The intestate laws provide numerous other distribution options that depend on the make-up of the surviving family.

By the way, the only time that an estate would pass to the State is when the Personal Representative cannot identify any surviving members of the decedent's family, no matter how remote the relationship may be. In those cases, the estate is transferred to the Board of Education in the county in which the decedent was a resident.

## 8. The Taxable Estate

One of the most confusing aspects associated with administering an estate is sorting out all of the various taxes that may need to be paid. In recent years, there have been some dramatic improvements to the tax laws; however, these taxes still must be considered during the probate process, especially since the penalties associated with non-compliance or non-payment are often severe.

There are five different types of taxes that must be considered:

- **Maryland Inheritance Tax.** The Maryland Inheritance Tax generally applies to all probate property passing to a non-exempt beneficiary. However, it also applies to retirement accounts, to jointly-owned property, to property held in certain trusts for the decedent's benefit, and to certain

life estates that pass to a non-exempt beneficiary. Fortunately, this tax has been limited so that distributions to spouses, children, spouses of children, stepchildren, grandchildren, step-grandchildren, spouses of grandchildren, parents, brothers and sisters, and grandparents are no longer taxed. In addition, this tax does not apply to inheritances of less than \$1,000 and distributions from life insurance policies to individuals. Distributions to all others, such as siblings-in-law, nieces, nephews, aunts, uncles, cousins and friends, are taxed at the rate of 10%. Also, bequests to most charitable organizations are not subject to the Inheritance Tax.

- **Federal Estate Tax.** The Federal Estate Tax is imposed on all property interests of the decedent, including both probate and non-probate property. For example, the Federal

Estate Tax extends to property such as life insurance proceeds from policies owned by the decedent or in which the decedent had ownership rights or powers. Annuities are treated in much the same way as life insurance, except for establishing the value to be included.

The Federal Estate Tax was overhauled in 2012 by Congress so that the vast majority of estates will no longer be subject to this tax. In brief summary, in 2018, taxable estates that do not exceed \$5.6 million will not be subject to the Federal Estate Tax. Moreover, if a surviving spouse files a Federal Estate Tax return on behalf of the first spouse-to-die, and elects “portability” on that return, any amount of the estate tax credit sheltering \$5.6 million not used by the estate of the first spouse-to-die can be “ported” to the surviving spouse’s



taxable estate. Thus, in 2018, a married couple could protect \$11.2 million from the Federal Estate Tax simply by electing portability upon the death of the first spouse.

The Federal Estate Tax is assessed on the fair market value of decedent's estate as of the date of death. If the value of the gross estate declines after the date of death, the Personal Representative has the option of using a date that is six months after the date of the decedent's death as an "alternate valuation date." If using the alternate valuation date provides a tax benefit to the estate, it must be applied to the entire estate, not just certain assets that have gone down in value.

When the Federal Estate Tax is applied, it can be a very harsh tax. In most cases, the marginal tax rate is 40%. Any Federal Estate Tax that is due must be paid within nine months of the decedent's death, even if an extension for filing the tax return is requested. Otherwise, penalties and interest will be assessed against the amount of tax that is due.

- **Maryland Estate Tax.** In 2014, Maryland passed legislation which provided for the gradual increase of the amount that Maryland residents can exempt from the Maryland Estate Tax upon their passing. The exemption amount per decedent for 2018 is \$4 million, and in 2019 going forward, the exemption amount will match the then-allowable Federal Estate Tax exemption amount. The new law does not allow married couples to use "portability"

to preserve the first spouse's Maryland estate tax exemption for the surviving spouse until 2019. However, to the extent that an estate is exposed to both the Maryland Estate Tax and the Federal Estate Tax, any Maryland Estate Tax paid by an estate is considered a deduction against the Federal Estate Tax.

- **Individual Income Tax.** The income earned by a decedent prior to his or her death must be included in the decedent's federal and state income tax returns. These income tax returns, and any income taxes that may be due, must be submitted by April 15th in the year following the death of the decedent.



- **Fiduciary (Estate) Income Tax.** While an estate is being probated or being administered, the property in the estate continues to earn interest, dividends, or other types of income. In addition, there may be capital gains or losses on property that is sold during the administration of the estate. This income must be reported and any tax paid annually during administration and before the estate can be closed. Alternatively, depending on the timing of distributions from the estate, that income tax can be “passed through” to the beneficiaries, with the result that the beneficiaries will declare the income on their personal income tax returns. The benefit of passing the tax through to beneficiaries is that the income tax rates for individuals are typically lower than for estates.
- **Income Tax Exposure for Beneficiaries.** While certain assets can pass directly to a beneficiary and avoid probate, that does not mean that income tax is avoided. For example, if someone is named as the beneficiary of a retirement account, that beneficiary must pay any income tax on the retirement accounts assets as they are withdrawn from the IRA. Similarly, if someone inherits an annuity, there is often built-in income tax exposure that will fall to the beneficiary.

A common misconception is that property that escapes probate is not subject to estate and inheritance taxes. This is not the case. This confusion comes from the assumption that the probate process triggers the payment of taxes. The only tax actually triggered by the probate process is the Maryland Inheritance Tax, and even



this tax is payable on non-probate assets whether an estate is opened or not.

## 9. Costs of Probate

Minimally, the costs would include up to \$1,000 as a probate fee for most estates (for probate estates of \$1 million or less), and several hundred dollars for advertising and bond costs. Note that bond costs can be much higher if the requirement for a bond is not waived in the decedent's Will, or if the estate will incur significant inheritance taxes. Appraisal fees may also be incurred, and they can range from \$300 to several thousand dollars or more, depending on the nature of the property that must be appraised.



The largest expenses associated with probate, however, involve the Personal Representative's commission and attorneys' fees. By statute, absent extraordinary circumstances, the total of both these expenses is usually limited to 9% of the first \$20,000, and 3.6% of the balance of the probate estate. These expenses are monitored by the Orphans' Court, and can only be paid after approval is received by that Court, unless all of the beneficiaries and creditors have consented in writing. These fees can be less than the statutory rate, although this would require working out the fee arrangements with the attorney at the time an attorney is engaged to handle the probate process. Also, when the Personal Representative is also a beneficiary, the commission paid to the Personal Representative is often waived since any commission paid is taxable income to the Personal Representative, whereas distributions from the estate are not.

Note that attorneys' fees are reviewed by the Orphans' Court before they are approved, unless consent has been obtained from all of the beneficiaries. These fees may exceed the statutory limitations if extraordinary efforts are required. For examples, if business interests are sold, complex litigation is involved, or there are unique or time-consuming issues, the attorney may request fees in excess of the statutory amounts.

## Conclusion

As stated above, probate is a process that is used to wind up, in an orderly manner, the worldly affairs of a decedent. Although the process can seem cumbersome, it does provide a mechanism for making sure that the decedent's wishes are followed, that all creditors be paid, and for giving a beneficiary a means to question any aspect of the administration of the estate. Considering how complicated each of our lives can be, it is no wonder that the mechanism used to accomplish these purposes is likewise a bit complicated. However, by taking the time to understand the process and following the guidelines in a logical way, the angst associated with probate can be eased considerably.

If you have any questions about your probate needs, please feel free to call us at **410-995-5800** or visit **[www.darslaw.com](http://www.darslaw.com)**.

A person's hands are shown holding a small, square-framed portrait of an elderly man with white hair and a serious expression. The portrait is resting on a cardboard box. In the background, a potted plant with long, thin leaves is visible. The overall lighting is warm and slightly dim, creating a somber or reflective mood.

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