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EC77-867 Probate

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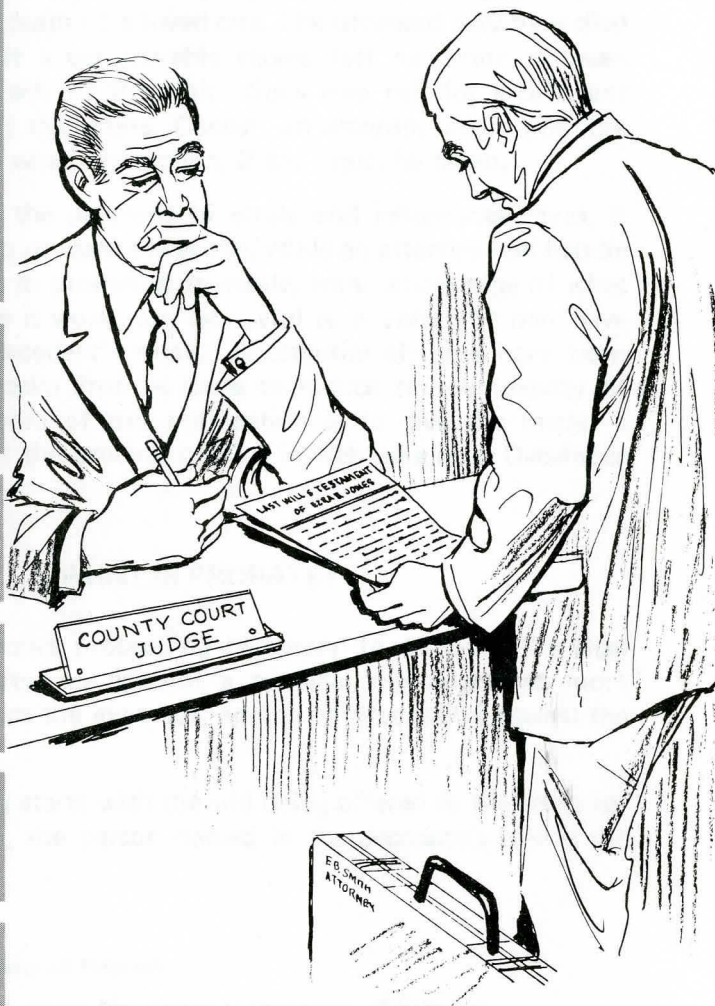
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Leo E. Lucas, Director

Probate

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Many different situations may confront a surviving spouse or children upon the death of a loved one. The deceased may have died without a will, left a considerable estate, left no estate, or been heavily in debt. Each of these situations may call for a different method of settling the estate. Consult an attorney soon after the death to determine what legal action, if any, must be taken.

In addition to the payment of estate and inheritance taxes, it may be necessary to probate the estate. While an attorney will handle most of the details in probating an estate, some knowledge of what probate is and how it works can be useful to anyone who may have an interest in a decedent's estate. Substantial changes have been made in the Nebraska Probate Code to reduce the complexity of probate. The purpose of this publication is to give the reader a general overview of the probate process in Nebraska after December 31, 1976.

WHAT IS PROBATE?

Probate is a court proceeding necessary to establish the legal transfer of property; to appoint a personal representative, more commonly known as the executor; and to enforce claims against the estate.

The proceeding starts with the will being offered to the court for probate. Generally, the person named in the decedent's will as the

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personal representative requests the court to begin the probate proceeding. However, a spouse, child, creditor, or beneficiary may also make such a request. After the will has been admitted to the court, a legal document, called Letters Testamentary, is issued to the personal representative. This document gives the personal representative the authority to pay the proper claims, expenses, and taxes associated with the estate, and to distribute the decedent's property to the beneficiaries.

A similar procedure applies when a person dies without making a will. Normally, a spouse, child, parent, or creditor will request the court to appoint a personal representative. Letters of Administration will be issued to the personal representative once he or she is appointed by the court. This document gives the personal representative the authority to pay the claims, expenses, and taxes associated with the estate, and to distribute the property to the heirs.

The administration of an estate may last anywhere from a few months to several years, depending on its complexity.

The Necessity of Probate

There are several reasons for administering an estate. First, the probate proceeding protects the estate against any possible fraud or embezzlement by heirs or others. Second, the probate proceeding protects creditors by insuring that all claims against the estate will be paid before the assets are distributed. Third, some form of probate is necessary to appoint a personal representative. Finally, probate gives to the heirs or beneficiaries a marketable title to the decedent's property.

A beneficiary or heir is entitled to the deceased's real property at the moment of death. But the heir or beneficiary may be unable to firmly establish the right to the property unless the estate has been probated. Any person who later purchases any of the decedent's real estate will want a title that is free from any claims of creditors, heirs, or beneficiaries. Since the probate proceeding is a matter of public record, the buyer can determine from the record whether or not the property was subject to further claims at the time of probate. When there is no public record the buyer may be less willing to purchase the property. Thus, a major reason for probate is to transfer a

defensible and marketable title to property from the decedent to the beneficiaries or heirs, who, in turn, can pass a good title to others.

Property Subject to Probate

Generally speaking, property which was held only in the decedent's name and the decedent's share of tenancy-in-common property is subject to probate. Three types of property are not probated.

First, property which the deceased had transferred to others during his or her lifetime would not be subject to probate. This includes property that had been sold, given away, or transferred to a trust. In each of these situations, legal title to the property has already been transferred to someone else during the decedent's lifetime.

Second, property that passes by contract is not probated. Such property includes insurance proceeds and retirement annuity benefits payable to a named beneficiary. These assets are transferred to the proper beneficiaries by the terms of the insurance policy or retirement contract rather than through probate.

Third, property held in joint tenancy with rights of survivorship is not subject to probate. Title passes automatically to the other joint holder or holders at the decedent's death. Property held in joint tenancy should not be confused with property held as tenants in common. The major difference is that there is no right of survivorship with tenants in common.

For example, suppose that Fred and John hold title to property as tenants in common. Fred and John each own an undivided half interest in the property. Should Fred die before John, Fred's half interest would **not** necessarily pass to John. Fred's interest will pass to his beneficiaries, if he makes a will, or to his heirs, if he dies without a will. The same is true for John's interest. If the property had been held in joint tenancy with rights of survivorship, however, Fred's interest would have passed to John at Fred's death by virtue of the right of survivorship.

Even though the three kinds of assets described in the preceding paragraphs are not subject to probate, estate and inheritance taxes

may still have to be paid on them.

(For additional information on trusts, life insurance, joint tenancy, tenancy in common, and death taxes see EC 77-856 Estate Planning.)

PERSONAL REPRESENTATIVE

The initial step in the administration of an estate is the appointment of a personal representative. The personal representative is more commonly referred to as an executor or administrator. Usually, the deceased names a certain person in the will to be the executor of the estate. If no executor has been named in the will, the court will appoint a person to act as a personal representative. In the past, the personal representative appointed by the court to handle the estate was called an administrator. In many cases, the personal representative will be a spouse, child, or close relative of the deceased. However, anyone can be chosen, including an attorney, bank, or trust company.

The personal representative can be a resident of any state. However, a bank or trust company designated as a trustee of the estate, in addition to serving as a personal representative can administer the property only if: (1) it is chartered in Nebraska, or (2) the state where it holds its charter permits Nebraska banks and trust companies to administer trust property in that state.

Duties and Responsibilities

Before appointment, a personal representative named in a will can carry out any written instructions made by the decedent relating to his body, funeral, and burial arrangements. In addition, the personal representative may take only such measures as are necessary to protect the decedent's assets. The personal representative does not have the power to fully administer the estate until the court issues to him his Letters of Administration or Letters Testamentary.

The personal representative is a fiduciary of the decedent's estate. This means that the personal representative is required to administer the estate with such care and skill as an ordinary prudent man would exercise in dealing with the property of another. In other

words, the personal representative is liable for any embezzlement or mismanagement of the estate.

The personal representative's main responsibility is to see that the estate is administered according to the wishes expressed in the will. If the deceased dies without a will, the personal representative will distribute the estate in the manner provided in the Nebraska Probate Code (for information on how property is inherited if there is no will, see EC 77-865 Have It Your Way—By Making A Will).

There are numerous other duties the personal representative must perform. The personal representative must send a notice of his appointment to all the heirs or beneficiaries within 30 days of his appointment. The personal representative must also submit an inventory of the decedent's assets to the court within two months after his appointment. Independent appraisers may be employed to assist the personal representative in valuing the property, although there is no statutory requirement that one be employed.

Powers of Administration

The new Nebraska Probate Code grants broad powers of administration to the personal representative. The only major restriction placed on the personal representative is that he cannot sell or mortgage any real estate of the decedent without first obtaining a court order, unless the will provides otherwise. In all other respects, the personal representative can freely dispose of the estate without court action. If an interested party desires to restrict the powers of the personal representative, he or she must request the court to restrict those powers.

Legal Assistance

The personal representative will require the services of an attorney to assist in the administration of an estate. Generally, it is preferable to use the decedent's attorney since he should be more familiar with the decedent's property, affairs, and family situation than someone else. However, the personal representative is not required to use the decedent's attorney. In certain instances it may be more desirable for the personal representative to choose some

other attorney with whom he or she can develop a closer working relationship.

Keep in mind that the attorney is the counsel for the personal representative. If any conflict develops between an heir or beneficiary and the personal representative, the heir or beneficiary should obtain his own attorney.

ESTATE ADMINISTRATION

Estate settlement may take place in any of the following ways: unsupervised administration, either informal or formal; court supervised administration; and small estate administration. These proceedings apply to all estates even if there is no will.

Unsupervised Administration—Informal Probate

The simplest procedure is the informal probate of a will or appointment of a personal representative. A court will appoint the personal representative without notices or hearings before interested parties. After the appointment, the clerk of the court will publish notices in the newspaper for three consecutive weeks stating that a personal representative has been appointed to handle the estate. Once appointed, the personal representative will generally be able to transfer a marketable title and pay all the debts of the decedent without further court action.

In a typical estate, court appearances will be minimized or eliminated by use of the informal procedures of unsupervised administration. Thus, informal probate should be the least time-consuming and the least expensive probate procedure.

The major disadvantage to informal probate is that it could be overturned by formal probate, within three years after the decedent's death. This may happen when: (1) a new will is found; (2) an heir previously unknown appears; (3) or where the beneficiaries or heirs become dissatisfied with the property settlement under the informal proceeding and decide to contest the will in formal probate. Therefore, informal probate may be appropriate only when all the heirs or beneficiaries are known and all are in agreement as to the proper distribution of the property.

Unsupervised Administration—Formal Probate

A notice and a hearing is required before acceptance of a will and the appointment of a personal representative in the formal probate proceeding. The hearing gives interested parties the opportunity to present their arguments against probating the will. The will may be contested in the formal proceeding on grounds that: (1) the decedent was not of sound mind when the will was written; (2) the will was a fraud; (3) the will was not properly witnessed; or (4) there are several wills which are inconsistent with each other (for additional information on wills see EC 77-865 Have It Your Way—By Making A Will).

The formal proceeding may also be used to prevent someone from requesting the probate of a different will at a later time. Any formal probate proceeding replaces an informal proceeding. Consequently, heirs or beneficiaries can best establish and protect their legal rights to inherited property by means of the formal probate proceeding.

Once the will is approved and the personal representative appointed, the procedures in formal and informal probate are the same. Notice must be published in a newspaper for three weeks stating that a personal representative has been appointed. Similarly, a personal representative formally appointed has the same powers as an informally appointed personal representative.

Court Supervised Administration

Supervised administration is a proceeding which requires the settlement and distribution of an estate under the continuing authority of the court. For example, the personal representative cannot distribute any of the estate assets without first obtaining a court order. The court may also place other restrictions on the power of the personal representative to administer the estate.

Supervised administration may be used when there is a great deal of dissension among the heirs, who may distrust the power of the personal representative to administer the estate. Since the court is more deeply involved, supervised administration can be more time consuming and more expensive than the formal or informal unsupervised administration of an estate.

Small Estate Proceedings

The new Probate Code provides less formal proceedings when small estates are involved. A personal representative can distribute an estate to heirs or beneficiaries without giving public notice to creditors only when the estate does not exceed the sum of: (1) the allowances set aside for the spouse and children, consisting of a \$5,000 homestead allowance, \$3,500 of exempt personal property, and family support allowance for one year; (2) costs and expenses of administration; (3) reasonable funeral expenses; and (4) reasonable and necessary medical expenses of the decedent's last illness (for additional information on the spouse's and children's allowances, consult EC 77-865 Have It Your Way—By Making A Will).

Time for Administration

The administration of an estate by one of the above procedures must begin within three years after death. In most instances, it is desirable to administer the estate at the earliest convenient time within the three year period.

Until the estate is settled by one of the probate proceedings, the heirs or beneficiaries take the chance of being deprived of some or all of their inheritance. A creditor could force the beneficiaries to sell part of the decedent's assets to satisfy a claim. For example, creditors have three years after death to present their claims against the estate when there has been no probate proceeding. Similarly, an informally probated will can be contested as late as one year after the beginning of informal probate or three years after death, whichever occurs last. A late discovered will could not be probated after this time. Consequently, inaction during the three year period may possibly be appropriate only where a sole surviving heir to a small estate: (1) pays the decedent's debts; (2) is willing to assume the risk that a conflicting will may be found; and (3) is content to possess and enjoy the property without selling it.

A will that has not been probated during the three year period can be admitted to the court, at a later time, solely for the purpose of establishing legal title to property. This procedure may be necessary when the heirs or beneficiaries sell the property. A potential buyer may require that the will be made a matter of public record to show a good claim of title from the deceased to the beneficiaries or heirs.

COST OF ADMINISTRATION

Probate has frequently been associated with lengthy court proceedings and high costs. The newly enacted Nebraska Probate Code is designed to minimize the time and expense of administering an estate in Nebraska. The costs of administration will vary depending on the type of probate procedure used, the size and complexity of an estate, and the degree to which interested parties get along.

In addition, federal estate taxes and state inheritance taxes may be due. These taxes are liens (legal claims) against the property and must be paid. However, a partial distribution of property can be made to the heirs or beneficiaries before the amount of taxes is finally determined.

Court Costs

The fee paid to the clerk of the court probating the estate is called court costs. Normally, court costs will amount to only a very small part of the total administration costs. Great involvement by the court in holding hearings and issuing orders will result in higher costs. Thus, court costs would be greatest in those estates requiring close supervision over the personal representative. However, court costs are not large enough to be a significant item in choosing the method of administering an estate.

Fees to Personal Representative

The person who serves as the personal representative is entitled to a fee for his services. Under prior Nebraska law, the fees paid to the personal representative were fixed by statute. The new Probate

Code eliminates this statutory fee schedule. The only statutory requirement is that the fees be reasonable.

The fees that the personal representative is entitled to may be fixed in the will. However, the personal representative can renounce the fees set by the will if they are unreasonably large or small, and if no separate contract regarding fees has been entered into between the deceased and the personal representative. The fees paid the personal representative are reviewable by the probate court.

Attorney Fees

Attorney fees are generally based on a percentage of the estate values and will vary according to the size of estate and the amount of work done by the attorney. Attorney fees charged in Nebraska typically range from 2% to 2½% of the estate. A somewhat higher percentage may be charged on a small estate.

Before administration of the estate begins the personal representative should discuss with the attorney the estimated costs for handling the estate. This can help to eliminate any possible misunderstanding between the parties at a later time.

Bond Costs

A bond is required of a personal representative unless: (1) a provision in the will expressly waives the bond; (2) a written waiver is filed in the probate court by all the heirs or beneficiaries; or (3) the personal representative is a bank or trust company. A creditor or party having more than a \$1,000 interest in the estate may demand that a bond be posted. Even if bond is demanded, the court may excuse the requirement of bond in an informal or formal probate proceeding.

If a bond is required, the amount of the bond is generally determined according to the size of the estate and the income that will be generated from it during the next year. However, the court, in its discretion, may increase or reduce the size of the bond.

Appraiser Fees

There is no requirement that an independent appraiser be

employed to value the estate under the new Probate Code. However, the personal representative, if he so desires, can hire an appraiser to help in valuing the estate. Appraisal costs are paid out of the estate.

Creditor Claims

Any creditor must present his claim within two months after the date the notice of the probate proceeding was first published. The creditor may present his claim either by filing a written statement with the clerk of the court or by filing suit for the payment of the debt. Additional time to present a claim may be granted by the court provided that justification for the delay is shown by the creditor.

If no notice has been published in a newspaper, a creditor has three years after the decedent's death to present his claim. After that time his claim will be lost.

If the assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order: (1) costs and expenses of administration; (2) reasonable funeral expenses; (3) debts and taxes with preference under federal law (i.e. estate taxes, income taxes, etc.); (4) reasonable medical and hospital expenses of the deceased's last illness; (5) debts and taxes with preference under other laws of this state (i.e. state inheritance taxes, state income taxes, etc.); and (6) all other claims.

Conclusion

Probate is a court proceeding necessary to establish the legal transfer of property from the decedent to the heirs or beneficiaries, to appoint a personal representative to settle the estate, or to enforce a claim against the estate. The simplest way to accomplish these goals is to petition the court for the unsupervised administration of an estate, using either the informal or formal procedure. The more involved probate proceeding is the court supervised administration of the deceased's estate.

The purpose of this circular is to give the reader a better understanding of the nature of probate—what it is and how it works. Only a general overview of the procedures that can be expected following the death of a person who has an estate have been

discussed. An attorney is necessary to probate nearly every estate and should be consulted for additional information.

GLOSSARY

Administrator: See Personal Representative.

Beneficiary: Commonly known as one who is entitled to receive personal or real property under the provisions of a will. Other names for a beneficiary include a devisee or legatee.

Estate: The decedent's property.

Executor: See Personal Representative.

Formal Proceedings: The probate of a will or the appointment of a personal representative with a notice to interested persons and a hearing before a judge.

Heir: Those persons who are entitled to the property of a decedent under the state law if there is no will.

Informal Proceeding: The probate of a will or the appointment of a personal representative without a notice to interested persons and a hearing before a judge.

Interested Person: Includes heirs, beneficiaries, children, spouses, creditors, and any others having a property right or claim against the estate.

Letters: The formal document given by the probate court to the personal representative which enables the personal representative to proceed with the administration of the estate. Also referred to as Letters Testamentary or Letters of Administration.

Personal Representative: Individual or corporation appointed in a will by a testator or by the court to take care of a person's property after his death. Also called an executor or administrator.

Petition: A written request to the court for a court order. A notice of the request must be sent to interested parties.

Probate: Probate is a court proceeding necessary to establish the legal transfer of property; to appoint a personal representative, more commonly known as the executor; and to enforce claims against the estate.

Probate Court: The court having jurisdiction in matters relating to the deceased's affairs. The probate court in Nebraska is the county court.

Supervised Administration: The settlement and distribution of an estate under the continuing authority of the court. The personal representative must obtain a court order prior to distributing any of the estate assets.

Testator: One who disposes of property by a will.

Will: Any legal document which disposes of personal and real property; or appoints a personal representative, conservator, guardian, or trustee (consult EC 77-865 Have It Your Way—By Making A Will).

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