

THE ESTATE ADMINISTRATION PROCESS

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In the last article I wrote, I talked about living trusts and what they could and could not accomplish for you. One of the benefits of a properly drafted and funded living trust, is that it enables a person to avoid probate upon their death. Whether probate avoidance is a “good” or a “bad” thing is highly subjective. To answer the question, we need to first define exactly what probate is and then to overlay the process on your financial and family situation to determine whether probate avoidance is in your best interests.

In general, when a person dies the function of the probate Court is the following: to ensure that, if there was a Will, it is the decedent’s true Last Will and Testament, and not a forged or revoked version; to ensure that the decedent’s assets are safeguarded and protected from waste, theft, or neglect; to ensure that valid bills and debts are paid, including death and inheritance taxes, if any, and lastly, to make sure that what remains is paid to the intended beneficiaries in accordance with the decedent’s valid Last Will and Testament. In summary, the purpose is to oversee the transfer of title of the decedent’s assets from the decedent’s name to the decedent’s beneficiaries, making sure along the way that all the assets are accounted for and all the bills are paid.

The more important steps in the probate process are described chronologically below:

1. Application for Administration or Probate of Will. This is the first form filed with the Probate Court, giving the Court all pertinent information about beneficiaries and family members. The original Will, if there is one, accompanies this form. After the Court receives this form it will set a hearing to accept the Will and also to appoint an Executor of the estate (this hearing can oftentimes be waived to speed up the process). The Probate Court will issue certificates to the Executor. These certificates will evidence the Executor’s authority to act on behalf of the estate. In many situations, the Will can be accepted and the Executor appointed without the need for a hearing or for anyone to go to the probate Court at all.
2. Certificate for Land Records. If the decedent owned real estate, the Probate Court will give the executor this form to be recorded on the land records showing the decedent died and that, if the property was owned jointly, that the remaining joint owner now solely owns the property.
3. About two months after the Executor is appointed, the Executor must file an Inventory of the estate's assets with the Probate Court. This Inventory will list all assets held by the decedent in his or her name solely. The purpose of the Inventory is to show what assets are subject to the Court’s jurisdiction--the Court only deals with assets in the decedent’s own name. Assets that are payable by beneficiary designation (life insurance and IRAs, for example) or that are held jointly (such as a

bank account titled “husband or wife”) pass outside of the probate process because the Court’s intervention is not needed to transfer title. In the case of jointly titled assets, title passes automatically at death to the surviving named account holders and for life insurance, for example, title passes when the insurance company signs and delivers the proceeds check to person named on the Beneficiary form.

4. Next, the Executor must determine what bills were owed at the decedent’s death. This will include any medical bills, tax bills, alimony, mortgages, etc. These bills will be set forth on a Return and List of Claims, which the Executor files with the Probate Court. This form must be filed by the end of the fifth month following the decedent’s death.

5. A Connecticut Estate Tax Return will need to be filed by the Executor. The inheritance tax rules in Connecticut changed in 2005 and there is no longer a “succession tax.” The succession tax was replaced with the Connecticut Estate. This return must be filed within nine months of the date of death and has to be filed regardless of the size or value of the estate. The Estate Tax is based on all property, whether solely owned or jointly owned by the decedent, any life insurance, pensions or trusts, and any taxable gifts that might have made by the decedent since January 1, 2005. The Estate Tax return will also list funeral expenses, burial expenses, estate administrative expenses, and any bills that the decedent owed at the time of death. Although this tax return is not part of the probate process, it is filed with the Probate Court and the Court forwards it to the State Department of Revenue Services. A probate fee (not a tax) will be assessed against the net taxable estate reflected on the return.

6. Nine months after the date of death, a federal estate tax return (Form 706) may need to be filed, depending on the size of the estate, and any tax paid. This tax return will show, like the Connecticut Estate Tax Return, everything in the estate and will include out of State real property. This form is sent directly to the IRS who will then assess its own tax on the net taxable estate.

7. After the State and Federal taxing authorities have reviewed their respective tax returns, the tax authorities will send the Executor an assessment and, if the amount of tax initially paid was correct, they will also issue a Certificate or other evidence which will show all taxes have been paid. If no tax was due, the Probate Court will issue the Certificate or other evidence which will show all taxes have been paid. Upon receipt of the assessment and evidence that all taxes were paid or none were due, the Executor can start to prepare a Final Accounting and Proposed Distribution of the estate. The final account shows all activity that occurred in the estate, using as the beginning balance, the total assets shown on the Inventory that was filed with the probate Court at the start of the process. After filing the accounting and proposed distribution with the Court, a hearing will be held and the Court will accept the accounting and proposed distribution of assets to the beneficiaries. The executor will then distribute any remaining assets.

This ends the probate process. Was it long, lengthy or expensive? Were the assets “tied up” – during this time?

The Executor may make distributions to estate beneficiaries prior to concluding the Probate Court process. The Executor must always be careful, however, to retain sufficient assets to pay all creditors and any taxes (estate, income or otherwise) that may be found to be due. The Executor is personally liable if there is a shortfall. My practice is to make a cash needs projection early in the process, add a cushion to it to be safe, and to then assist the Executor in immediately distributing those assets that are not going to be needed for bills or other purposes.

The process is not a long one. The rule of thumb in Connecticut is that probate should take no longer than one year. During most of that time period, little work is being done--usually the Executor is waiting for the 150 day claims period to end or is waiting until the last moment to file the death tax returns (why pay the government sooner than you have to). As mentioned earlier, the final account cannot be filed until there is evidence that all taxes have been paid. This often delays estates because it may take several months after filing the death tax returns to receive confirmation from the taxing authorities that the return is correct or to settle and disputes (such as over the value of real estate or the value of an interest in a family business) raised by the taxing authorities.

Probate is also not an inherently expensive process. In my practice I have found that probate becomes expensive for three reasons. The first is when the family was dysfunctional to begin with and now that mom and dad have both died, the beneficiaries’ (usually children) true nature is revealed and they argue over who gets what and how mom or dad always favored so and so. Items of relatively insignificant value take on added significance all of a sudden. In such disputes people tend to act in a manner not economically justified and end up hiring lawyers to resolve these matters, although the lawyers are often reluctant to get involved.

In any event, most of the costs incurred in probate, for accountants, lawyers, and appraisers, for example, result from tax issues that arise regardless of whether your assets avoid probate. These professional fees will result even if you use a living trust. Another fee that cannot be avoided is the Probate Court’s fee. Probate Courts in Connecticut are funded in part based on fees that they levy on a decedent’s taxable estate. People who use living trusts have taxable estates as well and will have to pay a probate fee even though their assets pass outside of probate!

A second reason probate becomes expensive is because the named Executor is not particularly trustworthy or intelligent. The Executor “drags his feet” the entire time, tries to live in the decedent’s house rent free for as long as he can, co-mingles his personal funds with those of the estate, fails to meet tax filing deadlines (thereby incurring interest and penalties), does not communicate with family members or

beneficiaries (who then hire lawyers to find out what is going on which then forces the Executor to hire a lawyer), and for similar reasons. All of this delays the process and results in additional costs to everyone.

A third reason is due to an ambiguous or inconsistent scheme that the decedent left behind to dispose of his property. This can be due to a poorly drafted will (which is rare) or because the decedent had assets titled jointly with some children and not others, but made promises to those other children that certain assets would pass to them under their will, but which don't end up passing to them. This is the classic – I have titled my \$100,000 bank account jointly with my daughter, but she knows that when I die she is to share it with my other two children. Right! This is a formula for trouble if ever there was one, unless there is very good trust among the entire family.

Assuming a harmonious family and a properly and thought out estate plan, there is no reason to fear probate. Probate may even be a beneficial process in that there is an independent and skilled entity, the probate Court, overseeing the process to make sure that everything happens as you would like it to. In summary, the probate process and probate avoidance through living trusts each have their pros and cons. There is no right or wrong solution. What matters most is that someone take the time to discuss with you how each method would work in your situation--what advantages of each might you gain from and what disadvantages of each might you suffer. This is where a lawyer who is versed in estate administration can play a valuable role.