

ESTATE & TRUST ADMINISTRATION

FREQUENTLY ASKED QUESTIONS

ESTATES & PROBATE

Q. WHAT IS PROBATE?

A: The actual process of “probate” involves presenting a last will and testament to court and it being accepted as valid. However, typically the term “probate” is used to reference the entire process of administering an estate before the court—regardless of whether there is a valid last will and testament. This “probate process” varies widely from state to state.

OUR SERVICES INCLUDE:

- Representation of executors, trustees, and other fiduciaries
- Estate & trust disputes
- Family settlement agreements
- Trust modification or termination

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Q. IS THE PROBATE PROCESS EXPENSIVE?

A. In North Carolina, fees related to the probate process are fairly low. The initial fees can range from \$11-\$120 depending on the type of matter before the court, and for estates with probate assets subject to administration the filing fee is 4/10% (i.e. multiply the probate assets by 0.004).

Q. WHAT ASSETS ARE INCLUDED IN THE PROBATE PROCESS?

A. In North Carolina, assets subject to administration generally include assets in the sole name of the decedent (i.e. the person who passed away) that *did not* have a (1) joint owner with right of survivorship, (2) payable on death (POD)/transfer on death (TOD) designation, or (3) beneficiary designation.

Q. WHAT ABOUT REAL ESTATE?

A. Generally speaking, real estate is not part of the probate process unless (1) the last will and testament leaves the real estate to the executor and directs him or her to sell the property, or (2) the debts of the estate exceed the available probate assets, requiring the real estate to be sold to generate funds to pay those debts.

Q. WHO SUPERVISES THE PROBATE PROCESS?

A. In North Carolina, the Estates Division of the Clerk of Superior Court’s office in each county supervises the administration of estates. This office has a number of pre-made “fill in the blank” forms for various aspects of the probate process and ensures that estates are administered according to law. However, this office cannot and will not provide legal advice to you if you encounter an issue in the administration of an estate.

Q. WHO PAYS THE LAWYER IF THE EXECUTOR OR ADMINISTRATOR WANTS ASSISTANCE WITH THE PROBATE PROCESS?

A. Generally speaking, attorneys’ fees for an attorney representing the executor or administrator of an estate are paid from the funds on hand in the estate, subject to court approval. This ensures that the individual administering the estate is able to hire competent legal counsel, if desired, to assist him or her and ensure the estate administration is done according to law. Having experienced counsel in this area can help make the probate process smoother.

Q. WHAT ARE THE REQUIREMENTS OF A LAST WILL AND TESTAMENT?

A. In North Carolina, a last will and testament can be (1) typewritten, (2) handwritten (i.e. holographic), or (3) oral (i.e. nuncupative). However, the requirements to prove the validity of each type is different and, understandably, there are higher hurdles to prove the validity of handwritten or oral wills in comparison to an attested will.

A valid attested will must have two eligible witnesses. Many people assume that it is the notary seal that makes a will valid; however, the witnesses are a key component. However, after the person who made the will (i.e. testator) has died, if the will only has two witnesses then the witnesses must sign affidavits certifying that they witnessed the will. To avoid this requirement, a will may be made “self-proving,” meaning that the will can be notarized with particular language in the document. The notary verifies the identities of the testator and the two witnesses at the time of signing, so the court does not require additional proof in the future.

Q. WHAT IF I DIE WITHOUT A LAST WILL AND TESTAMENT?

A. North Carolina has “intestate succession” statutes intended to provide a list of who will inherit property if the decedent dies without a valid last will and testament. These statutes provide for an individual’s spouse and children to receive fractional shares of the personal property (e.g. bank accounts) and real property (e.g. real property owned only by the decedent). Contrary to public perception, if you are married and have children, these laws *do not* provide that your spouse will inherit all of your probate assets—the spouse and the children will share the assets together.

For example, if a man (survived by a wife and two children) dies with no valid will and owns real estate that was in his sole name (e.g. property inherited from his family), then his wife will inherit a 1/3 share of the property and his two children will own the remaining 2/3 of the property.

Q. CAN I DISINHERIT MY SPOUSE OR CHILDREN?

A. In North Carolina, spouses are granted certain protections from disinheritance. The most notable protection is the elective share, which provides a certain minimum share of assets to the surviving spouse depending on the length of the marriage. In contrast, adult children do not enjoy the same level of protections and generally speaking may be disinherited by a parent.

Q. DO I NEED A REVOCABLE LIVING TRUST?

A. A trust is a legal entity that holds property for the benefit of particular people or organizations. One of the most frequently used types of trusts is a revocable living trust. These types of trusts can simplify the estate administration by avoiding the probate process entirely, avoid court-supervised guardianships if the creator (i.e. grantor) is unable to manage assets in the future, or hold specific assets such as property in multiple states or intellectual property rights, just to name a few benefits. However, not every person will benefit from a revocable living trust. Oftentimes, for individuals with a simple estate plan and straightforward family situation, the same goals of a revocable living trust can be accomplished using beneficiary designations to avoid probate and a good financial power of attorney in the event of incapacity.

Q. WHAT ARE THE DUTIES OF AN EXECUTOR, ADMINISTRATOR, OR TRUSTEE?

A. When administering an estate or trust, the executor, administrator, or trustee is responsible for ensuring that all applicable laws are followed in handling estate or trust assets. This includes certain obligations in managing estate or trust property, ensuring that valid claims and debts are paid, filing tax returns, and ultimately distributing assets to the appropriate heirs or beneficiaries. If the person was appointed under a valid last will and testament or trust agreement, then the distribution of assets will be governed by that document. If there was no valid document governing the administration of assets, then the administrator must follow North Carolina’s intestate succession statutes.

Q. WHAT IF SOMEONE CHALLENGES MY WILL/TRUST?

A. Anticipating potential objections or challenges to your last will and testament and/or trust is a good way to be proactive and potentially reduce future litigation costs. Working with a law firm with experience both in drafting such documents and defending against challenges will help protect your assets so that they can pass to the beneficiaries that you have chosen.

